

TOBACCO AND PRIMARY MEDICAL SERVICES (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT – OVERVIEW

3. **Part 1** of the Act contains a number of controls on sales, including a ban on the display of tobacco products and on the sale of tobacco products from vending machines, the establishment of a Register of Tobacco Retailers and the introduction of tobacco retailing banning orders. It also creates the new offence of purchase of tobacco products by under 18s or by persons aged 18 or over on behalf of under 18s. Part 1 also consolidates and updates some tobacco sales legislation (including provisions from the Children and Young Persons (Scotland) Act 1937, the Children and Young Persons (Protection from Tobacco) Act 1991, the Tobacco Advertising and Promotion Act 2002 and the Smoking, Health and Social Care (Scotland) Act 2005).
4. **Part 1** creates the following offences:
 - 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 that does not comply with regulations;
 - an offence of selling tobacco products or cigarette papers to persons under 18;
 - an offence of a person under 18 buying or attempting to buy tobacco products or cigarette papers;
 - an offence of a person aged 18 or over buying or attempting to buy tobacco products or cigarette papers for a person under 18;
 - an offence for someone under 18 who is in possession of tobacco products or cigarette papers in a public place to fail to comply with a request from the police to surrender these items or to supply a name and address;
 - an offence of selling tobacco products from vending machines, and
 - an offence of carrying on a tobacco business whilst not on the Register of Tobacco Retailers or carrying on such a business from unregistered premises;
 - an offence of a person who is on the register failing to notify certain changes to the Scottish Ministers
 - an offence of breaching a tobacco retailing banning order or an ancillary order;
 - an offence of failing to display a notice relating to a tobacco retailing banning order.
5. **Part 1** also creates an enforcement regime of fixed penalty notices and banning orders for offences under that Part.

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(Scotland) Act 2010 (asp 3) which received Royal Assent on 3 March 2010*

6. **Part 2** of the Act amends the provisions of the National Health Service (Scotland) Act 1978 (“the 1978 Act”) regarding the persons with whom Health Boards can contract for the provision of primary medical services.
7. **Part 3** of the Act makes general provision in relation to the Scottish Ministers’ order and regulation making powers, gives the Scottish Ministers powers to make ancillary provision and provides as to commencement of the Act.

Part 1 – Tobacco Products Etc.

Section 1 – Prohibition of tobacco displays etc.

8. Subsection (1) makes it an offence to display tobacco products and smoking related products in the course of business. The display of smoking related products is only caught by the ban in premises where tobacco products are also for sale.
9. Smoking related products are defined in section 35(2) as:
 - cigarette papers
 - cigarette tubes
 - cigarette filters
 - apparatus for making cigarettes
 - cigarette holders
 - pipes for smoking tobacco products
10. Ministers may amend this list by order (see section 35(3)).
11. Subsection (2) exempts specialist tobacconists from the prohibition of tobacco displays in relation to all tobacco products other than cigarettes and hand-rolling tobacco provided the display is inside the specialist tobacconist’s premises and complies with any requirements which may be prescribed. A specialist tobacconist is defined in the Tobacco Advertising and Promotion Act 2002 as “a shop selling tobacco products by retail (whether or not it also sells other things) more than half of whose sales on the premises in question derive from the sale of cigars, snuff, pipe tobaccos and smoking accessories”.
12. Subsection (3) exempts wholesalers from the prohibition of tobacco displays but only when trading with persons engaged in a tobacco business. The Scottish Ministers may prescribe further requirements in order for displays to meet this exemption.
13. Under subsection (6) the offence of displaying tobacco products etc does not apply to any display on websites. However, section 8 of the Tobacco Advertising and Promotion Act 2002 (which provides for the regulation of the display of tobacco products and their prices) will still apply to websites by virtue of the amendments in paragraph 4 of schedule 2.

Section 2 – Displays which are also advertisements

14. This section allows the Scottish Ministers to make regulations providing for an advertisement to be considered only as a display and vice versa where the promotion of tobacco products could be considered to be both so that only one of the regulatory regimes applies.

Section 3 – Regulation of display of prices

15. This section allows the Scottish Ministers to regulate the display of prices of tobacco products or smoking related products again only in places where tobacco products are offered for sale. As with the ban on displays, website displays are excluded.

