



Department
of Health

Equality Analysis

Age of Sale for Nicotine Inhaling Products
(electronic cigarettes)

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Introduction

This Equality Analysis examines the potential impact of proposed regulations to introduce a minimum age of sale of 18 for electronic cigarettes, refill cartridges and nicotine-containing refill liquids. It accompanies the *Consultation on the age of sale for nicotine products* and aims to inform responses to the consultation and post-consultation decision-making. The regulations, this equality analysis and the public consultation apply to England and Wales.

This Equality Analysis considers the likely impact of this policy on all the relevant equality characteristics under the public sector equality duty set out in the Equality Act 2010. This document also considers issues relevant to the Secretary of State's duty to have regard to the need to reduce inequalities between the people of England with respect to the benefits that they can obtain from the health service under section 1C NHS Act 2006 (as inserted by s.4 Health and Social Care Act 2012).

The public sector equality duty relates to the following protected characteristics:

- age
- disability
- race (including ethnic origin, nationality and colour)
- religion or belief
- sex and sexual orientation
- gender reassignment
- pregnancy and maternity

The general Equality Duty contained in the Equality Act 2010 has three aims. It requires public bodies to have *due regard* to the need to:

- **Eliminate unlawful discrimination**, harassment, victimisation and any other conducts prohibited by the Act.
- **Advance equality of opportunity** between people who share a protected characteristic and people who do not share it; and
- **Foster good relations** between people who share a protected characteristic and people who do not share it.

During the passage of the Children and Families Bill, the Government introduced a number of new measures intended to protect children and young people from the risk of nicotine addiction and the health harms caused by tobacco use and exposure to secondhand smoke. The Children and Families Act received Royal Assent in March 2014 and Section 92 of the Act provides the Secretary of State for Health with powers to make regulations prohibiting the sale of nicotine products to people aged under 18 years. The Department of Health is now consulting on the draft regulations and this document forms part of that public consultation.

Policy Intention & Background

During the last decade the global market for electronic cigarettes (known as e-cigarettes) has developed rapidly. E-cigarettes have become increasingly popular, with many new and novel products continuing to emerge onto the market. A wide range of different types and brands of e-cigarettes are now available and they can be purchased in a variety of settings. They are sometimes designed to look and feel like conventional cigarettes. Other products, often called vaporisers, have a tank or reservoir which the user fills with liquid nicotine of their choice. E-cigarette products are generally marketed as cheaper and healthier alternatives to cigarettes and for use in places where smoking is not permitted since they produce vapour and not smoke. An estimated 2.1 million adults in Great Britain currently use electronic cigarettes – up from an estimated 700,000 users in 2012¹.

E-cigarettes are a means of delivering nicotine to the user. They are regarded by many in the public health community as a safer alternative to cigarettes for smokers who are unable or unwilling to stop using nicotine, although a range of concerns have also been expressed. It has long been established that nicotine is highly addictive; in 1988 the Surgeon General of the United States concluded that nicotine ‘is as addictive as heroin or cocaine’.

While use of e-cigarettes by people under age of 18 is presently limited, there is evidence to suggest that it is plausible that usage of these products by young people will increase. Awareness of e-cigarettes is now high amongst children and young people in the UK – a recent study in Wales found that over two-thirds of Welsh children have heard of e-cigarettes². In a study conducted among young people in Cheshire and Merseyside, there were no children that had not heard of e-cigarettes or did not know what they were³.

The marketing and promotion of e-cigarettes is likely to be a key reason why awareness of these products is increasing amongst young people. E-cigarettes are now widely available and are often prominently displayed in a variety of different shops ranging from local newsagents and convenience stores to large supermarkets and pharmacies. The market is now highly competitive and e-cigarette companies are investing heavily in marketing and promotion. Advertisements for e-cigarettes have now appeared on television and most products are marketed aggressively through social media such as Twitter and on You Tube. This is a cause of concern for some, including the Faculty of Public Health.

¹ Action on Smoking and Health (2014). ASH briefing: Use of electronic cigarettes in England. Available at: http://www.ash.org.uk/files/documents/ASH_891.pdf

² Welsh Government Social Research. (2014). Exposure to secondhand smoking in cars and e-cigarettes use among 10-11 year old children in Wales: CHETS Wales 2 key findings report.

³ Hardcastle, K and Bennet A. (2014). “*Most people I know have got one*”. Young people’s perceptions and experiences of electronic cigarettes. Centre for Public Health at Liverpool John Moores University, Liverpool.

