

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

CHILDREN AND FAMILIES BILL: AMENDMENTS IN RELATION TO THE PURCHASE OR ATTEMPTED PURCHASE OF TOBACCO ETC ON BEHALF OF PERSONS UNDER 18; AND THE PROHIBITION OF SALE OF NICOTINE PRODUCTS TO PERSONS UNDER 18.

1. This supplementary Legislative Consent Memorandum is laid under Standing Order (SO) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for a purpose that falls within, or modifies the legislative competence of the National Assembly.
2. The Children and Families Bill (the “Bill”) was introduced in the House of Commons on 4 February 2013. The Bill can be found at:
<http://services.parliament.uk/bills/2012-13/childrenandfamilies.html>

Summary of the Bill and its Policy Objectives

3. The Bill is sponsored by the Department for Education (DfE) to make legislative changes to reform support to children and families. The first half of the Bill seeks to improve services for children and young people by reforming the systems for adoption, Looked after Children, family justice and Special Education Needs. The second half seeks to encourage growth in the childcare sector, shared parental leave and ensuring children in England have strong advocates for their rights.
4. The Bill includes provisions relating to;
 - (a) Adoption - to deliver on reforms to: reduce delays in the adoption system; widen the use of ‘Fostering for Adoption’; improve the support available to adopters and the arrangements for the recruitment and assessment of prospective adopters and to make the Adoption and Children Act Register a statutory register in its application to England.
 - (b) Reform of the family justice system in England and Wales^[1] to tackle delays in public law cases:
 - by implementing a 26 week time-limit for care and supervision cases; reduce the excessive use of experts' reports; remove unnecessary duplication; and ensure the impact of the child is considered when timetabling decisions are made, and

^[1] FJR review of the family justice system for England and Wales and written statement

<http://wales.gov.uk/topics/childrenyoungpeople/parenting/help/justice/?jsessionid=F5E2D1B1C006F79F4176E6D249D006D4?lang=en>

<http://wales.gov.uk/about/cabinet/cabinetstatements/2012/familyjusticereviewupdate/?lang=en>

- in private family law - by requiring parents to attend a family mediation and assessment meeting before applying to court; send a clear signal to separated parents that courts will take account of the principle that both should continue to be actively involved in their children's lives where that is safe and consistent with the child's welfare; and introduce a new "child arrangements order" so that the courts can make full use of powers to direct parents to undertake activities aimed at helping them to make child arrangements work; and streamline divorce processes for the courts.
- (c) To reform the Special Educational Needs (SEN) system in England to: improve support for 16-25 year olds; offer a personal budget to children and families; require better collaboration between services; clearer information about the support available; streamline assessment processes and plans.
- (d) Childcare including to increase flexibilities for childminders by the introduction of childminder agencies.
- (e) Looked after children: to require every local authority in England to designate an officer to act as its 'Virtual School Head' (VSH) for the children it looks after; clarify the right to an assessment for support for young carers; and enable the Secretary of State to bring forward new regulations with the aim of raising standards in children's homes.
- (f) Office of the Children's Commissioner for England – to enhance the commissioner powers in promoting and protecting children's rights and greater independence from UK Government. The changes will apply to the Commissioner's role in promoting and protecting the rights of children in the devolved administrations, but only in relation to non-devolved matters.
- (g) Shared Parental Leave and Flexible Working; to introduce a system for shared parental leave and shared statutory parental pay as well as reform the system that gives individuals the right to request flexible working.
- (h) Regulation of the retail packaging of tobacco products. The Secretary of State is taking powers that will enable him to make regulations, on a UK wide basis, to (1) regulate the retail packaging of tobacco products; (2) regulate the markings on and appearance of tobacco products; and (3) create associated offences.

Provisions in the Bill for which consent is sought

5. The consent of the Assembly is sought to the amendments, tabled on 31 January 2014 which: (1) create the offences of purchasing or attempting to purchase tobacco or cigarette papers on behalf of a person under the

age of 18; (2) give the Secretary of State power to make Regulations to prohibit the sale of nicotine products to those aged under 18 and (3) contain provisions consequential upon the prohibition of sale of nicotine products to persons under 18. Provided the National Assembly for Wales consents to this Motion, the amendments will apply to Wales as well as England.

