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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Tobacco and Vapes Bill



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 28 January and 25 February 2025, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers that are exercisable within devolved competence in the [Tobacco and Vapes Bill](#) ("the Bill").
2. The Committee considered the Legislative Consent Memorandum ("LCM") for the Bill by virtue of Rule 9B.3.6 of the Scottish Parliament's Standing Orders. Paragraph 6 of Rule 9B.3 provides that where the Bill that is subject to an LCM contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.
3. The LCM was also considered in terms of the Committee's wider remit contained in Rule 6.11.1(b) of the Standing Orders which provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation". The Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various Bills over the course of sessions 5 and 6.

Overview of the Bill

4. The Tobacco and Vapes Bill was introduced by the UK Government in the House of Commons on 5 November 2024. The Bill is now due to have its report stage and third reading on a date to be announced. As the Bill is still progressing through the UK Parliament, it is subject to amendment. The Committee may therefore need to consider a supplementary LCM in due course.
5. This is a substantial Bill made up of 8 parts (171 clauses) and 21 schedules. Most of the provisions extend to the whole of the UK, with Part 2 extending only to Scotland. A significant number of the provisions in the Bill which are subject to the LCM were in the previous 'Tobacco and Vapes' Bill which fell at the time of the General Election last year. These powers are either the same, or broadly similar to those contained in the previous Tobacco and Vapes Bill which the Committee considered at its meeting on 14 May 2024 and [wrote out to the Scottish Government](#) about it on 15 May 2024.
6. The Committee was generally content with the provisions in the initial Tobacco and Vapes Bill, but agreed to request further information on the Scottish Government's plans for consultation regarding the exercise of several powers dealing with the regulation of nicotine products. The Committee also agreed to ask the Scottish Government whether it considered that SI Protocol 2 applied to several powers dealing with product (tobacco, vaping and nicotine) requirements or if not, how the scrutiny of its decision to consent to such regulations would be facilitated.
7. The Scottish Government responded on 22 May 2024ⁱ stating that it did not consider those powers to fall within the scope of SI Protocol 2 however, that the Health, Social Care and Support Committee (the lead committee) will be informed of any decisions made regarding regulations made within devolved competence. The letter was not put before the Committee due to the Bill falling on dissolution of the UK Parliament for the general election.
8. This Bill also raises similar issues and those are discussed in further detail below. To note, this Bill also introduces further measures which were not included in the previous Tobacco and Vapes Bill. For example, the Bill introduces a retail licensing regime for the sale of tobacco and vapes and restates the ban of snusⁱⁱ across the UK.
9. The stated purpose of the Bill is to create a smoke-free UK and minimise the harms of smoking. It is stated in the explanatory notes for the Bill that it builds on the existing legislative framework, seeking to broadly align provisions across the UK and that the core measures in the Bill will:
 - create a smoke-free generation, gradually ending the sale of tobacco products across the country, so children born on or after 1 January 2009 will never be legally sold these products, and break the cycle of addiction and disadvantage;

i <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/sg-response-on-tobacco-and-vapes-bill.pdf>

ii In the Bill snus is defined as an oral tobacco product that (a) is intended for oral use, (b) is not intended to be inhaled or chewed, and (c) consists wholly or partly of tobacco in powder or particulate form.

- strengthen the existing powers to ban smoking in public places to reduce harms of passive smoking, particularly around children and vulnerable people;
 - ban vapes and nicotine products from being deliberately branded, promoted, and advertised to children to stop the next generation from becoming hooked on nicotine; and
 - provide powers to introduce a licensing scheme for the retail sale of tobacco, vapes and nicotine products, extend the retail registration scheme in Scotland, and strengthen enforcement activity to support the implementation of the above measures.
10. The Scottish Government lodged the [LCM for the Bill](#) on 21 November 2024. A number of the provisions relate principally to the devolved matter of public health.
 11. The Scottish Government supports the Bill and states in its LCM that it recommends consent to the relevant provisions. It is explained in the LCM that officials from across the four nations have been working closely on the development of the Bill and that the Bill aligns with the ambitions and actions set out in the Scottish Government's Tobacco and Vaping Framework, which was published in November 2023.
 12. The lead committee for the LCM is the Health, Social Care and Sport Committee.

Delegated Powers

13. The UK Government has published a [Delegated Powers Memorandum](#) (“DPM”) to accompany the Bill. It explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected.
14. As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s views on the relevant clauses are set out in the LCM.
15. The powers which are relevant to this Committee’s remit are contained in parts 2,5,6,7 and 8 of the Bill.
16. At its meeting on 28 January 2025, the Committee was content with the following delegated powers:
 - section 4B(4) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (amended by Clause 50 of the Bill);
 - section 8(5) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (amended by Clause 55 of the Bill);
 - section 3A(1) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (inserted by Clause 61(2) of the Bill);
 - section 8B(2) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (inserted by Clause 62(1) of the Bill);
 - section 34A(1) and (3) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (inserted by Clause 67(2) of the Bill);
 - clause 103;
 - clause 104;
 - clause 105;
 - clause 107;
 - clause 121;
 - clause 125;
 - section 4(2) of the Smoking, Health and Social Care (Scotland) Act 2005 (substituted by Clause 142 of the Bill);
 - sections 3(1) and (3) of the Smoking, Health and Social Care (Scotland) Act 2005 (substituted by Clause 143 of the Bill);
 - sections 4G and 4H of the Smoking, Health and Social Care (Scotland) Act 2005 (inserted by Clause 144(4) of the Bill);

- sections 4K and 4L of the Smoking, Health and Social Care (Scotland) Act 2005 (inserted by Clause 145(2) of the Bill);
 - clause 161;
 - clause 162;
 - clause 168; and
 - clause 169.
17. However, the Committee agreed to [send questions](#) to the Scottish Government in relation to the following clauses in the Bill:
- clause 61: Displays of vaping and nicotine productsⁱⁱⁱ
 - clauses 90, 91 and 92: Powers to regulate packaging, features of products, and contents and flavour;
 - clause 93: Substances released into human body and emissions;
 - clause 94: Non-compliant images;
 - clause 96: Information;
 - clause 97: Studies;
 - clause 98: Responsible person;
 - clause 99: Testing;
 - clause 101: Matters dealt with by TRPR;
 - clause 123: Brandsharing; and
 - clause 133: Power to extend Part 6 and Communications Act 2003 to other products.
18. The [response](#) from the Scottish Government was received on 4 February.
19. The Committee's consideration of all the relevant powers in the Bill is set out in the next section of the report.

