



**Isle of Man
Government**

Reiltys Ellan Vannin



Public Health (Tobacco) (Amendment) Bill Consultation

Department of Health and Social Care
Slaynt as Kiarail y Theay

December 2014

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1. Foreword by the Minister for Health and Social Care



The Isle of Man already has legislation in place, in Part 1 of the Public Health (Tobacco) Act 2006, which controls the advertising and promotion of tobacco products with the aim of decreasing the numbers of people taking up smoking and becoming addicted to tobacco products.

This legislation has had some success but the Department of Health and Social Care ('the DHSC') now wants to further tackle the problem, as there is evidence that easy access (such as via vending machines) and shop advertising continues to influence young people to take up smoking. The DHSC was pleased to note, through a previous policy consultation on this subject, that the public agreed that additional legislation could help to address this problem.

The provisions in this draft Bill which deal with banning tobacco vending machines and addressing 'front of shop' advertising and displays have already been adopted in various countries.

The risks of exposure to second hand smoke are well established on the Island with legislation, in Part 2 of the Public Health (Tobacco) Act 2006, already banning smoking in certain premises (including pubs) and in vehicles used for work. However, there are no restrictions in other vehicles even though research has found that secondhand smoke concentrations in vehicles are often greater than in other restricted areas such as pubs. Children are particularly vulnerable to the effects of second-hand smoke and exposure increases the risk of cot death, glue ear, asthma and other respiratory diseases.

The previous public consultation demonstrated that the public agreed that further efforts to decrease the exposure of young people to secondhand smoke should be made, and, in particular, agreed that smoking in cars where children were present should be banned.

The DHSC is, therefore, pleased that the Department of Environment, Food and Agriculture ('DEFA') has supported a request for them to bring forward regulations in this area, and is happy to include provision in this draft Bill for the introduction of fixed penalty notices for use in association with these regulations and other smoking offences.

Whilst appreciating that many of you will already have commented on the policy consultation, I hope you will be able to find the time to read through this document and the draft Bill and to let us have any additional views you might have.

Thank you.

A handwritten signature in black ink, which reads "Howard Quaye". The signature is written in a cursive style with a long horizontal line underneath.

Hon. Howard Quaye MHK

Minister for Health and Social Care

2. About the Consultation

The purpose of this consultation exercise is to invite comments on the proposed provisions of the Public Health (Tobacco) (Amendment) Bill 2014. The proposed draft Bill is contained in Appendix 1 of this document.

It is not a referendum but is an exercise for gathering information, views and evidence to allow the Department to take an informed decision on the final content of the proposed draft Bill. In any consultation exercise the responses received do not guarantee changes will be made to what has been proposed.

Comments should be submitted by Monday 19th January 2014 in writing, by post to:

Public Health (Tobacco) (Amendment) Bill
2014 Consultation
Department of Health and Social Care
4th Floor,
Markwell House,
Market Street,
Douglas
IMI 2RZ

or email to: kate.usher@gov.im

Paper copies of this consultation document are available, if required, via the above contact methods or by telephoning (01624) 685005.

Electronic copies are also available [here](#).

To ensure that the process is open and honest, and in line with the Government's Code of Conduct on Consultation, responses can only be accepted if you provide your name with your response.

Unless specifically requested otherwise, any responses received may be published either in part or in their entirety. Please mark your response clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary and numbers of comments received.

When submitting your views please indicate whether you are responding on behalf of an organisation.

List of persons and organisations to be consulted

- Tynwald Members
- Attorney General
- Chief Officers of Government Departments, Statutory Boards and Offices
- Local Authorities
- Isle of Man Chamber of Commerce
- Isle of Man Trades Union Council
- Isle of Man Law Society
- Positive Action Group
- Relevant Professional Bodies
- Health Services Consultative Committee
- Council of Voluntary Organisations
- Relevant stakeholders (businesses, third sector organisations, etc.)

Steps which will be taken following consultation

Following consultation, the next steps in the process will be as follows:

- The DHSC will review comments received from consultees.
- A summary of the responses received will be published within 3 months of the closing date for this consultation, and will be made available on the Government website or by contacting the DHSC.
- The DHSC will prepare the draft Bill for introduction into the Legislative Branches.
- Once the draft Bill becomes law new regulations will be submitted to Tynwald for approval.

2. About the Consultation

Government Code of Practice on consultation

It is the intention to carry out this consultation in accordance with the Isle of Man Government Code of Practice on Consultation. The Code sets out the following six criteria:

- Consult widely throughout the process, allowing a minimum of 6 weeks for a minimum of one written consultation at least once during the development of the legislation or policy.
- Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- Ensure your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your Department's effectiveness at consultation.
- Ensure your consultation follows best practice, including carrying out an Impact Assessment if appropriate.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way the consultation has been carried out please write to:

Chief Executive's Office
Department of Health and Social Care
Crookall House
Demesne Road
Douglas
IM1 3QA

3. Background

The Isle of Man Tobacco Strategy states that everything possible should be done to prevent young people from easily accessing cigarettes, and one of the key policy drivers of the Public Health (Tobacco) Act 2006 ("the Act") was to reduce the visibility of tobacco products.

DHSC has recognised the success of the Act in reducing the use of tobacco products on the Island and, as a consequence, in reducing the burden of ill-health. However, it is apparent that more needs to be done to shield people, and particularly young people, from the influence of tobacco product promotion in order to achieve a further reduction in the numbers taking up smoking, and to provide a public health incentive to existing consumers to further reduce their consumption.

There is good evidence that tobacco advertisements and 'cool, fun and attractive' displays do influence young people to take up smoking, and studies have shown that impulse buying of tobacco products as a result of seeing a display remains high, especially amongst young people.