Whilst the Government acknowledges that responsible e-cigarette manufacturers will not seek to specifically market their products to children, we believe their advertising and promotion is designed for the young adults market (i.e. 18-24 year olds), and could therefore be attractive to younger teenagers. A Cancer Research UK report examined the marketing of e-cigarettes and found that ‘independent e-cigarette companies appear to be actively targeting younger non-smokers or social smokers and promoting the e-cigarette as lifestyle products’⁴. Nevertheless, while e-cigarette companies may design their promotional and marketing activity to reach out to young adults, it is possible that this promotion may also resonate with young people. In addition, the research conducted in Cheshire and Merseyside found that although some older adolescents appeared to associate e-cigarette use with smoking cessation, generally young people viewed e-cigarettes as a product in their own right, suggesting that many young people initially use them simply for the sake of it, for fun, or simply to try something new.

Nicotine is a highly addictive substance. Electronic cigarettes that contain nicotine therefore carry a significant risk of nicotine addiction. There is currently not sufficient evidence to rule out e-cigarettes acting as a gateway into smoking tobacco for children. Currently, most e-cigarette use by children is strongly linked with tobacco smoking, and those children who smoke are more likely to also use e-cigarettes. Whilst much evidence from the UK suggests regular use by children who have never smoked (or have only tried smoking once) is rare, recent research among 10-11 year olds in Wales found that most children who had reported that they had used an e-cigarette had never smoked a tobacco cigarette². E-cigarettes are a relatively new product and there is currently no definitive evidence to indicate whether or not e-cigarettes are having a ‘gateway effect’ into tobacco smoking for children and young people.

E-cigarette vapour is less irritating than tobacco smoke, making it easier for young and inexperienced smokers to inhale. Flavourings can also make the experience of using e-cigarettes more pleasurable for novice users compared to smoking tobacco. In the Chief Medical Officer’s 2012 Annual Report, she ‘raises concern that there may be young people for whom e-cigarettes could be an entry point to use of conventional tobacco products, including cigarettes’⁵.

We know that most children and young people who currently use e-cigarettes also use tobacco (“dual users”) but that could change as awareness and availability of the products increase. However, there is emerging evidence to suggest that children who do not smoke tobacco are willing to experiment with e-cigarettes. For example, research published recently by the Welsh Government² provides tentative evidence that e-cigarette use appears to represent a new form of childhood experimentation with nicotine, which is more prevalent among 10-11 year olds than smoking. What is clear is that further research is needed to answer the gateway question definitively, and it will be some time before definitive evidence is available either way.

⁴ De Andrade et al. (2013). The Marketing of Electronic Cigarettes in the UK. Cancer Research UK, London.

⁵ Davies, S. (2013) *Annual Report of the Chief Medical Officer 2012 – Our Children Deserve Better: Prevention Pays*. Department of Health, London,

Whilst e-cigarettes do not currently deliver nicotine as efficiently as cigarettes⁶, this will undoubtedly improve over time. The potential for these products to cause addiction remains high. The European Commission says that:

“E-cigarettes simulate smoking behaviour and can lead to further experimentation with other nicotine-containing products. Recent studies suggest that e-cigarettes are increasingly used by non-smokers and young people. For example, a French study of 2013 revealed that the number of Parisian students experimenting with e-cigarettes has doubled in one year reaching 18%”⁷.

A study of 40,000 young people in the US found that e-cigarette use among middle and high school children doubled between 2011 and 2012, from 3.1% to 6.5%. The research found that dual use of e-cigarettes and tobacco was high amongst adolescents. While the study was not able to identify whether most youths are initiating smoking with conventional cigarettes and then moving on to (usually dual use of) e-cigarettes or vice versa, it suggested that e-cigarettes do not discourage the use of conventional cigarettes. The research concluded that ‘e-cigarettes may contribute to nicotine addiction and are unlikely to discourage conventional cigarette smoking among youths’.⁸

As noted earlier, there is no definitive evidence currently available to indicate whether or not e-cigarettes are acting as a “gateway” to tobacco smoking in children and young people. However, we can say with certainty that nicotine is a potent pharmacological agent and is highly addictive. We also do not know about the effect of inhaling vaporised nicotine on the developing lungs of young people. The Government is not currently aware of any long-term studies that suggest the use of e-cigarettes is safe, particularly for young people. Whilst e-cigarettes do not currently deliver nicotine as efficiently as cigarettes, the potential for these products to cause nicotine addiction remains high.