ⁱⁱⁱ The Committee was content with this power. However, it agreed to ask the Scottish Government whether there is any equivalent power in current legislation that deals with powers to regulate displays on websites.

Review of relevant powers

Part 2 – Sale and distribution: Scotland

Clause 50: Age of sale – Amending the power in section 4B(4) of the Tobacco and Primary Medical Services (Scotland) Act 2010

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

20. Part 2 of the Bill makes various amendments to the Tobacco and Primary Medical Services Act 2010 (“2010 Act”) and the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (“2016 Act”). The Scottish Government explains in the LCM that all of the clauses in this Part of the Bill require the consent of the Scottish Parliament and that they make provision for the devolved purpose of public health. It is clear from the Explanatory Notes for the Bill that the UK Government shares this view.
21. The 2010 Act currently makes it an offence to sell tobacco products and cigarette papers in Scotland to anyone who is under the age of 18. Clause 50 amends the 2010 Act by replacing references to anyone “under the age of 18” to anyone “born on or after 1 January 2009”. The DPM states that this will ensure alignment with the rest of the UK. The practical effect of this is that it will be an offence for a person to sell a tobacco product, herbal smoking product, or cigarette papers to a person who is born on or after 1 January 2009.
22. Clause 50 also amends and updates several provisions of the 2010 Act dealing with ‘age verification policy’, proxy purchasing offence and display of warning statements to take into account the new age of sale restrictions.
23. Clause 50 amends an existing power for the Scottish Ministers in section 4B(4) of the 2010 Act to make regulations to amend the age in respect of vaping and nicotine products that is specified in the age verification policy.

Committee consideration

24. The UK Government has not commented on the amendment of this existing power for the Scottish Ministers in the 2010 Act in the DPM. The only comment on this is found in the explanatory notes for the Bill which states that:
 - ” the power to amend the specified age for the age verification policy for tobacco products is no longer required as the Bill updates the provision in the 2010 Act such that it refers to retailers needing to consider if the customer purchasing tobacco products appears to have been born on or after 1 January 2009 rather than referring to a specific age.
25. The Committee considered this existing power conferred on the Scottish Ministers last year in the previous Tobacco and Vapes Bill, which also amended the power.

The [DPM for the previous Tobacco and Vapes bill](#) explained that this power is narrower than the current regime given that the power to amend the specified age for the age verification policy for tobacco products is no longer required. However, since the age verification policy in relation to vaping or other nicotine products still applies to customers who appear to be under the age of 25, the Scottish Ministers may need to alter the age of sale for those products in the future to reflect the fact that the legal age of tobacco smokers will be higher in the future.

26. In relation to the procedure, this is the same as the existing procedure provided in the 2010 Act and given that the power allows for primary legislation to be amended by subordinate legislation, the affirmative procedure is considered to be appropriate.
27. Therefore, the Committee has considered the explanation of the power and justification provided for the equivalent clause in the previous Tobacco and Vapes Bill given they apply equally to this clause.

28. The Committee is content with the power conferred on the Scottish Ministers in section 4B(4) of the Tobacco and Primary Medical Services (Scotland) Act 2010 in principle and that it is subject to the affirmative procedure.

Clause 55: Power to make provision about warning statements – Amending the power in section 8(5) of the Tobacco and Primary Medical Services (Scotland) Act 2010

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

29. Section 8 of the 2010 Act requires tobacco businesses in Scotland to display a notice that contains the following statement: “It is illegal to sell tobacco products to anyone under the age of 18” (clause 50 of the Bill changes what the notice is required to say to “It is illegal to sell tobacco products to anyone born on or after 1 January 2009”). Section 8 also provides the Scottish Ministers with the power to make provision prescribing the dimensions of the notice and the size of the statement to be displayed on it. The same approach is provided in the Bill for England, Wales and Northern Ireland.
30. Clause 55 of the Bill re-enacts with modifications the existing power conferred on the Scottish Ministers under section 8(5) of the 2010 Act, enabling them to make provision as to the appearance of the statement and any other aspect of the notice. The same approach is provided in the Bill for England, Wales and Northern Ireland.

Committee consideration

31. The DPM states that:

- ” this power is similar to the existing approach in the 2010 Act whereby the Scottish Ministers can set the size and dimensions for the notice, but is extended slightly to allow for the size, appearance of the statement and any other aspect of the notice to be set by regulations.
32. The DPM also states that:
- ” this power is narrow in scope, as its purpose is simply to allow the Scottish Ministers to adjust the requirements if the sign is not having the appropriate impact or, conversely, is overly burdensome.
33. Regarding the procedure, the DPM explains that the negative procedure affords an appropriate level of parliamentary scrutiny for regulations specifying the details of the notice. The UK Government is of the view that the affirmative procedure, relative to the impact of such regulations, would not be an appropriate use of parliamentary time.
34. The Scottish Government states in the LCM that clause 55 represents a slight expansion of the power currently provided in section 8 of the 2010 Act and ensures equivalent powers are aligned across the UK.
35. Given the technical nature of this power and that its purpose is confined to allowing the Scottish Ministers to adjust the requirements of the sign, the Committee considers this power to be acceptable.
36. Clause 55 is a clause which was in the previous Tobacco and Vapes Bill and the re-enacted power to amend is in the same terms. Therefore, the comments and recommendation apply equally to clause 55 as previously considered by the Committee.