Purchase of tobacco etc on behalf of persons under 18

6. Tobacco is stated to have the same meaning as in section 7 of the Children and Young Persons Act 1933. In that Act tobacco is defined as *“the expression tobacco includes cigarettes, any product containing tobacco and intended for oral or nasal use and smoking mixtures intended as a substitute for tobacco, and the expression “cigarette” includes cut tobacco rolled up in paper, tobacco leaf, or other material in such form as to be capable of immediate use for smoking”*.
7. The overall effect of the proposed amendment is to provide that:
 - (a) If a person aged 18 or over buys, or attempts to buy, tobacco or cigarette papers on behalf of an individual aged under 18 (proxy purchase) he or she commits an offence.
 - (b) Where a person is charged with such an offence it is a defence to prove that he or she had no reason to suspect the individual concerned was aged under 18, or, in a case where a person has bought or attempted to buy cigarette papers, that the person had no reason to suspect the individual concerned intended to use the papers for smoking.
 - (c) A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).
 - (d) Local weights and measures authorities in England and Wales must enforce the provisions in their areas. In effect this means that enforcement will be carried out by trading standards officers.
8. The application of the provisions of section 9 of and Schedule 1 to the Health Act 2006 means that trading standards officers will be able to issue fixed penalty notices to those whom they have reason to believe have committed the offences of proxy purchase. In accordance with paragraph (4) of Schedule 1 to the Health Act 2006, the Welsh Ministers (as the appropriate national authority) will prescribe, in regulations which are subject to the negative resolution procedure, the form of the fixed penalty notice and, in accordance with paragraph (5) of Schedule 1, the Secretary of State will set the amount of the penalty, in regulations that apply in relation to England and Wales. This reflects how the regulation making powers are currently split between the Welsh Ministers and the Secretary of State in relation to smoking offences under the Health Act 2006 where fixed penalty notices may be issued.

9. Section 11 of, and Schedule 2 to the Health Act 2006 apply in relation to the offence of proxy purchase. The principal effects of incorporating these provisions are, in relation to the offence of proxy purchase: (1) to make it an offence to intentionally obstruct an authorised officer of an enforcement authority in the exercise of his functions; (2) to make it an offence to, without reasonable excuse, fail to give to an authorised officer of an enforcement authority any information or assistance which he reasonably requires in the exercise of his functions; (3) to make it an offence to make a statement to an authorised officer of an enforcement authority that the person knows is false or misleading or is reckless as to whether it is false or misleading; and (4) incorporate the provisions at Schedule 2 which relate to the powers of entry of authorised officers of an enforcement authority.

Prohibition on sale of nicotine products to persons under 18

10. In the proposed amendment, nicotine product is defined as: “(a) any device which is intended to enable nicotine to be consumed by an individual or otherwise to be delivered into the human body; (b) an item which is intended to form part of a device within paragraph (a); or (c) a substance or item which consists of or contains nicotine and which is intended for human consumption or otherwise to be delivered into the human body. Electronic cigarettes, nicotine patches and gums all meet the definition of nicotine product.
11. The following are not nicotine products for the purposes of this particular section: tobacco; cigarette papers; and any device which is intended to be used for the consumption of lit tobacco; and these are specifically excluded from the definition of nicotine products.
12. The overall effect of the proposed amendment is to provide that:
- a. The Secretary of State may by regulations make provision prohibiting the sale of nicotine products to persons aged under 18.
 - b. A person who sells nicotine products to a person aged under 18, in contravention of regulations made by the Secretary of State, commits an offence.
 - c. Where a person is charged with such an offence it is a defence that the person took all reasonable precautions and exercised all due diligence to avoid committing the offence.
 - d. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).

