

National Assembly for Wales / Cynulliad Cenedlaethol Cymru
[Health and Social Care Committee / Y Pwyllgor Iechyd a Gofal Cymdeithasol](#)

[Public Health \(Wales\) Bill / Bil Iechyd y Cyhoedd \(Cymru\)](#)

Evidence from Directors of Public Protection (Wales) – PHB 04 / Tystiolaeth gan Cyfarwyddwyr Diogelu'r Cyhoedd (Cymru) – PHB 04

HEALTH AND SOCIAL CARE COMMITTEE CONSULTATION ON PRINCIPLES OF THE PUBLIC HEALTH (WALES) BILL

Submission of Evidence by Directors of Public Protection Wales (DPPW) in advance of attendance at oral session.

Introduction:

Directors of Public Protection Wales (DPPW) represent a range of local authority services, including Environmental Health, Trading Standards and Licensing which collectively, are often referred to as Public Protection services.

Public Protection services are responsible for applying a wide range of legislation required to protect consumer rights and protect public health. These services directly affect the health, safety and wellbeing of our communities in Wales

The following represents views on Part 2, Part 3 and Part 4, submitted in advance of DPPW attendance at a forthcoming oral session. A more comprehensive consultation response to encompass other aspects of the Bill will be submitted under separate cover in due course.

Part 2: Tobacco and Nicotine Products Part 2 of the Bill includes provisions relating to tobacco and nicotine products, these include placing restrictions to bring the use of nicotine inhaling devices (NIDs) such as electronic cigarettes (e-cigarettes) in line with existing restrictions on smoking; creating a national register of retailers of tobacco and nicotine products; and prohibiting the handing over of tobacco or nicotine products to a person under the age of 18.

Do you agree that the use of e-cigarettes should be banned in enclosed public and work places in Wales, as is currently the case for smoking tobacco?

YES.

The use of e-cigarettes, in particular those that have the appearance of traditional cigarettes, undermines enforcement of smoke-free legislation, not only by local authorities but also those that manage smoke-free places. Many business owners have banned them for that reason.

DPPW published its views on the availability and use of e-cigarettes in 2013 (DPPW, 2013) which included several examples where the enforcement of the ban on smoking in enclosed public places had been undermined by claims of the use of e-cigarettes. Local authorities have had legal actions fail because offenders claimed they were using e-cigarettes.*

[*examples: Cardiff County Council instigated a prosecution against a taxi driver for smoking in his vehicle. The defendant pleaded not guilty on the basis that he was

smoking an e-cigarette and not a “real” cigarette. The matter proceeded to Court where the defendant was found not guilty despite the alleged offence being witnessed by an Enforcement Officer.

Powys County Council has also experienced difficulties with enforcement, having lost a court case against a taxi driver who as part of his defence in Court suggested he may have been using an e-cigarette. The Court found the defendant not guilty despite the investigating officer’s witness statement.

Similar enforcement difficulties have been experienced by Caerphilly CBC, Wrexham CBC and Swansea CBC where taxi drivers have been witnessed smoking in their vehicles but Enforcement Officers have been unable to prove whether it was a tobacco product or an e-cigarette. These cases demonstrate that where an individual is witnessed contravening the ban on smoking in a wholly or substantially enclosed public place they can simply claim that they were smoking an e-cigarette and it is extremely difficult for enforcing authorities to prove otherwise, thereby compromising the enforcement of the ban.]

Our officers that visit business premises on a regular basis, often hear concerns from owners and managers about confrontation when dealing with people “vaping”. Some vapers argue “it’s not against the law”.

We believe that the use of e-cigarettes in public places can help “normalise” smoking. See later.

There is uncertainty over the potential adverse health implications associated with e-cigarettes and despite recent studies suggesting some benefit to those quitting smoking the efficacy of e-cigarettes as an aid to smoking cessation is not entirely clear. It is therefore appropriate to take a precautionary approach to the risks associated with e-cigarettes. Currently people in Wales can breathe clean air in offices, shops, pubs and other public places and work environments. We don’t want to see a backwards step towards potentially polluted air.

What are your views on extending restrictions on smoking and ecigarettes to some non-enclosed spaces (examples might include hospital grounds and children’s playgrounds)?

We are of the opinion that smoking should be discouraged in all public places, in particular those locations where there are children or vulnerable people. These include:

Playgrounds

School grounds & their immediate vicinity

Hospital & medical facility grounds

Places promoted to children (e.g. “petting farms”, fairgrounds and family centred leisure parks).

There is a need for Fixed Penalty Notice powers which should be consistent powers with existing provisions. In drafting such provisions there is a need to consider that law currently places a responsibility on the person in control of premises to prevent smoking (e.g. hospital grounds) and that local authorities’ usual enforcement approach is against the “person in control of premises” for permitting smoking. (Under the Health Act 2006 “*It is the duty of any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop smoking.*”)

Do you believe the provisions in the Bill will achieve a balance between the potential benefits to smokers wishing to quit with any potential disbenefits related to the use of e-cigarettes?

Yes.