37. The Committee is content with the power conferred on the Scottish Ministers in section 8(5) of the Tobacco and Primary Medical Services (Scotland) Act 2010 in principle and that it is subject to the negative procedure.

Clause 61: Displays of vaping and nicotine products – Inserting a power in section 3A(1) of the Tobacco and Primary Medical Services (Scotland) Act 2010

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

38. Clause 61 amends the Tobacco and Primary Medical Services (Scotland) Act 2010 Act by inserting a new section 3A which confers a regulation-making power on the Scottish Ministers to impose prohibitions, requirements, or limitations on retailers regarding the display of herbal smoking products, vaping products or nicotine products and the display of their prices, as well as empty retail packaging. Similar regulation-making powers are provided in the Bill for the Secretary of State and the

Welsh Ministers. This power could be used to place limitations on retailers on the location of the products, for instance on displays in windows however, it does not extend to the display of these products on websites.

Committee consideration

39. At its meeting on 28 January 2025, the Committee was content with this power and did not raise any concerns with it.

40. However, the Committee asked the Scottish Government whether there is any equivalent power in current legislation to deal with the displays of such herbal smoking products, vaping products or nicotine products and their prices on websites.

41. In its response, the Scottish Government states that:

” There are no powers in current legislation to deal with the displays of such herbal smoking products, vaping products or nicotine products and their prices on websites. While there is a power for the Scottish Minister to regulation the display of tobacco products and prices on websites, in section 8 of the Tobacco Advertising and Promotion Act 2002, that power has never been exercised. An equivalent power for the Secretary of State to make regulations for England, Wales and Northern Ireland, in section 7D of that Act, has similarly never been exercised. Both powers are to be repealed by the Bill. A consistent position has been taken that such a power has, thus far, not been necessary. We will keep this under review and can bring forward legislation in future should it be considered necessary.

42. The Committee is content with the power conferred on the Scottish Ministers in section 3A(1) of the Tobacco and Primary Medical Services (Scotland) Act 2010 in principle and that the exercise of the power is subject to the affirmative procedure.

43. The Committee also notes and highlights the Scottish Government’s response to the lead committee for further consideration of this point.

Clause 62: Free distribution and discount of products – Inserting a power in section 8B(2) of the Tobacco and Primary Medical Services (Scotland) Act 2010

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

44. This clause amends the 2010 Act by inserting two new sections: 8A (Free distribution and discount of products) and section 8B (Free distribution of products: defences). The new section 8A makes it an offence to give away any product, or a coupon (physical or electronic) to a member of the public at a substantial discount where the purpose of effect is to promote a relevant product. Anyone convicted of

an offence under this clause may be fined, imprisoned for up to 2 years, or both.

45. Section 8B(1) provides that it is a defence for anyone charged with an offence under section 8A to prove that the product or coupon was given away in accordance with arrangements made by a public authority. Section 8B(2) provides a regulation making power for the Scottish Ministers to create further defences to the offence outlined in 8A.

Committee consideration

46. The justification provided for this power in the DPM is as follows:

” Whilst the UK government believe that we have already captured all necessary defences and therefore do not need this power, health is a devolved area, and the Scottish Government has already consulted on the free distribution of vapes. These consultation responses raised several circumstances in which vapes may be distributed at no cost and could result in the promotion of these products to people who are trying to stop smoking. Further consideration needs to be given to those situations before a final policy decision on appropriate defences can be reached. It is appropriate for the Scottish Ministers to retain flexibility to provide for further defences in line with their separate devolved policy in this area. It is therefore appropriate under the principles of devolution to add this in.

47. The UK Government also considers that whilst this is a Henry VIII power (insofar as it permits secondary legislation to amend primary legislation) and relates to a criminal offence under clause 62, it is narrow in scope as it is only to provide for additional defences to be created for that specific offence.

48. The Scottish Government is supportive of the provision and considers that this power may be used in the future in certain circumstances, for example, where the new offence inadvertently catches programmes which are trying to encourage individuals to stop smoking by encouraging them to switch to vaping or nicotine products.

49. The UK Government is of the view that the affirmative procedure will provide an appropriate level of parliamentary scrutiny as this power has the ability to influence the scope of defences. It is explained in the DPM that this will ensure that such regulations achieve a balance between having proportionate defences and ensuring the measures are effective in practice.

50. Given that the purpose of this power is clearly set out and is limited only to the creation of additional defences for the purposes of the offence under section 8A of the 2010 Act, the Committee considers this power to be acceptable. The Committee also considers that the affirmative procedure will provide the appropriate level of parliamentary oversight. Accordingly, the Committee is content that this is a Henry VIII power in this instance.

- 51. The Committee is content with the power conferred on the Scottish Ministers in section 8B(2) of the Tobacco and Primary Medical Services (Scotland) Act 2010 in principle and that it is subject to the affirmative procedure.**

Clause 67: Power to extend 2010 Act to other products – Inserting powers in section 34A(1) and (3) of the Tobacco and Primary Medical Services (Scotland) Act 2010

Powers conferred on: Scottish Ministers

Powers exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

52. Clause 67 provides the Scottish Ministers with a power, in new section 34A(1) of the 2010 Act, to amend Part 1 of that Act to extend any provision which applies in relation to a tobacco product to any device that enables a tobacco product to be consumed other than by being smoked (such as a heated tobacco device).
53. Additionally, it provides the Scottish Ministers with the power, in new section 34A(3), to amend Part 1 of the 2010 Act to extend the any provision which applies in relation to a tobacco product to some or all smoking related products, as listed in the 2010 Act.
54. The clause also requires the Scottish Ministers to consult before exercising these powers.