There is international concern that under-aged sales of tobacco products are increasingly being made from 'self-service' vending machines. These are often not directly supervised with no routine age checks prior to purchase. The DHSC has noted that the current regulation of tobacco retailers has not directly affected the sale of tobacco products from vending machines on the Island.

Additional controls have already been established in English and Scottish primary legislation to further restrict tobacco advertising (including online) and displays, and to ban tobacco vending machines. The DHSC was of the view that similar controls might be appropriate for the Isle of Man.

At about the same time as the DHSC was considering these new controls, more

evidence about the risks of exposure to second hand smoke was coming to light. In particular, it was further highlighted that children are particularly vulnerable to the effects of second-hand smoke with an increased risk of sudden infant death syndrome, glue ear, asthma and other respiratory diseases.

It was noted that, although the Act already banned smoking in certain premises (including pubs) and in vehicles used for work, there were no restrictions in other vehicles, even though research has found that second-hand smoke concentrations in vehicles are often greater than in other restricted areas such as pubs.

In October 2012 the DHSC decided to hold a comprehensive public consultation exercise on both the proposed advertising/display controls and some ideas around extending smoking bans, particularly relating to children.

The consultation received 420 responses and the DHSC was pleased to note that the additional controls and a proposal that smoking in cars should be banned when children were present were supported.

A response to the consultation was published in February 2013 and can be found at:

<http://www.gov.im/lib/docs/dhsc/Consultations/summaryofresponses.pdf>

4. Introduction

The main aim of this draft Bill is to extend the provisions of the Act by making amendments to:

- Introduce further controls on tobacco advertising;
- Ban tobacco displays, and
- Ban the sale of tobacco products from vending machines.

It should be noted that, unlike the UK, there is no intention to offer a period of grace for local businesses to comply with the updated provisions once the Act comes into force. The previous policy consultation made it clear what the DHSC proposals were and, subject to approval by Tynwald, it is not expected that there will be a change away from the current public and political support.

It is anticipated that most businesses will already be prepared for this legislation coming in as a consequence of similar UK legislation already being in place. However, the DHSC will ensure that there is provision for the implementation of the Act to be delayed, if it is requested and necessary, to allow businesses additional time.

A secondary aim of the draft Bill is to facilitate the introduction of Fixed Penalty Notices for offences relating to smoking.

As mentioned earlier the previous consultation exercise supported the introduction of legislation to ban smoking in cars when children are present. This legislation would be in the form of regulations, to be drafted by the DEFA.

In order to reduce the cost of enforcement and to increase the likelihood of enforcement action, DEFA, in conjunction with DHSC and the Department of Home Affairs ('DHA'), obtained approval from the Council of Ministers for Fixed Penalty Notices to be introduced for the new offence and some existing offences. The draft Bill, therefore,

incorporates amendments to add this provision.

5. Summary of the Content of the Bill

This summary should be read in conjunction with the attached copy of the draft Bill. Comments are welcomed on specific sections or more generally.

Introductory

Clause 1 gives the short title of the Act, as the Public Health (Tobacco) (Amendment) Act 2014.

Clause 2 provides for the Act to come into force on a day or days appointed by DHSC, and provides for an order to include consequential, incidental, transitional and saving provisions.

Clause 3 provides for the Amendment Act to expire as soon as all of its provisions have been brought into operation and confirms that such expiry cannot revive any provisions which were in place prior to the amendments.

Clause 4 introduces the amendments to the Act.

Tobacco Advertising and Control

Clause 5 changes the heading of Part 1 of the Act to read 'Tobacco Advertising and Control' and creates a Division 1 to deal specifically with tobacco advertising.

Clause 6 substitutes subsections (4) and (5) from section 1 (Prohibition of tobacco advertising) with a new subsection (4) to give effect to European Parliament (EC) Directives so that offences under this section, in relation to services provided on the internet (called information society services in this legislation), would also be an offence if done in an EEA State. EEA State is defined in clause 18 as a member of the European Community plus Norway, Iceland or Liechtenstein in line with the equivalent UK legislation.

Clause 7 inserts a new section 2A (Advertising: information society services) which introduces the offence of advertising, or procuring the advertisement of, tobacco products via the internet either on the Island, or in an EEA State from the Island.

Clause 8 amends section 3 (Advertising: exclusions) to give effect to the EC Directives in the exclusions for offences relating to advertising tobacco on the internet. Subsection (6) provides for a Schedule to the draft Bill to add a Schedule to the Act regarding the liability of internet providers (see paragraph 13 below).

Clause 9 amends section 4 (Advertising: defences) to give effect to the EC Directives in the defences for offences relating to advertising tobacco on the internet.

Displays

Clause 10 inserts new sections as follows:

A new section 4A (prohibition of tobacco displays) makes it an offence to display tobacco products, or cause them to be displayed, in the Isle of Man.

A new section 4B (tobacco displays: exclusions and defence) provides for a number of exclusions and defences relating to the new section 4A as follows:

- no offence is committed if tobacco products are displayed as part of the tobacco trade and the display is only accessible to persons who are engaged or employed as part of that trade;
- no offence is committed if the display is a requested display to someone aged 18 or over.

'Requested display' is defined as a display to an individual following a particular request to purchase, or for information about, a tobacco product.

It is also a defence where a person is charged with an offence of displaying a tobacco product to someone under 18 if they believed the person was aged 18 or over and had either taken reasonable steps to establish the person's age (including, where appropriate, by requesting evidence) or, nobody could reasonably have suspected that they were under 18 from their appearance.