Our key concerns are the potential for e-cigarettes to undermine the enforcement of smoke free legislation; intentionally or inadvertently promote or normalise smoking; and the potential impact upon smoke free environments.

We are concerned that there is a real potential for e-cigarettes to intentionally or inadvertently promote smoking amongst those who currently do not smoke. In particular we feel there is a need to make every effort to deter young people from becoming smokers.

Do you have any views on whether the use of e-cigarettes renormalises smoking behaviours in smoke-free areas, and whether, given their appearance in replicating cigarettes, inadvertently promote smoking?

Yes. DPPW takes the view that anything that has the appearance of smoking helps “normalise” smoking and therefore promotes smoking behaviour and culture. We also question whether the term “inadvertently” is appropriate. For example, we are not aware that there is any technical reason why e cigarettes need to glow or emit a vapour.

We are also concerned by the nature of e-cigarette advertising; we note the reappearance of 1950’s style marketing of tobacco products.

Workplaces have worked hard to implement the smoke free premises legislation and the use of e-cigarettes undermines this work.

We are concerned that e-cigarettes encourage young people to think that smoking is acceptable and therefore has the potential to act as a gateway to both e-cigarettes and tobacco based products.

Data relating to smoking behaviour in Wales leads us conclude that we cannot afford to step back from promoting smoke free behaviour and the health and societal benefits associated with that approach.

Do you have any views on whether e-cigarettes are particularly appealing to young people and could lead to a greater uptake of their use among this age group, and which may ultimately lead to smoking tobacco products?

Yes we feel they are. We feel every effort must be made to prevent young people developing nicotine addiction or smoking behaviours.

Worryingly, our members have witnessed e-cigarettes being displayed for sale with sweets, at child height, at the checkout in large stores.

Some e-cigarettes utilise scented or flavoured refills that may be attractive to younger users, which is a particular concern if combined with the highly addictive properties of nicotine. Some of these are branded in ways that may be particularly attractive to younger users, such as “Gummy Bear, Cherry cola and Bubble Gum”.

Some products are being packaged and marketed in a way that is closely associated with that of conventional cigarettes. For example, we are not aware that there is any technical reason why e-cigarettes need to glow or emit a vapour. We are also concerned by the nature of e-cigarette advertising; e.g. consistent with the 1950's style marketing of tobacco products.

Many of these factors reinforce the association with conventional tobacco cigarettes and may normalise smoking related behaviour.

Do you have any views on whether restricting the use of e-cigarettes in current smoke-free areas will aid managers of premises to enforce the current non-smoking regime?

Yes. A number of licensed premises have independently introduced bans on the use of e-cigarettes within their premises in recognition of the difficulty they cause their staff in applying the smoking ban within their premises.

Our colleagues that visit business premises on a regular basis, often hear concerns from owners and managers about confrontation when dealing with people "vaping". Some vapers argue "it's not against the law".

Some employers have had difficulties. e.g. Caerphilly CBC had problems with lorry drivers smoking in their cabs and when tackled claimed they were vaping an e-cig, which made taking action difficult. Caerphilly CBC has also received complaints from their own office based staff that colleagues have been using e-cigarettes at their desks and that they may be also be inhaling the vapours in a similar way to second hand smoke. Hence Caerphilly amended their no smoking policy to include e-cigs.

The proposed legislation in smoke-free places should apply equally to tobacco based products and all forms of e-cigarettes.

Do you have any views on the level of fines to be imposed on a person guilty of offences listed under this Part?

The power to issue Fixed Penalty Notices and other enforcement provisions need to be consistent with other smoking legislation, and the fines need to be set at such a level as to be a deterrent to (re)offending.

Do you agree with the proposal to establish a national register of retailers of tobacco and nicotine products?

Yes. DPPW supports the proposal.

DPPW supports the view that these provisions would best be enforced by Local Government in Wales. Public Protection Services have considerable experience and expertise in the operation of registers and licensing regimes and our Trading Standards and Environmental Health Officers are already enforcing associated legislation at these premises.

Given the significant financial pressures being faced by Local Government in Wales, there will need to be careful consideration of how the implementation of a tobacco retail register

and its enforcement are resourced. Welsh Government may wish to consider the use of on-line or be-spoke registration software, that may be updated by each local authority, rather than to require one host local authority to maintain the register on behalf of Wales.

In addition, DPPW would encourage WG to not be prescriptive in allocating enforcement responsibilities to a particular functional area such as Trading Standards Officers or Environmental Health Officers but allow Local Authorities the discretion to determine how best these provisions may be implemented by their suitably qualified or competent enforcement officers. This will afford Local Government the opportunity and the flexibility to deploy their resources in the most effective manner to suit local circumstances.

Do you believe the establishment of a register will help protect under 18s from accessing tobacco and nicotine products?

The introduction of a register will provide an additional control on the availability of tobacco; a register would contain detailed information on those people and premises from which tobacco can be sold legitimately. Furthermore it would restrict access to the trade to those people and premises where tobacco should not be sold. It will be easier for enforcement officers to identify those premises where tobacco is permitted to be sold, which will in turn assist with the enforcement of underage sales and the display ban.