Committee consideration

55. The DPM provides a detailed explanation for this power. First, it explains that this power is narrow in scope given that it only allows devices that enable a tobacco product to be consumed to be included in the legislation. The DPM states:
 - ” The Bill currently restricts tobacco products but not the devices used to consume these products. We do not want to create a loophole where tobacco use is encouraged and promoted by the tobacco industry via the promotion of the device used to consume it. The industry is already known to do this with heated tobacco devices, which they often claim they are permitted to advertise as the actual device is not a tobacco product.
56. Secondly, the DPM also explains that the tobacco industry is known to be extremely innovative and that this power will provide the government with the flexibility to keep up with the changes in the market, thereby ensuring the legislation is as comprehensive and future-proof as possible. The UK Government considers that there may be areas where the tobacco industry pivot to try and circumvent the Bill’s provisions, potentially allowing harmful products onto the market, especially those targeting children.
57. The UK Government also considers that the requirement to consult will ensure the appropriate engagement will take place before any provisions are made under this power.
58. The Scottish Government explains in its LCM that these powers will ensure devices which enable the consumption of harmful tobacco products can be subject to the same regulatory framework as the products themselves, should this be considered necessary in future.

59. This is a Henry VIII power insofar as it permits secondary legislation to amend primary legislation and the UK Government therefore considers the affirmative procedure is the appropriate procedure. It also considers that the affirmative procedure will ensure that the right balance has been struck between industry and public health.
60. Given that the purpose of this power is clearly set out and adequate justification has been provided in the DPM in relation to its anticipated use in practice, the Committee considers this power to be acceptable. The Committee also considers that the affirmative procedure will provide the appropriate level of parliamentary oversight. Accordingly, the Committee is content that this is a Henry VIII power in this instance.
61. **The Committee is content with the powers conferred on the Scottish Ministers in section 34A(1) and (3) in principle and that they are subject to the affirmative procedure.**

Part 5 – Product and information requirements etc

Clauses 90-92: Powers to regulate packaging, features of products, and contents and flavour;

Clauses 93, 94, 96: Powers to regulate substances released into human body and emissions, non-compliant images, and information;

Clauses 97 - 99, 101: Powers to regulate studies, responsible persons, testing and matters dealt with by the Tobacco and Related Products Regulations 2016;

Part 6 – Advertising and sponsorship

Clause 123: Power to regulate brandsharing; and

Clause 133: Power to extend Part 6 and the Communications Act 2003 to other Products.

Powers conferred on: Secretary of State and where the provision to be made is within the legislative competence of the Scottish Parliament, with the consent of the Scottish Ministers

Powers exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

62. Clauses 90 to 92 deal with powers conferred on the Secretary of State to regulate retail packaging, features, contents and flavours of tobacco products, herbal smoking products, cigarette papers, vaping products and nicotine products. Regulations made under these clauses may impose prohibitions, requirements or limitations in relation to the production, importation, or supply of such products. This would have the effect that any individual or organisation involved in the supply chain would be required to ensure products they deal with adhere to the regulations.

63. Clause 93 provides the Secretary of State with a power to make regulations about the nature and amount of substances and emissions that may be released by tobacco products, tobacco related devices, herbal smoking products, cigarette papers, vaping or nicotine products. Clause 94 provides the Secretary of State with regulation making powers to prohibit a person from publishing a “non-compliant” image of tobacco products, tobacco related devices, herbal smoking products, cigarette papers, vaping products, nicotine products or of their packaging. Clause 96 provides a power enabling the Secretary of State to make regulations to place a requirement on producers or importers of tobacco products, tobacco related devices, herbal smoking products, cigarette papers, vaping products and nicotine products, to provide information about a product or its producer.
64. Clause 97 provides the Secretary of State with a power to require a producer of a tobacco product, tobacco related device, herbal smoking product, cigarette papers, vaping product or nicotine product to carry out a study and submit the results in relation to the product or an ingredient in the product. Clause 98 provides the Secretary of State with a power to require a producer of a tobacco product, tobacco related device, herbal smoking product, cigarette papers, vaping product or nicotine product to nominate an individual to be responsible for information that has to be provided in accordance with regulations made under clauses 95, 96 and 97. Clause 99 provides the Secretary of State with a power to introduce regulations that require a person to test products to determine whether a product complies with requirements imposed in regulations made under this part (Part 5) of the Bill. Clause 101 enables the Secretary of State to make provision in regulations that are similar to or correspond to any provision of the Tobacco and Related Products Regulations 2016^{iv} (“TRPR”) in so far as not enabled by the other provisions of this Part of the Bill.
65. Clause 123 deals with brandsharing, conferring a power on the Secretary of State to introduce regulations to prohibit or restrict brandsharing of tobacco products, herbal smoking products, cigarette papers, vaping products and nicotine products. The provision includes a power to create offences for failure to comply with the regulations. Anyone convicted of such offences could receive, on indictment, imprisonment for a term not exceeding 2 years, or a fine, or both. On summary conviction in Scotland, the penalty may be imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.
66. Clause 133 provides the Secretary of State with powers to amend Part 6 of the Bill (Advertising and sponsorship) and any provision of the Communications Act 2003, by extending the scope of those provisions to any device that enables a tobacco product to be consumed (such as a heated tobacco device), or an item which is intended to form part of such a device.

Committee consideration

67. At its meeting on 28 January 2025, the Committee noted that the Secretary of State may make provision under these powers which falls within the Scottish Parliament’s legislative competence, with the consent of the Scottish Ministers. These powers are only exercisable by the Secretary of State; the Bill does not confer equivalent powers on the Scottish Ministers. Accordingly, the Committee asked the Scottish Government:

” In light of the four-nation approach to regulation under its Tobacco and Vaping Framework^v, what consideration was given to requiring regulations proposed under each of these clauses which make provision within the Scottish Parliament's legislative competence to be laid in both the United Kingdom Parliament and the Scottish Parliament, and to be subject to procedure in both Parliaments?