It is also a defence where a person has exercised all due diligence to avoid committing an offence of displaying a tobacco product.

Section 4B also provides that DHSC may make regulations to provide that no offence is committed if a display complies with specified requirements.

A new section 4C (displays: prices of tobacco products) gives the DHSC the power by regulations to impose requirements in relation to the display of prices of tobacco products and makes a breach of those requirements an offence.

A new section 4D (Displays on a website) allows the DHSC to make regulations to impose requirements relating to displays on websites, and makes it an offence to breach those requirements, including in an EEA State, unless the service provider is established outside of the Island.

Clause 11 repeals the existing section 5 (Displays) which the above new sections replace.

Free Distributions/Brandsharing

Clauses 12 and 13 amend sections 6 (prohibition of free distributions) and 8 (brandsharing) respectively to give effect to the EC Directives regarding internet providers.

Sale from Vending (Automatic) Machines

Clause 14 firstly creates Division 2 and inserts a new section 8A (prohibition of the sale of tobacco from automatic machines). This provision makes the person who controls or manages a place where an automatic machine for the sale of tobacco is situated guilty of the offence of selling tobacco from such a machine. It does not matter whether the machine also sells other products.

Clause 14 also creates Division 3 which deals with enforcement under Part 1 of the Act.

Enforcement

Clause 15 makes a minor amendment to subsection 10(1) to amend the wording 'the officer's written authority' to read 'evidence of the officer's authority'.

General matters under Part 1

Clause 16 creates a new Division 4 dealing with general matters.

Clause 17 amends section 12 (Defences: burden of proof) to amend references to section numbers in other sections of Part 1, as a consequence of the changes mentioned earlier.

Clause 18 firstly amends section 13 (Part 1: interpretation) by inserting a number of new definitions relating to the new provisions around internet services and the EC Directives.

Clause 18 also omits the definition of 'authorised officer' in Part 1 and replaces it with a definition of 'enforcement officer' to avoid confusion with references to an 'authorised person' in Part 2. Subsection (4) then makes consequential changes to sections 10 and 11.

Subsection (3) of Clause 18 adds some further definition around internet service provider establishments.

Powers of entry under Part 2 (Smoking: Prohibition and Control)

Clause 19 inserts an additional provision into section 18 (Powers to enter and require identification) to state that an authorised person exercising a power must produce evidence of their authorisation. This brings part 2 of the Act into line with Part 1 in this respect.

Fixed Penalty Notices

Clause 20 inserts new sections 20A and 20B into the Act.

Section 20A (fixed penalties for offences under Part 2) firstly empowers an authorised person to issue fixed penalty notices in respect of offences under Part 2. It also sets out, in subsections (2) to (4) and (6) and (7), that a fixed penalty notice must give details of the offence, state the penalty (£50) and the consequences of non-payment, and detail the payment periods and methods.

Subsection (5) allows DEFA to vary the fixed notice penalty by order after consulting DHSC and the DHA.

Subsections (8) to (10) confirm that no proceedings for an offence may be commenced before the payment period has ended or if a payment has been made, and states the evidence which is required to confirm that payment has been made.

Finally section 20A provides that DEFA may make regulations, after consulting DHSC and DHA, to make additional provisions regarding fixed penalty notices.

Section 20B deals with the circumstances under which a fixed penalty notice may or must be withdrawn.

Penalties

Clause 21 repeals section 21 (Penalties) of the Act and amends and relocates the

provisions as follows:

- Firstly the provision from subsection 21 (1), which relates to the obstruction of enforcement officers, is relocated to section 11 (Obstruction, etc. of officers) of the Act as a new subsection 11(4).
- Secondly, the provision from subsection 21 (2), which relates to all other penalties under Part 1 of the Act, is relocated as a new section 12A (Penalties for offences under Part 1) and the wording is tidied up accordingly.
- Thirdly, the provision from subsection 21(3), which relates to penalties under Part 2 of the Act is relocated as a new section 20C (Penalties for offences under Part 2) and the wording is also tidied up accordingly.

Clause 22 amends section 22 (Offences by bodies corporate, etc) by inserting a new subsection (2A) which provides that payment of a fixed penalty by an officer of a body corporate does not preclude prosecution of the body corporate (and vice versa).

Regulations and Orders

Clause 23 inserts a new section 22A (Order making power to amend Act) which enables DHSC to amend the Act by order in consequence of developments in technology relating to publishing or distributing by electronic means; or for the purpose of making the Act correspond with legislation operating in the UK.

Clause 24 replaces section 23 (public documents) to introduce a requirement for regulations under Part 2 and Orders under section 20A or 22A to be subject to Tynwald approval. All other regulations/Orders under the Act continue as before to be laid before Tynwald.

Interpretation

Clause 25 replaces section 25 (interpretation). The new section 25 firstly adds a new definition of "authorised person" and inserts the new term into section 18 to replace the wording "environmental health officer" to give DEFA more flexibility as to who can give authorisations.

Clause 25 also tidies up references to the names of the Departments, "DEFA" and "DHSC", and makes the consequential changes in the various sections of the Act.

Clause 25 also replaces section 26 (Short title) in order to omit subsection (2), as this subsection it relates to the appointed day order for the original Act and is no longer required.

Schedule (Internet Services)

The new schedule regarding the liabilities of internet services (inserted via clause 8, see above) includes exceptions for mere conduits, for caching and for hosting.

6. Appendix 1 - Draft Public Health (Tobacco) (Amendment) Bill 2014

A copy of the draft Public Health (Tobacco) (Amendment) Bill can be found overleaf.