- e. These regulations may: (1) make provision prohibiting the sale of all nicotine products to persons under the age of 18; (2) prohibit the sale of specified nicotine products to persons under the age of 18; or (3) prohibit the sale of nicotine products to under 18s subject to specified exceptions. These powers may be exercised, for example, to exclude vegetables which contain naturally occurring nicotine, and products containing nicotine which fall under the medicines regime, from the categories of nicotine products which may not be sold to under 18s.
- f. The Secretary of State may also make regulations which make it an offence for a person to purchase or attempt to purchase a nicotine product for a person under the age of 18.
- g. The Secretary of State must obtain the consent of the Welsh Ministers before making regulations containing a provision which would be within the legislative competence of the Assembly.

Amendments consequential on the prohibition of sale of nicotine products to persons under 18

13 The overall effect of the proposed amendment is to provide as follows:

- (a) Subparagraphs (1) to (6) of the proposed amendment amend sections 12A to 12D of the Children and Young Persons Act 1933. Sections 12A to 12D of that Act address persistent sales of tobacco to persons under the age of 18 via a regime of restricted premises orders and restricted sales orders. Following a person's conviction for a tobacco offence, these provisions allow local authority enforcement officers to apply to a Magistrate's Court for an order banning premises from selling tobacco products for up to one year, or banning specified individuals from selling tobacco products for up to one year, if they have been found to have committed at least two other tobacco offences within a period of two years. A tobacco offence is defined in section 12D and includes sale of tobacco to a person under the age of 18.
- (b) The amendment amends sections 12A to 12D to allow restricted sales orders and restricted premises orders to prohibit the sale of nicotine products as well as tobacco and expands the application of the sections to allow nicotine offences to count towards the number of offences which need to be committed before an application for a restricted sales or restricted premises order may be made. A nicotine offence is defined as the offence of selling nicotine products to under 18s.
- (c) Subparagraph 7 amends section 5 of the Children and Young Persons (Protection From Tobacco) Act 1991 (enforcement action

by local authorities in England and Wales) to place a duty upon local authorities in England and Wales to consider, at least once in every period of 12 months the extent to which it is appropriate for them to carry out in their area a programme of enforcement action relating to the new offence of sale of nicotine products to under 18s. This amendment is considered necessary as section 5 already places that duty on local authorities in England and Wales in respect of enforcement action under section 7 of the Children and Young Persons Act 1933 which relates to under age sales of tobacco.

- 14 It is the view of the Welsh Government that these provisions fall within the legislative competence of the National Assembly for Wales in so far as they relate to the proxy purchase of tobacco etc. the prohibition of sale of nicotine products to persons under 18; amendments consequential on the prohibition of sale of nicotine products to persons under 18; and the creation of associated offences – subjects which fall under the health and health services and social welfare headings in Part 1 of Schedule 7 to the Government of Wales Act 2006.

Advantages of utilising this Bill rather than Assembly legislation

- 15 It is the view of the Welsh Government that it is appropriate to deal with these provisions in this UK Government Bill as it represents the most practicable and proportionate legislative vehicle to enable these provisions to apply in relation to Wales as soon as possible.
- 16 The proposed amendments create new offences on the face of the Bill and give the Secretary of State regulation making powers to create new offences which apply to England and Wales. There are, in the view of the Welsh Government, clear advantages to such an approach:
- (a) Legislation regulating the proxy purchase of tobacco would come into force in England and Wales at the same time. Legislation is already in place in Scotland, and is being considered in a Northern Ireland Bill currently in progress. Progressing via these means will ensure that Wales is not behind the rest of the UK in creating an offence for proxy purchase of tobacco
 - (b) Regulations prohibiting the sale of nicotine products to persons under 18 would come into force in England and Wales at the same time. This will provide consistency for enforcement officers, and manufacturers and retailers of nicotine products.
 - (c) It is considered that the public health message will be more clearly communicated by a consistent strategy relating to the

proxy purchase of tobacco; and prohibition of sale of nicotine products to persons under 18 across England and Wales.

- (d) There will be benefits from a combined England and Wales training and publicity strategy regarding the new offences.

Financial implications

- 17 There are no anticipated direct financial implications for the Welsh Government.

Mark Drakeford AM
Minister for Health and Social Services
January 2014