68. In its response, the Scottish Government states that:

” It is rare for a joint procedure to be applied to secondary legislation. There are examples, most notably in the Scotland Act 1998, of Orders in Council requiring the approval of both the UK and the Scottish Parliaments before the Privy Council may recommend that the Order is made by HM the King. Such Orders are most commonly used for matters of constitutional significance. Other joint procedures in the European Union (Withdrawal) Act 2018 and other Brexit-related legislation have never been used.

The Scottish Government does not consider a joint procedure would be appropriate for the powers in this Bill. The Government is clear that Parliament should have a role in considering the use of powers in devolved areas, which is provided by the opportunity to scrutinise Scottish Ministers' use of their power to consent or not to regulations. The Scottish Government is also committed to engaging with the Parliament as regulations progress.

69. The Committee notes that whilst joint procedures are not commonly used, there are other examples in secondary legislation. Some recent examples include: the Greenhouse gas Emissions Trading Scheme (Amendment) (No. 2) Order 2024 which was laid across all four parliaments in the UK and the Vehicle Emissions Trading Schemes (Amendment) Order 2024 which was laid in both houses of the UK Parliament and in the Scottish Parliament.

70. In its response, the Scottish Government also states that:

” In working with UK Government and the other devolved Governments on this Bill, there has been careful consideration given to the appropriate procedures applied to regulations in the Bill. The Scottish Government has ensured that regulations which make provision relating to devolved matters cannot be made without the consent of the Scottish Ministers.

In some cases, this is in line with the position in similar legislation (such as the powers to regulate the retail packaging flavouring and product requirements of tobacco products in the Children and Families Act 2014).

In other cases (such as with brandsharing, where the power in the Tobacco Advertising and Promotion Act 2002 did not require consent) this goes further in ensuring that the devolution settlement is appropriately reflected in Westminster legislation.

71. The Committee also notes that alongside these two examples, the Bill also repeals an existing power conferred on the Scottish Ministers to regulate nicotine vapour product brandsharing contained in section 17 of the Health (Tobacco, Nicotine etc.

^v <https://www.gov.scot/publications/tobacco-vaping-framework-roadmap-2034/pages/4/>

and Care) (Scotland) Act 2016.

72. Accordingly, it is the Committee's view that there is currently no uniform approach to existing delegated powers in this policy area, and that they are variously exercised by (i) Scottish Ministers, (ii) UK Ministers with Scottish Ministers' consent, and (iii) UK Ministers without consent.
73. Nonetheless, the Committee notes the Scottish Government's view that the joint procedure would not be appropriate for exercise of the powers in this Bill.
74. In its consideration of the powers under these clauses, the Committee also asked the Scottish Government whether the powers fall within the scope of SI Protocol 2 ("SIP2") and, if so, whether it is content to add the powers to Annex A of SI Protocol. The Committee also enquired how the Scottish Government will facilitate parliamentary scrutiny of Scottish Ministers' consent to the making of regulations under the powers, if its position is that those powers do not fall within the scope of SIP2.
75. In its response, the Scottish Government states that:
 - ” The scope of the current protocol (SIP2) covers secondary legislation to be made by UK Ministers that include provision that is within devolved competence and relates to matters within the competence of the EU immediately before IP completion day. The Scottish Government does not consider that these clauses fall within scope of SI Protocol 2. The Scottish Government will consider with the UK Government the possibility of extension of SIP2 beyond Brexit related powers, or alternative arrangements to govern notification to the Parliament of the exercise of powers in devolved areas by UK Ministers. However, SIP2 was put in place to manage particular circumstances in which a large volume of SIs connected to Brexit was expected in a short period. More flexible and proportionate arrangements might be more appropriate in the future.
76. The Committee notes the Scottish Government's view that SI Protocol 2 will not apply to the exercise of these powers. Accordingly, as matters currently stand, there is no formal process for scrutiny of the Scottish Ministers' decisions to consent to the making of UK regulations under the powers.
77. The Committee also notes that, in its response, the Scottish Government states that it will consider with the UK Government the possibility of extension of SIP2 beyond Brexit related powers, or alternative arrangements to govern notification to the Parliament of the exercise of powers in devolved areas by UK Ministers. It also suggests that more flexible and proportionate arrangements (than SI Protocol 2) may be more appropriate in the future.
78. Accordingly, the Committee urges both governments to propose potential suitable arrangements for consideration by Parliament, as a matter of priority.
79. With regards to the question of facilitating scrutiny of consent to the making of regulations made under these powers, the Scottish Government states that:

- ” The Scottish Government is clear that, as a matter of principle, the Scottish Parliament should have oversight of the use by UK Ministers of delegated powers in devolved areas.

The Government recognises the essential role which the Parliament plays in scrutinising regulations within devolved competence, and will facilitate the scrutiny of Scottish Government’s decision to consent to the making of regulations in these areas.

[...]

As part of this collaborative approach, we are committed to keeping the Health, Social Care and Sport Committee informed of the publication of consultations and consultation responses related to future regulations, where possible, in a similar way to our engagement on the four nations consultation for the Bill. I will also continue to ensure that the Health, Social Care and Sport Committee are informed of any decisions made on regulations and would be happy to engage with Committee should they have any questions about regulations which contain devolved provision.

80. The Committee notes the Scottish Government’s commitment to keeping the lead committee informed of consultations and decisions regarding future regulations under these powers which contain devolved provision, and to engage with the Committee should it have any questions on those regulations.