**PUBLIC HEALTH (TOBACCO) (AMENDMENT) BILL
2014**

Explanatory Memorandum

1. This Bill is promoted by the Department of Health and Social Care.
2. The Bill amends the Public Health (Tobacco) Act 2006 (the “2006 Act”).
3. *Clause 1* gives the resulting Act its short title and *clause 2* provides for its commencement to be by a day or days appointed by the Department of Health and Social Care. An appointed day order may include consequential, incidental, transitional and saving provisions.
4. *Clause 3(1)* provides for the resulting Act to expire on the day after its promulgation or on the day after the last provision is brought into operation. When the resulting Act expires, the amendments will already have been inserted into the 2006 Act. *Clause 3(2)* consists of a “non-revival” provision to avoid arguments about revival of the previous law after the resulting Act has expired.
5. *Clause 4* introduces the amendments to the 2006 Act.
6. *Clause 5* substitutes the heading to Part 1 and creates Division 1 (tobacco advertising) of that Part.
7. *Clauses 6 to 9* (and the *Schedule*) mirror the effect of Directive 2003/33/EC of the European Parliament and Council of 26th May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. These provisions achieve this aim by amending the 2006 Act to include provision about information society services. In doing so, these amendments also give effect to Directive 2000/31/EC (“the e-commerce Directive”).
8. *Clause 10* inserts new sections 4A to 4D (prohibition of tobacco displays etc.), the effect of which is as follows.
9. New section 4A (prohibition of tobacco displays) makes it an offence for a person, in the course of a business, to display tobacco products, or cause tobacco products to be displayed, in a place in the Island.
10. New section 4B (tobacco displays: exclusions and defence) provides for a number of exclusions from the new section 4A prohibition on tobacco displays.
11. New section 4C (displays: prices of tobacco products) gives the Department of Health and Social Care power by regulations to impose requirements in relation to the display of prices of tobacco products and makes such display an offence.
12. New section 4D (displays on a website) makes it an offence —

- a. to display, or cause to be displayed, tobacco products or their prices on a website in breach of any requirements imposed by regulations, except where this is in the course of providing information society services by a service provider established outside the Island;
 - b. for a service provider established in the Island to do something in an EEA State which, if done in the Island, would constitute an offence under subsection (2).
13. *Clause 11* repeals section 5 (displays).
14. *Clauses 12 and 13* amend section 6 (prohibition of free distribution) and section 8 (brandsharing) to give effect to the e-commerce Directive.
15. *Clause 14* creates Division 2 (sale from automatic machines) and Division 3 (enforcement) of Part 1. The provision also inserts a new section 8A (in Division 2) which prohibits the sale of tobacco from an automatic machine.
16. *Clause 15* makes a minor amendment to improve the wording in section 10(1).
17. *Clause 16* creates Division 4 (general) of Part 1.
18. *Clause 17* makes consequential amendments to section 12.
19. *Clause 18* amends the list of definitions in section 13 and makes provision about information society services.
20. *Clause 19* amends section 18 by requiring an authorised person exercising powers under that section to produce evidence of his or her authority on demand.
21. *Clause 20* inserts new sections 20A and 20B (fixed penalties for offences under Part 2). New section 20A empowers an authorised person to issue fixed penalty notices in respect of offences under Part 2 and new section 20B deals with their withdrawal.
22. *Clause 21* repeals section 21 (penalties) and relocates the penalties accordingly.
23. *Clause 22* amends section 22 by inserting a new subsection (2A) which provides that payment of a fixed penalty issued under new section 20A by an officer does not preclude prosecution of the body corporate (and *vice versa*).
24. *Clause 23* inserts a new section 22A which enables the Department of Health and Social Care to amend the 2006 Act by order —
 - a. in consequence of developments in technology relating to publishing or distributing by electronic means; or
 - b. for the purpose of making the 2006 Act correspond with legislation operating in the United Kingdom.
25. *Clause 24* substitutes section 23 (public documents). The effect of the substitution is to require regulations under Part 2 and orders under new sections 20A(5) and 22A to be subject to Tynwald approval.

26. *Clause 25* substitutes section 25 (interpretation). The purpose of the substitution is to insert a new definition of “authorised person”, to tidy up the definition of “DEFA” and to define “DHSC” (as opposed to “the Department”). The clause also substitutes section 26. The effect of the substitution is to omit subsection (2) since it refers to “the Department” (which is no longer defined) and it is a spent provision.
27. [The Bill is expected to be cost-neutral and revenue-neutral.
28. In the opinion of the member moving the Bill its provisions are compatible with the Convention rights within the meaning of the Human Rights Act 2001.]



PUBLIC HEALTH (TOBACCO) (AMENDMENT) BILL 2014

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PUBLIC HEALTH (TOBACCO) (AMENDMENT) BILL 2014

A **BILL** to amend the Public Health (Tobacco) Act 2006.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows:—

1 Short title

The short title of this Act is the Public Health (Tobacco) (Amendment) Act 2014.

2 Commencement

- (1) This Act (other than this section and section 1) comes into operation on such day or days as the Department of Health and Social Care by order appoints and different days may be appointed for different provisions and for different purposes.
- (2) An order under subsection (1) may make such consequential, incidental, transitional and saving provisions as the Department of Health and Social Care considers necessary or expedient.

3 Expiry

- (1) This Act expires —
 - (a) on the day after its promulgation if all of its provisions are in operation on its promulgation; or
 - (b) otherwise, on the day after the last provision is brought into operation.
- (2) The expiry does not —
 - (a) revive the *Public Health (Tobacco) Act 2006* as it operated before the amendments made by this Act commenced;
 - (b) revive anything not in operation or existing when those amendments commenced; or
 - (c) affect the continuing operation of the amendments.

