

## EXECUTIVE NOTE

### THE TOBACCO AND PRIMARY MEDICAL SERVICES (SCOTLAND) ACT 2010 (ANCILLARY PROVISIONS) ORDER 2010 (S.S.I. 2010/77)

1. The above Order was made in exercise of the powers conferred by section 42 of the Tobacco and Primary Medical Services (Scotland) Act 2010<sup>(1)</sup> and all other powers enabling them to do so. The Order is subject to negative procedures and comes into effect immediately on being made.

#### Background

2. The Tobacco and Primary Medical Services (Scotland) Act was given Royal Assent today, 3 March. Normally on Royal Assent certain enabling provisions in the Act are brought into force with immediate effect. That has been provided for in the Act. However, as an unintended consequence, Royal Assent also has the effect of bringing in repeal provisions contained in schedule 2 of the Act with immediate effect. This has the effect of immediately repealing the existing law in a number of areas in relation to tobacco control and primary medical services before we have commenced the relevant new law. We envisage a transitional period before the new law is fully brought into force and the immediate repeal of the provisions, therefore, creates a potential gap in the legislative framework which is of particular concern in relation to the sale of tobacco to under 18s and controls on displays currently provided for in 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.

#### The provisions of the Order

3. In order to resolve this issue and to ensure that any gap in the legislative framework is closed until the provisions of the Act are ready to be fully commenced, the Order under section 42 of the Act will put in place temporary provisions which replicate the law as it was before the repeals took effect thus enabling smooth transition from the current law to the new law. A summary of the provisions which are repealed/amended on Royal Assent are as follows:-

- Paragraph 1 of Schedule 2 to the 2010 Act repeals section 18 of the Children and Young Persons (Scotland) Act 1937 (“1937 Act”). The main provision in section 18 is the offence of selling tobacco to persons under 18. The effect of article 2 of the Order is that the 1937 Act is to take effect as if section 18 had not been repealed until the coming into force of section 4 of the 2010 Act. Section 4 of the 2010 Act makes it an offence to sell a tobacco product or cigarette papers to a person under 18.
- Paragraph 2(a) of schedule 2 repeals sections 2 and 4 of the Children and Young Persons (Protection from Tobacco) Act 1991 (“the 1991 Act”). Section 2 of the 1991 Act amends section 18 of the 1937 Act. The effect of article 2 of the Order is that the 1991 Act is to take effect as if section 2 had not been repealed until the coming into force of section 4 of the 2010 Act (sale of tobacco to under 18s). Section 4 of the 1991 Act requires the display of statements in retail premises and on vending machines warning that it is illegal to sell to under 18s. Section 4 of the 2010 Act provides in relation to sales to under 18s from retail premises and section 9 of the Act provides in relation to sales from vending

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<sup>(1)</sup> 2010, asp .

machines . Until both sections are commenced the provisions in section 4 of the 1991 Act will be required. Section 9 is to be commenced after section 4 and therefore article 2 of the Order provides that the 1991 Act is to take effect as if section 4 of that Act had not been repealed until the coming into force of section 9 of the 2010 Act.

- Paragraph 2(b) of schedule 2 amends section 6 of the 1991 Act. Section 6 provides in relation to Councils' duty to carry out an enforcement action programme in relation to tobacco offences. The amendments to section 6 mean that this provision now only deals with the Councils' duty in relation to section 3 of the 1991 Act (sale of unpackaged cigarettes). Section 26 of the 2010 Act provides in relation to the Council's duty of enforcement in relation to tobacco offences under the new regime. Article 2 of the Order has the effect that the 1991 Act is to take effect as if section 6 had not been amended until the coming into force of section 26 of the 2010 Act.
- Paragraph 2(c) of schedule 2 amends section 8 of the 1991 Act. This is consequential on the repeal of section 2 of that Act. The effect of article 2 of the Order is that the 1991 Act is to take effect as if section 8 had not been amended until Section 4 of the 2010 Act is commenced.
- Paragraph 3 of schedule 2 amends section 6 of the Tobacco Advertising and Promotion Act 2002 ("TAPA"). The effect of the amendment is to restrict the exemption which specialist tobacconists have under that Act to advertisements which are inside their premises. This is to bring the position on advertisements in line with the position on displays of tobacco products which are allowed in specialists tobacconists. Section 1 of the 2010 Act provides in relation to displays. The effect of article 2 of the Order is that TAPA is to take effect as if section 6 had not been amended until the coming into force of section 1 of the 2010 Act.
- Paragraph 4 of schedule 2 amends section 8 of TAPA so that that provision only regulates displays of tobacco products on websites. Other displays are to be regulated by section 1 of the 2010 Act and so article 2 of the Order has the effect that TAPA is to take effect as if section 8 had not been amended until section 1 of the 2010 Act is in force.
- Paragraph 5 of schedule 2 repeals section 9 of the Smoking, Health and Social Care (Scotland) Act 2005. This is the power of the Scottish Ministers to increase the age required before a person can be sold tobacco products. This power is to raise the age in section 18 of the 1937 Act. That section is being repealed and so the power is no longer required. Since this is related to the repeal of section 18 of the 1937 Act, section 4 of the 2010 Act is specified.
- Paragraph 6 of schedule 2 amends section 17D of the National Health Service (Scotland) Act 1978 ("the 1978 Act"). Section 17D currently specifies the persons with whom Health Boards can enter into agreements made under section 17C of the 1978 Act for the provision of primary medical services and personal dental services. As section 38 of the 2010 Act introduces a new section 17 CA into the 1978 Act, making new provision for who is eligible to enter into a section 17C Agreement to perform primary medical services, paragraph 6 of schedule 2 of the 2010 Act amends section 17D of the 1978 Act so that it will relate only to personal dental services.
- The effect of article 2 of the Order is that the 1978 Act is to take effect as if section 17D had not been amended until section 38 of the 2010 Act is in force.
- Paragraph 7 of schedule 2 is a consequential amendment to the Primary Medical Services (Scotland) Act 2004.

### **The coming into force of the Order**

4. To ensure that any gap in the legislative framework is closed as quickly as possible thus minimising the period of the gap it is proposed to bring the Order into force immediately. While this means breaching the 21 day period we consider this is justified in these exceptional and unintended circumstances.

### **Financial effects**

5. This Order has no direct financial implications.

### **Consultation**

6. As this Order is resolving an issue arising as an unintended result of Royal Assent, no consultation has been undertaken.

**Scottish Government Health Directorates  
March 2010**