- 81. The Committee is content with the powers conferred on the Secretary of State in principle and that they are subject to the affirmative procedure.**

- 82. Insofar as scrutiny by the Scottish Parliament is concerned, the Committee:**

- **notes the Scottish Government’s view that the joint procedure would not be appropriate for the powers in this Bill;**
- **notes the Scottish Government’s view that SI Protocol 2 will not apply to the exercise of these powers;**
- **notes that as matters currently stand, there is no formal process for scrutiny of the Scottish Ministers’ decisions to consent to the making of UK regulations under the powers;**
- **notes the Scottish Government’s intention to consider with the UK Government the possibility of extension of SIP2 beyond Brexit related powers, or alternative arrangements to govern notification to the Parliament of the exercise of powers in devolved areas by UK Ministers, and its suggestion that more flexible and proportionate arrangements (than SI Protocol 2) may be more appropriate in the future;**
- **urges both the UK and Scottish governments to propose potential suitable arrangements for consideration by Parliament, as a matter of**

priority; and

- **notes the Scottish Government’s commitment to keeping the lead committee informed of consultations and decisions regarding future regulations under these powers which contain devolved provision, and to engage with the Committee should it have any questions on those regulations.**

Supplementary and miscellaneous provision under Part 5

Clause 103: Offences

Power conferred on: provision supplementary to powers conferred on the Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: As per the relative substantive power (all of which are affirmative)

Provision

83. Clause 103 enables regulations made under Part 5 to include offences for failure to comply and sets out the maximum penalties that could be imposed for failure to comply with regulations (for Scotland, a term of imprisonment not exceeding 2 years, an unlimited fine, or both if convicted on indictment). The DPM explains that this power is required to ensure there will be appropriate sanctions for non-compliance with requirements imposed under the relevant regulations. this is the same as the existing penalty under TRPR.

Committee consideration

84. Given the detailed discussion above of the relevant substantive powers this clause relates to, the Committee is content with this supplementary power to create offences when exercising those substantive powers.

85. **The Committee is content with the power conferred on the Secretary of State which is available when exercising any of the substantive powers in Part 5 as described above.**

Clause 104: Enforcement

Power conferred on: Provision supplementary to powers conferred on the Scottish Ministers

Power exercised by: Regulations

Parliamentary procedure: As per the relevant substantive power (all of which are affirmative)

Provision

86. Clause 104 provides for provisions about enforcement to be included in regulations made under Part 5. The regulations may give the function of enforcement of the regulations to relevant enforcement authorities. The relevant enforcement authorities for Scotland are the local weights and measures authority.
87. The DPM explains that this power is required to ensure that relevant enforcement authorities have the powers needed to enforce regulations made under the Bill.
88. It is stated in the LCM that this aligns with similar enforcement provisions in other legislation.

Committee consideration

89. Given the detailed discussion above of the relevant substantive powers this clause relates to, the Committee is content with this supplementary power to make provision for enforcement.

- 90. The Committee is content with the power conferred on the Secretary of State which is available when exercising any of the substantive powers in Part 5 as described above**

Clause 105: Power to sub-delegate

Power conferred on: provision supplementary to powers conferred on the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: As per the relevant substantive power (all of which are affirmative)

Provision

91. This clause enables regulations under Part 5 to sub-delegate decisions to be made under the regulations. It allows the Secretary of State or persons appointed under the regulations to make provision on matters dealt with by the regulations via a determination or other informal document.
92. The DPM explains that this is considered appropriate to allow some discretion in deciding whether this type of technical requirement set by the regulations has been met. It is stated, by way of an example, that clause 99 (Testing) regulations may provide for a person to be required to carry out tests of products, and the technical nature of this would require specific expertise to determine if a test has been met or not.

Committee consideration

93. Given the detailed discussion above of the relevant substantive powers this clause relates to, the Committee is content with this supplementary power to provide for sub-delegation of decisions.

94. **The Committee is content with the power conferred on the Secretary of State which is available when exercising any of the substantive powers in Part 5 as described above.**

Clause 107: Power to amend legislation

Power conferred on: provision supplementary to powers conferred on the Secretary of State

Power exercised by: Regulations

Parliamentary procedure: As per the relevant substantive power (all of which are affirmative)

Provision

95. Clause 107 extends the general consequential provision that may be made by regulations under this Part to provide that such provision may amend, repeal, or revoke any legislation (whenever passed or made).

Committee consideration

96. The DPM explains that the effect of this clause is to make the regulation-making powers in Part 5 Henry VIII powers in respect of consequential amendments. The UK Government is of the view that this is necessary given that regulations made under Part 5 are likely to amend or may replace TRPR. There are a number of existing cross references in legislation, including primary legislation, to TRPR which will need to be consequentially amended or replaced in due course.
97. The Committee notes that it is not uncommon for powers to make consequential provision to be Henry VIII powers. Taking into account the considerable level of detail that is contained on the face of the Bill, the Committee is content that the Part 5 powers are Henry VIII powers insofar as they are used to make consequential provision.

98. **The Committee is content with the power conferred on the Secretary of State which is available when exercising any of the substantive powers in Part 5 as described above.**

Part 6 – Advertising and sponsorship

(N.B. two Part 6 powers are dealt with above, along with other clauses questions were asked on. They are: Clause 123: Brandsharing, and clause 133: Power to extend Part 6 and the Communications Act 2003 to other Products)

Clause 121: Specialist tobacconists

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

99. Clauses 114 to 118 in Part 6 of the Bill provide for the prohibition of advertising of tobacco and related products covered by the Bill. Clause 121 provides that, notwithstanding those clauses, specialist tobacconists may continue to advertise specialist products. This clause is restating the existing law. A person does not commit an offence under clauses relating to advertisement, publication, printing, or distribution if an advertisement is in a specialist tobacconist, is not visible from outside the specialist tobacconist and is not to advertise cigarettes or hand-rolling tobacco. In addition, regulations under clause 121(1)(d) may set requirements for advertisements such as that any advertisement must display a health warning.
100. The power in clause 121(1)(d) replaces an equivalent provision in the Tobacco Advertising and Promotion Act 2002 (“2002 Act”) for the Scottish Ministers to set requirements with which specialist tobacconists must comply in order to avoid committing an advertising offence. The LCM states that this power is important as it means the Scottish Government will be able to control the content of advertisements within these shops to ensure that messaging etc is consistent with the policy aims set out in the Tobacco and Vaping Framework.