4 **Amendment of the Public Health (Tobacco) Act 2006**

The *Public Health (Tobacco) Act 2006* is amended in accordance with sections 5 to 25.

5 **Part 1 heading substituted – control of tobacco advertising**

For the Part heading before section 1 substitute –

PART 1 – TOBACCO ADVERTISING AND CONTROL

DIVISION 1 – TOBACCO ADVERTISING

6 **Section 1 amended – prohibition of tobacco advertising**

SI 2006/2369 reg2(2)

In section 1, for subsections (4) and (5) substitute –

- (4) A service provider established in the Island who, in the course of providing information society services, does anything in an EEA State which, if done in the Island, would constitute an offence under subsection (1) or (2) is guilty of an offence.

7 **New section 2A – advertising: information society services**

SI 2006/2369 reg3

After section 2 insert –

2A Advertising: information society services

P2002/36/3A

- (1) This subsection applies where by means of an information society service, provided in the course of a business, a tobacco advertisement is published –

- (a) in the Island, or
- (b) in an EEA State, by a service provider established in the Island.

- (2) Where subsection (1) applies –

- (a) any proprietor of the information society service or any editor of the information contained in the information society service is guilty of an offence, and
- (b) any person who (directly or indirectly) procured the inclusion of the tobacco advertisement in the information contained in the information society service is guilty of an offence.

8 Section 3 amended and Schedule inserted – advertising and information society services

SI 2006/2369 reg4(2)-(7)

- (1) Section 3 is amended in accordance with subsections (2) to (5).
- (2) In subsection (1) –
 - (a) for “section 1 or 2” substitute **“section 1, 2 or 2A”**;
 - (b) at the end of paragraph (b) omit “or”; and
 - (c) for paragraph (c) substitute –
 - “(c) if it is contained in a publication (other than an in-flight magazine) –**
 - (i) which is printed outside the relevant territory, and
 - (ii) whose principal market is not one or more of the relevant territories (or any part of a relevant territory), or
 - (d) if it is published by means of an information society service by a person who does not carry on business in the relevant territory and it is not intended to be accessed principally by persons in one or more relevant territories (or any part of a relevant territory).”**
- (3) After subsection (1) insert –
 - “(1A) Subsection (1)(b) applies to a communication made by means of an information society service only if the request was made –**
 - (a) by means of an information society service which does not advertise any tobacco product to persons –
 - (i) who have not made such a request, or
 - (ii) who have not initiated a process by which a tobacco product may be purchased by means of that service, or
 - (b) without using an information society service.
 - “(1B) The supply of information to an individual is not a tobacco advertisement if –**
 - (a) an information society service provides a means by which tobacco products may be purchased which includes the provision of information about a tobacco product, and
 - (b) the information becomes available only after the individual has initiated the process of making the purchase.”
- (4) In subsection (3)(a) omit “or on a website”.
- (5) At the end insert –

(5) The Schedule has effect in relation to the liability of information society service providers. **(2)**.

(6) Accordingly, insert the Schedule set out in the Schedule to this Act.

9 Section 4 amended – advertising: defences

SI 2006/2369 reg5(2)-(6)

(1) Section 4 is amended as follows.

(2) In subsection (1) for “section 1 or section 2(a) or (b)” substitute **(3)** section 1, section 2(a) or (b) or section 2A(2) **(2)**.

(3) For subsection (3) substitute –

(3) A person does not commit an offence under the following provisions if that person did not know, and had no reason to suspect, that the tobacco advertisement would be published in the Island –

- (a) section 1(2),
- (b) section 2(a) or (b), or
- (c) section 2A(2) (by virtue of section 2A(1)(a)). **(2)**.

(4) After subsection (3) insert –

(3A) A person does not commit an offence under the following provisions if that person did not know, and had no reason to suspect, that the tobacco advertisement would be published in an EEA State –

- (a) section 1(4), or
- (b) section 2A(2) (by virtue of section 2A(1)(b)). **(2)**.

(5) In subsection (5) –

(a) at the end of paragraph (b) omit “or”;

(b) for paragraph (c) substitute –

(c) in relation to transmission by means of information society services, that person did not carry on business in the relevant territory at the relevant time, or

(d) in relation to transmission by any other means of electronic transmission, that person did not carry on business in the Island at the relevant time. **(2)**.

(6) After subsection (5) insert –

(5A) A person does not commit an offence under section 1(4) of distributing or causing the distribution of a tobacco advertisement if –

- (a) that person was unaware that what he or she distributed or caused to be distributed was, or contained, a tobacco advertisement, or
- (b) having become aware of it, it was not reasonably practicable for that person to prevent its further distribution. **22**.

10 New sections 4A to 4D – prohibition of tobacco displays etc.

P2009/21/21

After section 4 insert –

4A Prohibition of tobacco displays

P2002/36/7A

- (1) A person who in the course of a business displays tobacco products, or causes tobacco products to be displayed, in a place in the Island is guilty of an offence.
- (2) DHSC may by regulations –
 - (a) provide for the meaning of “place” in this section, and
 - (b) make provision for a display in a place which also amounts to an advertisement to be treated for the purposes of offences under this Act as an advertisement and not as a display and *vice versa*.

4B Tobacco displays: exclusions and defence

P2002/36/7B

- (1) No offence is committed under section 4A if –
 - (a) the tobacco products are displayed in the course of a business which is part of the tobacco trade,
 - (b) they are displayed for the purposes of that trade, and
 - (c) the display is accessible only to persons who are engaged in, or employed by, a business which is also part of that trade.
- (2) No offence is committed under section 4A if the display is a requested display to an individual aged 18 or over.
- (3) DHSC may provide in regulations that no offence is committed under section 4A if the display complies with requirements specified in the regulations.
- (4) Subsections (5) and (7) apply where a person (“D”) is charged with an offence under section 4A in a case where the display is a requested display to an individual aged under 18.