Section 4 – Sale of tobacco products to persons under 18

16. This section restates (with modifications as outlined in paragraph 17) the offence in section 18 of the Children and Young Persons (Scotland) Act 1937 of selling tobacco products to under 18s.
17. A retailer will have a defence to any offence under this section if he/she believed that the customer was over 18 and had taken reasonable steps to establish a customer's age by being shown acceptable proof of identification. Acceptable proof of identification includes a passport or a driving licence. Ministers may also prescribe other documents (e.g. the Young Scot National Entitlement Card) as acceptable ID.

Section 5 – Purchase of tobacco products by persons under 18

18. This section makes it an offence for someone under 18 to buy or attempt to buy a tobacco product or cigarette papers unless they are authorised to do so by a council officer or a constable as part of a test purchasing programme.

Section 6 – Purchase of tobacco products on behalf of persons under 18

19. This section makes it an offence for someone aged 18 or over to buy a tobacco product or cigarette papers on behalf of someone who is under 18.

Section 7 – Confiscation of tobacco from persons under 18

20. This section empowers the police to confiscate a tobacco product or cigarette papers from a person under 18 who is in possession of them in a public place. Failure to comply with a request from the police to surrender the tobacco product or cigarette papers or, when such a request has been made, for a name and address is an offence.

Section 8 – Display of warning statements

21. This section requires tobacco retailers to display a warning statement at all points of sale where tobacco products are sold. It is a restatement of the equivalent provision in section 4 of the Children and Young Persons (Protection from Tobacco) Act 1991.

Section 9 – Prohibition of vending machines for the sale of tobacco products

22. This section provides for the offence of having a “vending machine” available for use. Subsection (3) defines a “vending machine” as an automatic machine for the sale of tobacco products (regardless of whether the machine also sells other products). The person who commits the offence is the person who has the management or control of a premises on which the vending machine is available for use.

Section 10 – Register of Tobacco Retailers

23. This section establishes a national Register of Tobacco Retailers in Scotland. Sections 11 to 14 set out how retailers can apply to be on the register and how changes can be made to such entries in the register and outlines the circumstances under which the Scottish Ministers can remove tobacco retailers from the register. More detail on these provisions is outlined below.

Section 11 – Application for a registration and addition of premises etc.

24. This section allows retailers to apply to be on the Register of Tobacco Retailers. The Scottish Ministers can only refuse an application if not all information required is provided, the application is not made in the correct form and manner or if the person has been banned by a tobacco retailing banning order from selling tobacco from any of the premises he/she is seeking to register.

25. The section also allows existing registrants to add further premises to their entry in the register.

Section 13 – Duty to notify certain changes

26. This section requires a registered business to inform the Scottish Ministers within three months of any changes in its name or address or if it ceases its tobacco business at particular premises.

Section 14 – Changes to and removal from Register

27. This section includes a requirement on the Scottish Ministers to remove premises affected by a tobacco retailing banning order from the Register of Tobacco Retailers. There is no automatic reinstatement of the person once the banning order has expired. An application would have to be made under section 11 where the retailer would like to sell tobacco products from the premises again. This section also allows the Scottish Ministers to correct the register as considered appropriate. Ministers are required to notify a registered business of any changes to its entry as soon as reasonably practicable and, if appropriate, to issue at the same time a revised certificate of registration.

Section 15 – Tobacco retailing banning orders

28. Under this section a court can by order ban a tobacco retailer from selling tobacco from specified premises if the retailer has received three or more enforcement actions relating to each of those premises, at least one of the enforcement actions is within the two months preceding the application made by the council and the conduct which gave rise to the enforcement actions all took place within a two year period. Enforcement actions can either be in the form of a fixed penalty notice or a conviction for an offence under Chapters 1 or 2 of the Act. The ban can be for a period up to 24 months. .

Section 16 – Tobacco retailing banning orders: ancillary orders

29. This section allows councils to apply to the sheriff for an “ancillary order”. Such orders are ancillary to tobacco retail banning orders granted under section 15. The application can be made along with an application for a banning order or it can be made at a later date once a banning order is in place. The order can be sought against “P” who is the person against whom the banning order is being sought or has already been made. An ancillary order can be sought by the council banning P from being connected to or seeking to control another person carrying on a tobacco business at the specified premises. In addition, where P is not an individual (e.g. where P is a company or partnership), an order can be sought to ban any person connected to P from carrying on a tobacco business at the specified premises or being connected to any such person. Section 16(5) defines “specified premises” to be the premises in the banning order (either being sought or already granted) to which the ancillary order relates. Section 16(4) provides when a banning order ceases to have effect any related ancillary orders will also cease to have effect. Sections 16(6) and (7) define “connected to” and “control of a company” respectively.