The Government has legitimate concerns about young people becoming addicted to any substance before they are able to make informed, adult decisions. That is why the Government believes it is sensible and proportionate to restrict sales of e-cigarettes and related products to those aged 18 and over. A minimum age of sale for e-cigarettes also achieves consistency with other age restricted products such as alcohol and tobacco and we believe will be welcomed by retailers and their representative bodies.

The Government also has a duty to protect children and young people from the risk of harm. For the reasons explained above, the Government took a decision to consult on regulations to limit the sales of e-cigarettes, their component parts, including e-liquids containing nicotine, to people aged over 18. Notwithstanding the debate on whether e-cigarettes can lead to tobacco

⁶ Schroeder, M. Hoffman, A. (2014). Electronic cigarettes and nicotine clinical pharmacology, Tobacco Control 2014. Available at: http://tobaccocontrol.bmj.com/content/23/suppl_2/ii30.abstract

⁷ European Commission (2014). E-cigarettes Myth Buster. Available at: http://ec.europa.eu/health/tobacco/docs/tobacco_mythbuster_en.pdf

⁸ Dutra, L and Glantz, S. (2014). “Electronic Cigarettes and Conventional Cigarette Use Among US Adolescents – A Cross-Sectional Study” In JAMA Paediatrics 2014; 168(7), pp.610-617.

use, e-cigarette liquids are highly toxic and the number of people – including young children – poisoned by swallowing e-cigarette liquids containing nicotine rose sharply in the UK last year⁹.

The new EU Tobacco Products Directive, which the Government has to transpose into UK law by May 2016, includes requirements on the enhanced safety and quality of e-cigarettes (and related products). Despite these new consumer safeguards, it was not possible to achieve age of sale controls through the Directive. Member States were therefore encouraged to take action domestically on this issue. Against this background, the Government acted quickly to take the opportunity offered by the Children and Families Bill to take powers to make regulations introducing age of sale requirement for e-cigarettes.

Finally, where medical or therapeutic claims are made by e-cigarette companies, for example any product which claims or implies that it can treat nicotine addiction is considered to be a medicinal product and must be licensed for use under medicines regulatory regime (administered by the Medicines and Healthcare Products Regulatory Agency). E-cigarettes that are licensed as a medicine, for example as a smoking cessation device, can still be made available to children under the age of 18 under medical supervision – e.g. by way of prescription.

Powers to make regulations prohibiting the sale of nicotine products to people aged under 18 years are provided under section 92 Children and Families Act 2014. The draft regulations subject to this consultation also include at regulation 2(1), provision to create an offence for an adult to buy, or attempt to buy, a relevant nicotine product on behalf of anyone under 18 (known as proxy purchasing). This would bring the purchase of nicotine products in line with equivalent offences for the proxy purchase of tobacco and alcohol on behalf of under 18s. It is part of wider Government efforts to reduce the availability of tobacco and e-cigarettes to children and young people.

Subject to available Parliamentary time, Health Ministers expect to bring forward final regulations quickly after full consideration of the consultation responses, with the intention that the regulations would come into effect in 2015.

An Impact Assessment of this policy sets out the detailed rationale for intervention and the intended effects. It also estimates the total costs to business of eliminating all sales to under 18s from the existing e-cigarette market.

Analysis of the impact on equality

⁹ The Guardian (UK) (2014). 'E-cigarette poisoning figures soar as vaping habit spreads across UK', 14 April 2014. Article available here: <http://www.theguardian.com/society/2014/apr/14/e-cigarette-poisoning-figures-soar-adults-children>

This analysis identifies some equality issues that have been taken into account in developing the policy. However, it is important to note that electronic cigarettes are a relatively new product and the market is still evolving. New and novel products are coming onto the market all the time and the health risks and benefits of electronic cigarettes remain uncertain. The current body of research on e-cigarette use in the UK does not provide direct insight into the impact that introducing an age of sale could have on different socio-economic groups or many of the groups with protected characteristics under the Equality Act 2010. Within the EU, Croatia, Slovakia, Spain, Italy and Latvia have set age of sale requirements for e-cigarettes. However, any age of sale requirements that have been introduced worldwide, have only been in place for a relatively short time and have not therefore been evaluated.