- (5) Where D is charged by reason of D having displayed the tobacco product it is a defence that —
- (a) D believed that the individual was aged 18 or over, and
 - (b) either —
 - (i) D had taken all reasonable steps to establish the individual's age, or
 - (ii) from the individual's appearance nobody could reasonably have suspected that the individual was aged under 18.
- (6) For the purposes of subsection (5), a person is treated as having taken all reasonable steps to establish an individual's age if —
- (a) the person asked the individual for evidence of the individual's age, and
 - (b) the evidence would have convinced a reasonable person.
- (7) Where D is charged by reason of D having caused the display of the tobacco product it is a defence that D exercised all due diligence to avoid committing the offence.
- (8) In this section “a requested display” means a display to an individual following a particular request by the individual to purchase a tobacco product, or for information about a tobacco product.

4C Displays: prices of tobacco products

P2002/36/7C

- (1) DHSC may by regulations make provision imposing requirements in relation to the display in a place in the Island in the course of a business of prices of tobacco products.
- (2) A person who displays or causes to be displayed prices of tobacco products in breach of a requirement contained in the regulations is guilty of an offence.
- (3) The regulations may, in particular, provide for the meaning of “place” in this section.
- (4) The regulations may make provision for a display of prices in a place which also amounts to an advertisement to be treated for the purposes of offences under this Act as an advertisement and not as a display of prices and *vice versa*.

4D Displays on a website

P2002/36/7D

- (1) DHSC may by regulations make provision imposing requirements in relation to the display in the Island in the course of a business

of tobacco products or their prices on a website where tobacco products are offered for sale.

- (2) A person who displays or causes to be displayed tobacco products or their prices in breach of a requirement contained in the regulations is guilty of an offence.
- (3) A service provider established in the Island is guilty of an offence if, in the course of providing information society services, the provider does anything in an EEA State which, if done in the Island, would constitute an offence under subsection (2).
- (4) Nothing in subsection (2) makes it an offence for a service provider established outside the Island to do anything in the course of providing information society services.
- (5) The regulations may make provision for a relevant display of tobacco products or their prices which also amounts to an advertisement to be treated for the purposes of offences under this Act as an advertisement and not as a display and *vice versa*.
- (6) In subsection (5) a “relevant display” means a display on a website where tobacco products are offered for sale. **22**.

11 Section 5 repealed – displays

Section 5 is repealed.

12 Section 6 amended – prohibition of free distributions

P2009/21/Sch4 para5(2)&(3)

- (1) Section 6 is amended as follows.
- (2) After subsection (1) insert –
 - 66**(1A) A service provider established in the Island is guilty of an offence if, in the course of providing information society services, the provider does anything in an EEA State which, if done in the Island, would constitute an offence under subsection (1). **22**.
- (3) After subsection (5) insert –
 - 66**(5A) Nothing in subsection (1) makes it an offence for a service provider established outside the Island to do anything in the course of providing information society services. **22**.

13 Section 8 amended – brandsharing

P2009/21/Sch4 para6

- (1) Section 8 is amended as follows.
- (2) In subsection (3) for “section 1, 2, 5, 6 or 7” substitute **66**section 1, 2, 2A, 4A, 4C, 4D, 6 or 7 **22**.

(3) After subsection (4) insert –

- ❏ (5) A service provider established in the Island is guilty of an offence if, in the course of providing information society services, the provider does anything in an EEA State which, if done in the Island, would constitute an offence under subsection (4).
- (6) Nothing in subsection (4) makes it an offence for a service provider established outside the Island to do anything in the course of providing information society services. ❏.

14 New section 8A inserted – prohibition of the sale of tobacco from automatic machines

After section 8 insert –

❏ DIVISION 2 – SALE FROM AUTOMATIC MACHINES

8A Prohibition of the sale of tobacco from automatic machines

- (1) The sale of tobacco from an automatic machine is prohibited.
- (2) The person who controls, or is concerned with the management of, the premises where the automatic machine for the sale of tobacco is located is guilty of an offence.
- (3) It does not matter whether the automatic machine also sells other products.
- (4) In this section “premises” includes any place and any vehicle, vessel, hovercraft, stall or moveable structure.

DIVISION 3 – ENFORCEMENT ❏.

15 Section 10 amended – powers of entry, etc

In section 10(1) for “the officer’s written authority” substitute ❏ evidence of the officer’s authority ❏.

16 New Division created – general

After section 10 insert –

❏ DIVISION 4 – GENERAL ❏.

17 Section 12 amended – defences: burden of proof

P2009/21/Sch4 para10

In section 12(1) for “sections 4(1) to (6), 6(5), 7(3) and (4) and 11(3)” substitute ❏ sections 4(1) to (6), 4B(5) and (7), 6(5), 7(3) and (4) and 11(3) ❏.

18 Section 13 amended and consequential amendments – Part 1: interpretation

SI 2006/2369 reg8

- (1) Section 13 is amended in accordance with subsections (2) and (3).
- (2) In subsection (1) –
 - (a) omit the definition of “authorised officer”; and
 - (b) insert the following definitions in the appropriate place in the alphabetical list –

“**the e-commerce Directive**” means Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)¹;

“**EEA State**” means a member State, Norway, Iceland or Liechtenstein;

“**enforcement officer**” means a duly authorised officer of the OFT;

“**information society services**” –

- (a) has the meaning set out in Article 2(a) of the e-commerce Directive², and
- (b) is summarised in recital 17 of that Directive as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”;

“**member State**” has the same meaning as it has in the *European Communities (Isle of Man) Act 1973*;

“**relevant territory**” means the Island and the EEA States;

“**service provider**” means a person providing an information society service;²².