Section 17 – Tobacco retailing banning orders etc: appeals

30. This section sets out the process by which a person can appeal against a tobacco retailing banning order or an ancillary order made under sections 15 and 16. On appeal the sheriff principal can increase or decrease the length of the banning order period.

Section 18 – Tobacco retailing banning orders etc: notification to the Scottish Ministers

31. This section requires the sheriff to notify the Scottish Ministers on making a tobacco banning order or ancillary order. The sheriff principal must also notify the Scottish Ministers of the outcome of any appeal.

Section 19 – Tobacco retailing banning orders: display of notices

32. This section requires tobacco retailers, in respect of whom a tobacco retailing banning order has been granted, to display a notice in the premises specified in the order if the person continues to carry on a retail business at those premises. This section sets out specific requirements of the notice, including the content of the notice, where it is to be displayed and the period in which the notice has to be displayed. Scottish Ministers have power to prescribe the dimensions of the notice and the wording and size of the statement on it.

Section 20 – Offences relating to the Register

33. This section creates offences in relation to the register. Subsection (4) sets out the different levels of penalty for the offences. The highest penalty of a fine up to £20,000 and/or six months imprisonment applies to offences of carrying on a tobacco business without being registered, carrying on such a business at premises which are not registered and breaching a tobacco retailing banning order or ancillary order.

Section 21 – Public inspection of Register

34. Under this section the Scottish Ministers must make available for public inspection a list of all premises on the Register of Tobacco Retailers. The section also states that the Scottish Ministers must make this list available free of charge at all reasonable times.

Section 22 – Council access to Register

35. This section allows the Scottish Ministers to share information contained in the Register of Tobacco Retailers with councils for the purposes of their enforcement functions under Part 1 of the Act.

Section 23 – Delegation of functions relating to Register

36. This section allows the Scottish Ministers to delegate any of their functions under Chapter 2, except powers to make regulations and the power to determine the form and manner of an application to be on the register.

Section 24 – Vehicles, vessels and moveable structures

37. This section allows the Scottish Ministers to make regulations in relation to Chapter 2 (Register of Tobacco Retailers) to make specific provision for its application to vehicles, vessels and moveable structures.

Section 25 – Enforcement

38. By virtue of this section councils are the enforcement body in relation to Chapters 1 and 2 of this Act. However subsection (2) allows the Scottish Ministers by direction to take over that enforcement duty either in relation to cases of a particular type or a particular case.

Section 26 – Programmes of enforcement

39. This section requires councils to carry out a programme of enforcement at least once a year. Subsection (2) sets out what the programme must involve.

Section 27 – Fixed penalties

40. **Section 27** allows council officers and police constables to issue fixed penalty notices (FPN) for all offences contained in Chapters 1 and 2 of this Act. Fixed penalty notices may not be issued to under 16s. Schedule 1 to the Act makes further provision in relation to the fixed penalty notice regime.

Section 28 – Powers of entry etc.

41. This section sets out powers of entry which council officers may exercise to establish compliance with requirements set out in this Act. As well as entering non-residential premises, council officers may take possession of documents and records and require other people to provide them with information and assistance.

Section 29 – Warrants for entry

42. This allows sheriffs to authorise council officers to enter premises, using reasonable force if necessary, in specific circumstances including when the officer has been refused entry or expects to be refused entry. As in section 21, entries are only for the purpose of carrying out the council's enforcement functions.

Section 30 – Powers of entry and warrants for entry: supplementary

43. This section makes further provision about powers of entry etc. including providing that a council officer may take equipment and other people with him/her when entering premises. Subsection (2) states that premises should be entered only at a reasonable time. A reasonable time is a time which an average person would consider reasonable in view of all the circumstances.

Section 31 – Obstruction, etc. of council officers

44. This section makes obstructing a council officer or making false statements to such an officer an offence. There is a defence to the latter charge if the accused did not know that the information was false and had reasonable grounds to believe it was true.

Section 32 – Powers of entry: constables

45. The section gives the police powers of entry to enforce the provisions of Chapters 1 and 2 of the Act similar to those provided for under section 28 for council enforcement officers.

Section 33 – Presumption as to contents of container

46. This section raises a presumption in prosecutions for displaying tobacco products (and smoking related products) or for selling tobacco to under-18s that the contents of a container conform to the packaging. The presumption can be rebutted by the accused or other party in a trial.