Prohibition of the sale of nicotine products to under 18s, or their purchase on behalf of under 18s, would apply universally. It is difficult to predict with any accuracy what the impact of these restrictions might be in terms of equalities but possible areas for consideration have been set out below, in line with the Public Sector Equality Duty. This requires that policy makers have due regard to potential positive and negative impacts on protected groups and due regard to the need to eliminate discrimination, harassment, victimisation, advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share, and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.. The analysis below explores the potential positive and negative impacts that the policy might be expected to have when implemented.

Age

This policy is intended to protect a new generation of children and young people from the risk of nicotine addiction and possible tobacco use. The policy treats those under 18 differently from adults on the grounds of promoting good public health. The Government believes this policy is justified in order to protect the health of under 18s by reducing the likelihood of addiction to nicotine. As explained in the Regulatory Triage Assessment, not only is nicotine highly addictive, evidence shows that young people can develop nicotine dependence very rapidly and addiction to smoking tobacco is largely acquired in childhood and adolescence. In England, almost two-thirds of current and ex-smokers say that they started smoking regularly before they were 18 years old, with 39 per cent saying that they were smoking regularly before the age of 16¹⁰.

In addition, while the use of these products by children is currently limited, international evidence suggests that usage is likely to increase. The Government therefore believes it is right to act now to mitigate this risk especially as awareness of e-cigarettes among children is becoming widespread in the UK.

¹⁰ NHS Information Centre (2010). Statistics on Smoking: England, 2010. NHS Information Centre, Leeds.

In terms of the positive impact, preventing the sale of electronic cigarettes (and related products) to children and young people under 18 will contribute to the reduction in risk of young people becoming addicted to nicotine. If the policy is successful in reducing the availability of e-cigarettes to those aged under 18, it should minimise the risk of e-cigarettes acting as a gateway into tobacco use (although it is acknowledged that further research is needed to answer this question definitively).

It is also worth noting here that the Government recognises the important role played by retailers in enforcing age of sale restrictions across a whole range of products. Many responsible manufacturers and retailers of e-cigarettes already voluntarily stop children from accessing e-cigarettes. However, some do not. Age of sale restrictions that are consistent with the sale of tobacco will provide clarity and help retailers in the operation of their business.

In terms of the potential negative impact, the Government recognises that there are existing users of e-cigarettes aged under 18 who can currently access e-cigarette products where retailers choose not to voluntarily impose an age of sale restriction. When the minimum age of sale is introduced, there is a risk that a child who wishes to access e-cigarettes in order to reduce their tobacco use or to help them quit completely, will be prevented from doing so. However, this will not be the case. The Government has acknowledged the potential of e-cigarettes (and other inhaled nicotine products) to aid smoking reduction and cessation and has taken action to mitigate this risk. The draft age of sale regulations therefore exempt any nicotine inhaling devices that are medicines under certain circumstances – for example, if they are sold in accordance with a valid prescription by a pharmacist, or in other exceptional circumstances under which prescription only medicines could be sold. The regulations also exempt any nicotine inhaling products which that are authorised medicines with a general sale licence (GSL) which specifies that they are indicated for people under 18.

This means that a child under 18 trying to quit or reduce smoking would continue to be able to access e-cigarettes that are licenced as medicines under the supervision of their doctor. These proposals have no impact on non-inhaled forms of nicotine replacement therapies (NRT) such as patches and gums, therefore under 18s could access them as they do now.

On balance, the Government believes that these age of sale measures are both necessary and proportionate and that the evidence justifies differential treatment on the grounds of age.

Race and ethnicity

One of the most common retail outlets for e-cigarettes is small, independent shops such as newsagents or convenience stores. Many of these retail outlets are owned or run by proprietors from black or minority ethnic groups. The Government believes that applying the age of sale provisions for nicotine products will not be burdensome for small retailers who are familiar with applying age of sale restrictions on a whole range of products. Therefore, there is no evidence to support any disproportionate impact on grounds of race or ethnicity. There is a possibility that some retailers would see a small reduction in margins if the policy was successful in eliminating

all children and young people from the electronic cigarette market. However, our assumption is that most retailers already restrict the sale of these products to children and young people.

An Impact Assessment which accompanies this document provides an in-depth assessment of the impact of this policy on business.