Committee consideration

101. The DPM explains that this power is narrow in scope relating only to setting any additional requirements, in addition to those specified on the face of the legislation, that shops which meet the definition of specialist tobacconists must meet in order to be excluded from the offences set out in the Bill.
102. The UK Government is of the view that the negative procedure affords an appropriate level of parliamentary scrutiny for regulations, given the minor potential impact on business of provision made by these regulations. The DPM provides that use of the affirmative procedure in this case would amount to an inappropriate use of parliamentary time. The DPM explains that this is also consistent with the procedure for the equivalent power in section 6 of the 2002 Act.
103. Given the technical nature of this power and that its purpose is confined to allowing the Scottish Ministers to set additional requirements with which specialist tobacconists must comply in order to avoid committing an advertising offence, the Committee considers this power to be acceptable.

104. The Committee is content with the power conferred on the Scottish Ministers in principle and that it is subject to the negative procedure.

Clause 125: Sponsorship

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: None

Provision

105. Clause 125 makes it an offence for an individual to be a party to a sponsorship agreement where the purpose is to promote a herbal smoking product, cigarette paper, vaping product, or nicotine product in the course of business. For example, this clause will prohibit sports teams from being sponsored by a vaping company. The legislation will apply to any agreement entered into after this section comes into force, two months after Royal Assent. The ban will take effect from a date to be specified in regulations.

Committee consideration

106. The DPM explains that having the ability to specify the relevant date by regulations will enable the Secretary of State to gauge when sufficient notice will have been given, so that there is no risk of any retrospective effect.
107. Regarding the procedure, the DPM states that regulations made under this power are akin to commencement regulations and therefore it is not considered that any parliamentary scrutiny is required.
108. Although this power could be exercised within devolved competence, it is not a standalone power and can only be used on a limited basis to determine the date of which the ban is to take effect. Therefore, the purpose of the power is simply to enable the implementation of the ban.

109. **The Committee is content with the power conferred on the Secretary of State in principle and that it is not subject to any parliamentary procedure.**

Part 7: Smoke-free places, vape-free places and other free-from places

Clause 142, substituting a power in section 4(2) of the Smoking, Health and Social Care (Scotland) Act 2005: No-smoking premises in Scotland

Clause 143, substituting powers in sections 3(1) and (3) of the Smoking, Health and Social Care (Scotland) Act 2005 : No-smoking signs in Scotland

Clause 144, inserting powers in new sections 4G and 4H of the Smoking, Health and Social Care (Scotland) Act 2005: Vape-free premises in Scotland,

Clause 145, inserting powers in new sections 4K and 4L of the Smoking, Health and Social Care (Scotland) Act 2005: Heated tobacco free premises in Scotland

Powers conferred on: Scottish Ministers

Powers exercised by: Regulations

Parliamentary procedure: Affirmative

Provision

110. Part 7 of the Bill extends to the whole of the UK and includes provisions on smoke-free, vape-free and heated tobacco-free places in Scotland.

111. Clause 142 amends the power in section 4(2) of the 2005 Act to allow the Scottish Ministers to make regulations designating certain premises which are not “wholly or substantially enclosed” as no-smoking premises. The stated purpose of this expanded power is to broaden the scope of places that the Scottish Ministers can designate as smoke-free, including shared outdoor places. Section 4(7) of the 2005 Act as amended by the Bill specifies that the Scottish Ministers have a duty to consult prior to making such regulations. Equivalent provision is made in the Bill for England.
112. Clause 143 amends the 2005 Act requirements in relation to no-smoking signs. Section 3 as substituted by clause 143 sets out that a person who has management or control of no-smoking premises must ensure that relevant no-smoking signs are displayed in or near a premises. Section 3(1) confers power on the Scottish Ministers to make regulations which specify the display and design requirements of no-smoking signs, and how and where the signs are to be displayed. Section 3(1) confers power to create exceptions to the requirement for no-smoking signs. Equivalent provision is made in the Bill for England.
113. Clause 144 also amends the 2005 Act, conferring several powers on the Scottish Ministers. New section 4G provides the Scottish Ministers with powers to specify requirements relating to vape-free signage and to create exceptions in relation to those requirements. New section 4H(1) provides a power for the Scottish Ministers to prescribe a place as being vape-free, but only as far as they are already smoke-free. The clause also makes it an offence for a person to vape in a vape-free place or vehicle. It places a duty on the person having management or control of a vape-free place to permit a person to use a vape on their premises. Equivalent provision is made in the Bill for England.
114. Clause 145 amends the 2005 Act by inserting a new Chapter 3 concerning use of heated tobacco devices. New section 4K provides the Scottish Ministers with powers to prescribe specific requirements that heated tobacco-free signage must comply with and to create exceptions to the duty to display such signage. New section 4L(1) provides the Scottish Ministers with a power to prescribe “heated tobacco-free premises”. New section 4J makes it an offence for a person to use a heated tobacco device in heated tobacco-free premises. New section 4L(5) provides that the Scottish Ministers must consult such persons as they consider appropriate before making regulations under this section. Equivalent provision is made in the Bill for England.

Committee consideration

115. The DPM provides similar justifications for clauses 142 to 145. In particular, the DPM explains that flexibility is required to ensure regulations can be made in light of emerging data and that such delegated powers will allow the government to set out detail at the appropriate level. It is also stated that regulations can be adjusted as necessary to remain proportionate relative to their societal and public health impact.
116. Regarding the procedure, the DPM explains that the affirmative procedure provides an appropriate level of parliamentary scrutiny given the relative impact of such regulations, for example on individuals and businesses as well as the affect on the scope of smoke-free places restrictions.
117. The Committee considers that whilst these are significant powers, their respective

purposes are explained clearly in the DPM. Adequate justification has also been provided in relation to their anticipated uses in practice. The Committee therefore agrees that the affirmative procedure will provide the appropriate level of parliamentary oversight in these cases.