Section 34 – Offences by bodies corporate etc.

47. Where a body corporate, Scottish partnership or other unincorporated association commits an offence under this Act, which is proved to have been committed with the consent or the connivance of a "relevant individual" or an individual acting as such, or because of neglect by the "relevant individual", the individual, as well the relevant organisation, will be guilty of the offence.
48. Subsection (2) defines a "relevant individual" in relation to a body corporate as a director, manager, secretary or other similar officer of the body, or a member (where the affairs of the body are managed by its members). In relation to a limited liability partnership, Scottish partnership and unincorporated association other than a Scottish partnership the "relevant individual" is a member, a partner and a person who is concerned in the management or control of the association respectively.

Section 35 – Interpretation of Part 1

49. This section defines certain terms used throughout Part 1 of this Act.

Section 36 – Crown application

50. Under this section the Crown is bound by provisions in Part 1 but cannot be found criminally liable for contravening any such provisions. Rather, the Court of Session may declare unlawful any act or omission of the Crown where it has been found to be in contravention of such provisions.

Part 2 – Primary Medical Services

51. **Part 2** of the Act amends the 1978 Act as regards eligibility criteria for persons contracting or entering into arrangements with Health Boards to provide primary medical services by clarifying and amending the list of persons who are eligible and including a requirement that all the contracting parties must regularly perform, or be engaged in the day to day provision of, primary medical services. This requirement will apply whether the provision of primary medical services is under a section 17C arrangement, a general medical services contract or another contractual arrangement. The details of the new involvement criteria will be set out in regulations.

Section 37 – Contractual arrangements for the provision of primary medical services

52. Section 2C of the 1978 Act places an obligation on Health Boards to provide, or secure the provision of, primary medical services in respect of their area. Prior to this Act, section 2C(2) provided that Health Boards may make such arrangements to secure the provision of primary medical services as they think fit, including making contractual arrangements with any person. Two specific forms of arrangement are provided for in the 1978 Act, namely an arrangement under section 17C of the 1978 Act and a general medical service contract under section 17J of the 1978 Act, but Health Boards are free to make other arrangements if they wish.
53. **Section 37** replaces the wide power of Health Boards under section 2C(2) of the 1978 Act to “make contractual arrangements with any person” with a more limited power to enter into agreements which are one of the following: a section 17C arrangement, a general medical services contract, or an agreement with parties who would be eligible to enter into a section 17C arrangement.

Section 38 – Section 17C arrangements: persons with whom agreements can be made

54. The categories of person with whom a Health Board can contract are limited in relation to section 17C arrangements and general medical services contracts to those listed in section 17D and 17L of the 1978 Act respectively. Both sections include in the lists persons involved with the health service in Scotland, England and Wales or Northern Ireland, but the respective lists for section 17C arrangements and general medical services contracts are different.
55. **Section 38** amends the criteria for eligibility to provide primary medical services under a section 17C agreement by inserting section 17CA into the 1978 Act. Section 17CA(1) sets out that Health Boards may only make section 17C arrangements with medical practitioners, health care professionals and qualifying partnerships, limited liability partnerships or companies. Section 17CA(2) provides that a qualifying partnership or limited liability partnership is one where all partners are individuals and at least one partner is a medical practitioner or health care professional. A qualifying company is one where at least one member is a medical practitioner or health care professional, and all other members are individuals. Section 17CA(3) provides that Health Boards may only enter into a section 17C arrangement if they are satisfied that the parties have a sufficient involvement in patient care.
56. The involvement criteria in section 17CA(4) requires that all the parties to the agreement regularly perform, or are engaged in the day to day provision of, primary

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medical services. The details of what will be sufficient to meet this requirement will be set out in regulations (see section 17CA(5)), which will include details to cover periods of absence such as maternity leave (see section 17CA(6)).

57. Section 17CA(7) provides that regulations may be made to determine the effect on the 17C arrangement of a change in membership of the qualifying partnership.
58. Section 17CA(8) defines who is a health care professional. This includes nurses.