Gender

There is little available evidence that compares electronic cigarette use by gender. While in the past more men than women smoked tobacco, today the prevalence of smoking is about the same for men and women. A study of e-cigarette use amongst young people aged 13-17 in the Cheshire and Merseyside areas by the Centre for Public Health at Liverpool John Moores University was published in March 2014. One in eight (12.7%) young people under 18 reported having accessed e-cigarettes. There were no significant differences in access to e-cigarettes by gender or level of deprivation (socio-economic group). A study of e-cigarette use amongst young people aged 13-18 in Wales found that reported regular e-cigarette use (more than once a week) was slightly higher amongst males (9.2%) compared to females (2.3%). However, the study acknowledges limitations of the findings, as respondents were self-selecting. It is reasonable to assume that this policy will have no disproportionate impact – positive or negative – on the basis of gender.

Disability

There is no evidence available regarding e-cigarette use and disability. Using tobacco as a proxy, we know that tobacco use is much higher amongst people with mental health problems. Smoking rates by young people with mental health problems are significantly higher than average. Evidence for e-cigarettes is not available so it is not possible to assess if there would be any disproportionate impact – positive or negative – on disabled people.

Sexual Orientation

Whilst smoking rates are higher among lesbian, gay, bisexual and transgender (LGBT) groups, no comparable data is yet available for the use of electronic cigarettes and related products. It is not possible, therefore, to make any considered assessment of the impact of this policy on those groups. We will keep emerging evidence under review.

Pregnant Women

If this policy is successful in reducing the risk of e-cigarettes acting as a gateway for young people to smoke tobacco, this would have a benefit in those groups where there are high rates of smoking in pregnancy in under 18s. We know little about the long-term effects of using e-

cigarettes on the developing lungs of young people and even less about the effect of e-cigarette use on unborn babies. However, they are likely to be a safer alternative to smoking tobacco and could have a role to play in smoking cessation or reduction. A young pregnant woman aged under 18 who smoked could still have access to e-cigarettes as a smoking cessation tool on prescription, and to be used under medical supervision.

Socio-Economic Groups

Rates of smoking tobacco vary considerably between different social groups. Smoking is most common among people who earn the least and least common among those who earn the most. In recent times smoking has become one of the most significant causes of inequalities in health between socio-economic groups. However, the limited data available suggests that there is not the same variation by socio-economic group in use of e-cigarettes by young people. Whilst e-cigarette use by children has previously been strongly associated with tobacco use, there is tentative evidence in Wales of childhood experimentation with nicotine, which is more prevalent among 10-11 year olds than experimentation with tobacco². It would not therefore be robust to make assumptions about e-cigarette use by socio-economic group based upon smoking prevalence in these groups.

If the policy is successful in reducing the risk that electronic cigarette use encourages the smoking of tobacco, there would be a greater impact on those groups in which smoking prevalence is highest which could make a modest contribution to a reduction in health inequalities between socio-economic groups.

Other Groups

Based on the limited evidence available, no effects of this policy have been identified for other groups, including for different religions or beliefs (or non-beliefs), for those undergoing gender reassignment or for carers. The Government will continue to review the evidence relating to these groups as it emerges.

We have also considered the need to foster good relations between those who share a protected characteristic and persons who do not share it, and are not aware of any evidence on the potential effects of introducing a minimum age of sale for e-cigarettes on such relations.

Engagement and Involvement

The draft regulations will be subject to a 6 week consultation period. We invite all interested groups, including retailers, the e-cigarette industry, public health groups and the general public **in England and Wales** to give us their views on this policy during the consultation period. The consultation asks whether the draft regulations on age of sale for nicotine products would contribute to reducing health inequalities and/or help the Government fulfil its duties under the Equality Act 2010.

Conclusion

Having considered this policy in the context of the Public Sector Equality Duty, the conclusion of this Equality Analysis is that this policy will have no disproportionate impact – positive or negative - on protected groups, other than on grounds of age. Differential treatment on the basis of age is proportionate and justified on the grounds of promoting public health. The Government wishes to safeguard the health and wellbeing of children and young people by taking steps to protect them against the risk of nicotine addiction (and possible tobacco use later in life).

This policy, if successful in achieving the aim of restricting the availability of electronic cigarettes (and related products), will reduce the availability of these products amongst under 18s and limit the scope for young people to experiment with e-cigarettes. This is particularly important in relation to young non-smokers who could become addicted to nicotine and go on to smoke tobacco. Much current evidence suggests that current use of e-cigarettes amongst children and young people is largely by current or ex-smokers, however, recent research among 10-11 year olds in Wales found that most children who had reported that they had used an e-cigarette had never smoked a tobacco cigarette. Use by young people could increase as awareness and availability of the e-cigarette products increases. What is clear is that further research is needed to answer the gateway question definitively and emerging evidence must be kept under review.