- (3) After subsection (1) insert –

“(1A) For the purposes of this Part –

- (a) an establishment, in connection with an information society service, is the place at which the service provider effectively pursues an economic activity for an indefinite period,

¹ OJ L 178, 17.7.2000, p. 1-16

² Article 2(a) refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22nd June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998, p. 37-48) (as amended by Directive 98/48/EC of 20th July 1998 (OJ L 217, 5.8.1998, p. 18-26))

- (b) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, of itself, constitute that place as an establishment of the kind mentioned in paragraph (a),
 - (c) where it cannot be determined from which of a number of establishments a given information society service is provided, that service is to be regarded as provided from the establishment where the service provider has the centre of his or her activities relating to the service,
- and references to a person being established in any place must be construed accordingly. **22**.

- (4) Consequent on subsection (2)(a), in sections 10 and 11 for “authorised officer” (wherever occurring) substitute **23** enforcement officer **22**.

19 Section 18 amended – powers to enter and require identification

In section 18, after subsection (1) insert –

- 24**(1A) An authorised person exercising a power under this section must produce evidence of his or her authority on demand. **22**.

20 New sections 20A and 20B – fixed penalties for offences under Part 2

After section 20 (and before the heading to Part 3) insert –

25 20A Fixed penalties for offences under Part 2

2013/11/15

- (1) If an authorised person has reason to believe that a person has committed an offence under this Part, the authorised person may give that person a notice (a “fixed penalty notice”) offering him or her the opportunity of discharging any liability to conviction for that offence by payment of a fixed penalty.
- (2) A fixed penalty notice must –
 - (a) identify the offence to which it relates, and
 - (b) give reasonable particulars of the circumstances alleged to constitute the offence.
- (3) A fixed penalty notice must also state –
 - (a) the amount of the fixed penalty,
 - (b) the period within which it may be paid,
 - (c) the person to whom and address at which payment may be made,
 - (d) the method or methods by which payment may be made,

- (e) the consequences of not making payment before the end of the period for payment of the fixed penalty.
- (4) The amount of the fixed penalty is £50.
- (5) After consulting DHSC and the Department of Home Affairs, the amount of the fixed penalty may be varied by an order made by DEFA.
- (6) The period for payment of the fixed penalty is 28 days beginning with the day on which the notice was given.
- (7) DEFA may extend the period for payment of the fixed penalty in any particular case if it considers it appropriate to do so, by giving notice to the recipient of the fixed penalty notice.
- (8) If a fixed penalty notice has been given, no proceedings for the offence for which it has been given may be commenced before the end of the period for payment of the fixed penalty.
- (9) No such proceedings may be commenced or continued if payment of the penalty is made before the end of the period for payment or is accepted by DEFA after the end of that period.
- (10) In proceedings for an offence under this Part, a certificate which —
- (a) purports to be signed by or on behalf of a person having responsibility for the financial affairs of DEFA, and
 - (b) states that payment of the amount specified in the fixed penalty notice was or was not received by the expiry of the period within which that fixed penalty may be paid,
- is sufficient evidence of the facts stated.
- (11) Any sum received by DEFA under this section forms part of the General Revenue.
- (12) After consulting DHSC and the Department of Home Affairs, DEFA may by regulations —
- (a) provide that fixed penalty notices may not be given in such circumstances as may be prescribed,
 - (b) provide for the form of a fixed penalty notice,
 - (c) provide for the method or methods by which fixed penalties may be paid,
 - (d) modify subsection (6) so as to substitute a different period for that specified there,
 - (e) provide for the keeping of accounts, and the preparation and publication of statements of account relating to fixed penalties under this section.

20B Withdrawal of fixed penalty notice

2013/11/16

- (1) DEFA must consider any representations made by or on behalf of the recipient of a fixed penalty notice and decide in all the circumstances whether to withdraw the notice.
- (2) If a fixed penalty notice is withdrawn in accordance with subsection (1) –
 - (a) DEFA must give notice of the withdrawal to the person to whom the fixed penalty notice was given (“the recipient”),
 - (b) DEFA must repay any amount which has been paid under the fixed penalty notice, and
 - (c) no proceedings are to be commenced or continued against the recipient for the offence in question. ²²

21 Section 21 repealed and consequential amendments – penalties

- (1) Section 21 is repealed and the penalties in that section are relocated in accordance with the following provisions of this section.
- (2) After section 11(3) insert –
 - ²³(4) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding £1,000. ²²
- (3) After section 12 insert –

²³12A Penalties for offences under Part 1

A person guilty of an offence under or by virtue of any provision of this Part, other than section 11(1), is liable –

- (a) on conviction on information, to custody for not more than 2 years, a fine, or both, or
- (b) on summary conviction, to custody for not more than 6 months, a fine not exceeding £5,000, or both. ²²

- (4) After new section 20B³ (and before the heading to Part 3) insert –

²³20C Penalties for offences under Part 2

A person guilty of an offence under this Part is liable on summary conviction to a fine not exceeding £5,000. ²²

22 Section 22 amended – offences by bodies corporate, etc

After section 22(2) insert –

³ Section 20B is inserted by section 20 of this Act

(2A) If this section applies section 20A (fixed penalties for offences under Part 2) applies to the officer as well as the body corporate.

