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Reform Committee  
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4 February 2025

Dear Convener

Thank you for your consideration of the Tobacco and Vapes Bill.

In relation to clauses 90 – 99, 101, 123 and 133, you have asked:

- 1) In light of the four-nations approach to regulation under the Tobacco and Vaping Framework, what consideration was given to requiring regulations proposed under each of these clauses which make provision within the Scottish Parliament's legislative competence to be laid in both the United Kingdom Parliament and the Scottish Parliament, and to be subject to procedure in both Parliaments?**

In working with UK Government and the other devolved Governments on this Bill, there has been careful consideration given to the appropriate procedures applied to regulations in the Bill. The Scottish Government has ensured that regulations which make provision relating to devolved matters cannot be made without the consent of the Scottish Ministers.

In some cases, this is in line with the position in similar legislation (such the powers to regulate the retail packaging flavouring and product requirements of tobacco products in the Children and Families Act 2014).

In other cases (such as with brandsharing, where the power in the Tobacco Advertising and Promotion Act 2002 did not require consent) this goes further in ensuring that the devolution settlement is appropriately reflected in Westminster legislation.

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It is rare for a joint procedure to be applied to secondary legislation. There are examples, most notably in the Scotland Act 1998, of Orders in Council requiring the approval of both the UK and the Scottish Parliaments before the Privy Council may recommend that the Order is made by HM the King. Such Orders are most commonly used for matters of constitutional significance. Other joint procedures in the European Union (Withdrawal) Act 2018 and other Brexit-related legislation have never been used.

The Scottish Government does not consider a joint procedure would be appropriate for the powers in this Bill. The Government is clear that Parliament should have a role in considering the use of powers in devolved areas, which is provided by the opportunity to scrutinise Scottish Ministers' use of their power to consent or not to regulations. The Scottish Government is also committed to engaging with the Parliament as regulations progress.

In relation to clauses 90 – 99, 101, 123 and 133, you have asked:

**2) Whether the powers in these clauses fall within the scope of SI Protocol 2 and, if so, whether it is content to add those powers to Annex A of SI Protocol 2?**

The scope of the current protocol (SIP2) covers secondary legislation to be made by UK Ministers that include provision that is within devolved competence and relates to matters within the competence of the EU immediately before IP completion day. The Scottish Government does not consider that these clauses fall within scope of SI Protocol 2. The Scottish Government will consider with the UK Government the possibility of extension of SIP2 beyond Brexit related powers, or alternative arrangements to govern notification to the Parliament of the exercise of powers in devolved areas by UK Ministers. However, SIP2 was put in place to manage particular circumstances in which a large volume of SIs connected to Brexit was expected in a short period. More flexible and proportionate arrangements might be more appropriate in the future.

You also asked:

**3) If the Scottish Government's position is that the powers do not fall within the scope of SI Protocol 2, how will it facilitate parliamentary scrutiny to consent to the making of regulations under:**

- a) **clause 111 of the Bill in relation to the powers in clauses 90, 91, 92, 93, 94, 96, 97, 98, 99 and 101;**
- b) **clause 123(5) of the Bill in relation to the powers in clause 123; and**
- c) **clause 133(3) of the Bill in relation to the powers in clause 133?**

The Scottish Government is clear that, as a matter of principle, the Scottish Parliament should have oversight of the use by UK Ministers of delegated powers in devolved areas. The Government recognises the essential role which the Parliament plays in scrutinising regulations within devolved competence, and will facilitate the scrutiny of Scottish Government's decision to consent to the making of regulations in these areas. Throughout the development of the initial Tobacco and Vapes Bill and this re-introduced and strengthened Bill we have worked closely with the UK and other Devolved Governments. This close working has ensured that the provisions included in the Bill accurately reflect and progress our priorities as set out in the Tobacco and Vaping Framework. This collaborative

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approach will continue during the implementation of the Bill and development of regulations made under the new powers.

As part of this collaborative approach, we are committed to keeping the Health, Social Care and Sport Committee informed of the publication of consultations and consultation responses related to future regulations, where possible, in a similar way to our engagement on the four nations consultation for the Bill - "Creating a smokefree generation and tackling youth vaping".

I will also continue to ensure that the Health, Social Care and Sport Committee are informed of any decisions made on regulations and would be happy to engage with Committee should they have any questions about regulations which contain devolved provision.

In relation to clause 61, you have asked:

**4) Whether there is any equivalent power in current legislation to deal with the displays of such herbal smoking products, vaping products or nicotine products and their prices on websites?**

There are no powers in current legislation to deal with the displays of such herbal smoking products, vaping products or nicotine products and their prices on websites.

While there is a power for the Scottish Minister to regulation the display of tobacco products and prices on websites, in section 8 of the Tobacco Advertising and Promotion Act 2002, that power has never been exercised.

An equivalent power for the Secretary of State to make regulations for England, Wales and Northern Ireland, in section 7D of that Act, has similarly never been exercised.

Both powers are to be repealed by the Bill. A consistent position has been taken that such a power has, thus far, not been necessary.

We will keep this under review and can bring forward legislation in future should it be considered necessary.

I have copied the Convener for the Health, Social Care and Sport Committee into this response, and welcome your constructive engagement on this proposed approach.

Yours Sincerely

**NEIL GRAY**

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