118. The Committee is content with these powers conferred on the Scottish Ministers in principle and that they are subject to the affirmative procedure.

Part 8: General (Consequential and transitional provisions)

Clause 161: Power of Secretary of State to make consequential provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative in relation to primary legislation, otherwise negative

Provision

119. Clause 161 confers a regulation making power on the Secretary of State to make provision that is consequential on this Bill and may amend, repeal or revoke any legislation passed or made before, or in the same session as this Bill (including provision made by this Bill)
120. Any regulations made to amend, repeal, or revoke primary legislation will be subject to the affirmative resolution procedure. Any other regulations under this section will be subject to the negative resolution procedure.
121. The clause also defines “primary legislation” meaning it to be an Act of Parliament, an Act of the Scottish Parliament, an Act or Measure of Senedd Cymru or Northern Ireland legislation.

Committee consideration

122. The DPM states that this power may only be exercised to make provision that is consequential on this Bill and that it is standard practice to make consequential amendments through secondary legislation. The DPM also explains that whilst every effort has been made to identify and make provision in the Bill for such amendments, the Bill brings together a whole range of legislation made over the course of the last century on a range of overlapping topics, which increases the complexity. Therefore, that there is the small possibility that further consequential amendments may be required to give effect to the Bill, given the complex nature of commencement of provisions, with some provisions becoming spent or otiose as changes to the complex legislative landscape across the four nations of the UK progresses. Accordingly, the UK Government is of the view that it would be prudent for the Bill to contain a power to deal with these in secondary legislation.
123. The Scottish Government states in its LCM that some consequential provisions could be within devolved competence.
124. Ancillary powers are standard in modern primary legislation. Although this power

could be exercised within devolved competence (albeit in a limited way) this is an ancillary power to enable implementation of provisions which are a mix of devolved and reserved matters, and the power can only be exercised in consequence of provisions of the Bill. As explained in detail below in relation to clause 162, the Scottish Ministers will have the ability to make consequential, transitional and saving provision in connection with the coming into force of Part 2 and sections 140 to 144 and schedule 18 of the Bill.

125. The Committee is content with the power conferred on the Secretary of State in principle and that it is subject to the affirmative procedure in relation to primary legislation and otherwise negative.

Clause 162: Power of Scottish Ministers to make consequential provision

Power conferred on: Scottish Ministers

Power exercised by: Regulations

Parliamentary procedure: Negative procedure, unless the power is exercised to modify primary legislation then affirmative procedure

Provision

126. Clause 162 confers a regulation making power on the Scottish Ministers to make provision that is consequential on Part 2 and clauses 142 to 146 and schedule 18 of this Bill.
127. Regulations made under this power may amend, repeal, or revoke provision made by or under an Act passed before this Bill or in the same session of Parliament as this Bill or an Act of the Scottish Parliament passed before this Bill.
128. Any regulations that amend or repeal provisions made by an Act of the Scottish Parliament, or an Act are subject to the affirmative resolution procedure. Any other regulations under this section will be subject to the negative resolution procedure.

Committee consideration

129. The DPM provides the same justification as clause 161, namely that it is standard practice to make consequential amendments through secondary legislation and although every effort has been made to identify and make provision in the Bill for such amendments, the Bill does bring together a whole range of legislation made over the course of the last century and therefore there is the small possibility that further consequential amendments may be required to give effect to the Bill. The UK Government therefore considers that it would be prudent for the Bill to contain a power for the Scottish Ministers to deal with these in secondary legislation.
130. Ancillary powers are standard in modern primary legislation and enable implementation of provisions which in this case deal with devolved matters. The power can only be exercised in consequence of provisions of the Bill (Part 2, sections 140 to 144 and schedule 18).

131. The Committee is content with the power conferred on the Scottish Ministers in principle and that it is subject to the negative procedure unless the power is exercised to modify primary legislation in which case it subject to the affirmative procedure

Clause 168: Commencement - Parts 1 to 4

Clause 169: Commencement - Parts 5 to 8

Power conferred on: Scottish Ministers and the Secretary of State

Power exercised by: Regulations or an Order

Parliamentary procedure: None

Provision

132. Clause 168 contains a power for the Scottish Ministers to bring clause 65 (Extension of retailer register etc) and Schedule 9 (Extension of retailer register etc: Scotland) of the Bill into force by regulations, and different days may be appointed for different purposes.
133. Clause 169 confers a power on the Scottish Ministers to commence provisions in clauses 142 to 146, and Schedule 18.
134. Clause 169 confers a power on the Secretary of State to commence provisions in clauses 121, 123 and 133 (Part 6).
135. As is normal with commencement provisions, these powers are not subject to any parliamentary procedure.

Committee consideration

136. The DPM states that health is a devolved matter, and the devolved governments currently exercise powers in their respective legislature (Smoking, Health and Social Care (Scotland) Act 2005). Therefore, it is appropriate and consistent for each devolved government to have the power to commence their own powers on smoke-free, vape-free, and heated tobacco-free places.
137. In relation to the power conferred on the Secretary of State to commence the relevant provisions in clauses 121, 123 and 133, the DPM states that:
- ” It is appropriate to commence Part 6 of the Bill together with the amendments consequential on Part 6 by regulations because Part 6 in part replaces the Tobacco Advertising and Promotion Act 2002 (TAPA). When Part 6 is fully commenced, TAPA and associated legislation will be repealed and as part of the repeal, regulations will need to be made in order to maintain the current ban on displays and advertising of tobacco products. The government will also consider the appropriate timing for an introduction of a ban on advertising of vaping and other products in order to allow appropriate notice to minimise costs to business.
138. Given that adequate explanation is provided in the DPM and that this is a standard

provision, the Committee is content with these powers and that they are not subject to any parliamentary procedure.

139. The Committee is content with the commencement powers conferred on the Scottish Ministers and the Secretary of State and that they are not subject to any parliament procedure.