Payment of a fixed penalty by an officer under this subsection does not preclude prosecution of the body corporate (and vice versa).

23 New section 22A – order making power to amend Act

After section 22 insert –

22A Power to amend Act

P2002/36/7

DHSC may by order amend any provision of this Act if it considers it appropriate to do so –

- (a) in consequence of any developments in technology relating to publishing or distributing by electronic means, or
- (b) for the purpose of making this Act correspond (subject to such modifications, exceptions or adaptations as it considers appropriate) with corresponding legislation from time to time operating in the United Kingdom.

24 Section 23 substituted – public documents

For section 23 substitute –

23 Public documents

- (1) Regulations under Part 1 must be laid before Tynwald as soon as practicable after they are made, and if Tynwald at the sitting at which the regulations are laid or at the next following sitting resolves that they are to be annulled, they cease to have effect.
- (2) Regulations under Part 2 or an order under section 20A(5) or 22A must not come into operation unless approved by Tynwald.
- (3) Subsection (2) does not affect any public documents made under Part 2 before section 24 of the *Public Health (Tobacco) (Amendment) Act 2014* comes into operation.

25 Section 25 substituted and consequential amendments – interpretation

(1) For section 25 substitute –

25 Interpretation

In this Act –

“authorised person” means a person authorised by DEFA for –

- (a) the purposes of this Act,
- (b) any provision of this Act, or
- (c) any provision having effect under this Act;

“DEFA” means the Department of Environment, Food and Agriculture;

“DHSC” means the Department of Health and Social Care; and

“the OFT” means the Isle of Man Office of Fair Trading. **22**.

- (2) In section 3(3) for “The Department of Health and Social Care (“the Department”)” substitute **“DHSC”**.
- (3) In section 5(1) for “the Department” substitute **“DHSC”**.
- (4) In section 6 —
 - (a) in subsection (7) for “The Department” substitute **“DHSC”**; and
 - (b) in subsection (9) for “the Department” substitute **“DHSC”**.
- (5) In section 8 —
 - (a) in subsection (1) for “The Department” substitute **“DHSC”**; and
 - (b) in subsection (3) for “the Department” substitute **“DHSC”**.
- (6) In section 9 —
 - (a) in subsection (2) for “the Department” substitute **“DHSC”**; and
 - (b) in subsections (2) and (3) for “The Department” substitute **“DHSC”**.
- (7) In section 10(8) and (9) for “the Department” (wherever occurring) substitute **“DHSC”**.
- (8) In section 15(3) for “The Department of Environment, Food and Agriculture (“the DEFA”)” substitute **“DEFA”**.
- (9) In section 17 —
 - (a) for “the DEFA’s” (wherever occurring) substitute **“DEFA’s”**; and
 - (b) in subsection (2) for “the DEFA” substitute **“DEFA”**.
- (10) In section 18 —
 - (a) in subsection (1) for “environmental health officer of the DEFA” substitute **“authorised person”**; and
 - (b) in subsection (3)(a) for “environmental health officer” substitute **“authorised person”**.
- (11) In section 20 —
 - (a) in subsection (2) for “the DEFA” substitute **“DEFA”**; and
 - (b) in subsection (8) for “The DEFA” substitute **“DEFA”**.
- (12) In section 24 for “the Department, the DEFA” substitute **“DHSC, DEFA”**.

(13) For section 26 substitute —

26 Short title

The short title of this Act is the Public Health (Tobacco) Act 2006.

SCHEDULE

NEW SCHEDULE – INFORMATION SOCIETY SERVICE PROVIDERS

SCHEDULE

[Section 3(5)]

INFORMATION SOCIETY SERVICE PROVIDERS

P2002/36/Sch

1 Interpretation

In this Schedule —

“**recipient of the service**” means any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible, and

“**relevant offence**” is an offence under section 1, 2A, 4D, 6 or 8.

2 Exceptions for mere conduits

(1) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in —

- (a) the provision of access to a communication network, or
 - (b) the transmission in a communication network of information provided by a recipient of the service,
- if the transmission condition is satisfied.

(2) The transmission condition is that the service provider does not —

- (a) initiate the transmission,
- (b) select the recipient of the transmission, or
- (c) select or modify the information contained in the transmission.

(3) Sub-paragraph (1)(b) does not apply if the information is information to which paragraph 3 applies.


(4) For the purposes of this paragraph, the provision of access to a communication network and the transmission of information in the network includes automatic, intermediate and transient storage of information for the purpose of carrying out the transmission in the network.

(5) Sub-paragraph (4) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

3 Exception for caching

- (1) This paragraph applies to information which —
- (a) is provided by a recipient of an information society service, and
 - (b) is the subject of automatic, intermediate and temporary storage which is solely for the purpose of making the onward transmission of the information to other recipients of the service at their request more efficient.
- (2) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in the transmission in a communication network of information to which this paragraph applies if —
- (a) the service provider does not modify the information,
 - (b) the service provider complies with any conditions attached to having access to the information,
 - (c) in a case to which sub-paragraph (3) applies, the service provider expeditiously removes the information or disables access to it.
- (3) This sub-paragraph applies if the service provider obtains actual knowledge that —
- (a) the information at the initial source of the transmission has been removed from the network, or
 - (b) access to it has been disabled.

4 Exception for hosting

- (1) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in the storage of information provided by a recipient of the service if —
- (a) the service provider did not know when the information was provided that it contained offending material, or
 - (b) upon obtaining actual knowledge that the information contained offending material, the service provider expeditiously removed the information or disabled access to it.
- (2) Offending material is material the storage of which would constitute a relevant offence. 

The information in this booklet can be provided in large print or audio format upon request.

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