Section 39 – Eligibility to be contractor under general medical services contract

59. Section 39(1) amends the criteria for eligibility to provide primary medical services under a general medical services contract by substituting section 17L of the 1978 Act. Subsection (1) sets out that Health Boards may only enter into a general medical services contract with medical practitioners, or such other health care professional as may be prescribed, and qualifying partnerships, limited liability partnerships or companies. The definitions of a qualifying company, partnership and limited liability partnership in subsection (2) are similar to those for section 17C arrangements. That is, a qualifying partnership or limited liability partnership is one where all partners are individuals and at least one partner or member is a medical practitioner or prescribed health care professional, and a qualifying company is one where at least one member is a medical practitioner or prescribed health care professional, and all other members are individuals. The involvement requirement is that all parties regularly perform, or are engaged in the day to day provision of, primary medical services with the details to be set out in regulations (see subsections (3) to (6)).
60. Subsection (7) provides that regulations may be made to determine the effect on the contract of a change in membership of the qualifying partnership while subsection (8) provides a definition of the health care professionals who may be prescribed as contractors for the purposes of subsections (1), (2) and (4).
61. Section 39(2) amends section 105(3) of the 1978 Act (“Orders, regulations and directions”) by the addition of a reference to the regulation making powers to be inserted by section 39(1) - (section 17L(1)(b)). This means regulations under section 17L(1)(b) will attract affirmative procedure.

Part 3 – General Provision

Section 40 – Orders and regulations

62. This section provides that all regulations and orders under the Act are to be made in the form of a statutory instrument. Orders under sections 35(3), 39(1) and 42 (where the order amends primary legislation) and regulations under section 24 and paragraphs 3, 4, 10 and 11 of schedule 1 are subject to affirmative procedure in the Parliament. All other regulations and orders are subject to negative procedure.

Section 42 – Ancillary provision

63. This section gives the Scottish Ministers the power by order to make incidental, consequential, transitional, transitory and savings provision.

Schedule 1 – Fixed Penalties

64. **Schedule 1** makes further provision about fixed penalties in relation to offences under Chapter 1 or 2 of the Act . Paragraph 2 states that FPNs issued by virtue of this Act have to contain details such as the amount payable, deadline for payment, discounted amount for early payment and reasonable particulars of the circumstances alleged to constitute an offence.
65. Scottish Ministers may prescribe by virtue of paragraphs 3 and 4 the period in which a notice can be given after the related offence and the levels of FPNs respectively.

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Paragraph 4(2) empowers the Scottish Ministers to set different amounts of FPNs depending on whether the offender has been issued with a FPN in respect of a specified offence or been convicted of any specified offences within a prescribed period.

66. Paragraph 5 sets the payment deadline at 28 days after the day on which the notice is given and the discounted payment deadline at 14 days after the day on which the notice is given. The council can extend the payment deadline in any particular case where it considers it appropriate to do so. The Scottish Ministers can amend the deadlines more generally under paragraph 11(2).
67. By virtue of paragraph 7, a person can be prosecuted where they have not paid the FPN by the payment deadline.
68. Under paragraph 8, a council can withdraw an FPN . If withdrawn no criminal proceedings for the related offence may be commenced.

Schedule 2 – Minor and Consequential Modifications

69. Schedule 2 amends and repeals various enactments. Most of the provisions repealed are being replaced by similar provisions in the Act.
70. The provision repealed by paragraph 1 is replaced by section 4 of the Act.
71. Section 6 of the Children and Young Persons (Protection from Tobacco) Act 1991 has been modified to reflect the repeal of certain offences.
72. Paragraph 3 amends section 6(1)(a) of the Tobacco Advertising and Promotion Act 2002 (TAPA). Section 6(1) of TAPA allowed the advertisement of tobacco products other than cigarettes or hand-rolling tobacco if the advertisement is in or fixed to the outside of a specialist tobacconist and complies with other requirements set put on regulations. This amendment means that specialist tobacconists can only advertise specialist tobacco products inside their premises. The Scottish Ministers retain the power to set additional requirements in regulations.
73. The amendments in paragraph 4 limit section 8 of the Tobacco Advertising and Promotion Act 2002 to the regulation of the display of tobacco products on websites. Other displays are now banned by virtue of section 1 of the Act.
74. Paragraph 5 repeals section 9 of the Smoking, Health and Social Care (Scotland) Act 2005 which contained a power to modify the age specified in section 18 of the Children and Young Persons (Scotland) Act 1937. Now that section 18 is being repealed by paragraph 1, the provision in the 2005 Act is not needed.
75. The amendments in paragraph 6 limit section 17D of the 1978 Act so that it relates only to agreements for personal dental services and not primary medical services. The lists of persons who can be parties to personal dental services agreements are unchanged.