The success of such a measure would be dependent on the legislation including provisions to control access to the register such as a “fit & proper persons” or “suitable persons” test. This is explored further in response to subsequent questions.

If a register is to be established it needs to cover all those that manufacture, distribute and sell tobacco products. We feel that having a register only for the end retailers is not comprehensive and will not cover other parts of the tobacco chain that feed the habit including those under age. An offence should be created where tobacco products can only be sold, distributed, etc to those registered.

We note that section 29(5) provides that ‘A registered person who fails, without reasonable excuse, to comply with section 25 (duty to notify certain changes) commits an offence’. We are concerned by the use of the phrase ‘reasonable excuse’:

- a) Firstly, as it is out of step with the more robust due diligence offence common to most current consumer protection legislation, i.e. the two limbed all reasonable precautions and all due diligence defence. There is concern that with section 29(5) as currently worded, individuals failing to notify changes to the register will be able to evade enforcement action. There will be no definition of what is reasonable and so these explanations would need to be tested in court with associated wasting of resources.

Use of the well established two limbed due diligence system would enable enforcement officers to assess the adequacy of an individual’s defence based on tried and tested case law, well before a case has to enter the court system

- b) Secondly, the very use of the word ‘excuse’ in section 29(5) sends out quite the wrong message to the trade, and there is a danger that the current wording will encourage individuals simply to ‘come up with an excuse’ in the expectation that this will be acceptable.

Further, we would suggest that provisions should permit might permit placing limitations on the sale of tobacco products (including e-cigarettes) within a designated distance from schools and colleges for example.

DPPW would also highlight the need to recognise the potential resource implications for Local Authorities enforcing the provisions.

Do you believe a strengthened Restricted Premises Order regime, with a national register, will aid local authorities in enforcing tobacco and nicotine offences?

Yes. The proposed link to restricted sales orders (RSOs) and restricted premises orders (RPOs) under the Children & Young Persons Act are welcome. However, we see it as essential that the range of offences triggering an RPO is extended to include all tobacco related breaches, for example the supply of illegal (counterfeit and non-duty paid) tobacco, tobacco labelling offences, non-compliance with the tobacco display ban; and not just underage sales. It is hoped that these matters will be addressed through the proposed power for Welsh Ministers to make regulations under section 12D of the Children and Young Persons Act and the range of offences triggering an RPO extended accordingly.

However, our experience of “Registers” introduced under other legal provisions suggest that their efficacy can be limited if they are not also accompanied by robust enforcement powers. Some registers are merely administrative or informative.

Local authority enforcement officers will need effective powers to ensure that the register has the desired effect. These need to include power to restrict access to the register and to remove persons from the register where there has been a relevant infringement of the law, including offences concerning underage sales. We feel that there should be a provision to consider suitability of a retailer - whether the retailer is a “fit & proper” person. For example, whether a retailer been convicted for the sale of alcohol, solvents or other age restricted products to minors. The section 24 provision that an application to register will not be granted if an RPO or RSO is already in place goes some way towards this, but of course does not take account of the selling to minors of other age restricted products.

We welcome the section 23(2)(g) clarification that in addition to sellers of tobacco and nicotine products with a High Street presence, those supplying via online, telephone and mail order channels will be required to indicate this on the register. However, it is unclear from the wording of section 22(1) whether the requirement to register applies only to those based in Wales rather than those outside Wales supplying to customers in Wales, i.e. ‘The registration authority must maintain a register of persons carrying on a tobacco or nicotine business at premises in Wales’.

DPPW is disappointed with the section 23(3) definition of a “tobacco or nicotine business” as being a business involving the sale by retail of tobacco or cigarette papers or nicotine products’. Limiting the scope of the register to retail would be a lost opportunity to regulate throughout the supply chain. The illicit supply and sale of tobacco has been identified as a growing concern by Trading Standards in Wales. A register must not inadvertently add to the problem of illicit trade in cigarettes. The penalties of failing to register therefore need to be robust. We emphasise that the definitions of “business” need to be carefully considered to encompass not only legitimate traders but also those persons who are trading illegally in tobacco from domestic premises. We feel it should also include online suppliers. Effectively the provisions must apply to anyone who is *selling* tobacco products in Wales.

We support the need for robust and proportionate penalty for offences and proposed powers of entry (to retail premises) or the ability to seek a warrant (for domestic premises). These are obviously vital. We also support the need for powers to seize tobacco goods in all relevant premises including those that are not registered.

What are your views on creating a new offence for knowingly handing over tobacco and nicotine products to a person under 18, which is the legal age of sale in Wales?

We support the proposals which would bring tobacco products into line with alcohol sales.

Do you believe the proposals relating to tobacco and nicotine products contained in the Bill will contribute to improving public health in Wales?

Yes.

Smoking remains the single greatest avoidable cause of death in Wales (PHW, 2012). The introduction of the ban on smoking in enclosed public spaces in 2007 has been hugely successful in reducing exposure to environmental tobacco smoke and in strengthening public awareness and attitudes towards it. However, reducing the prevalence of smoking, remains a key health priority. Protecting young people from the effects of smoking and deterring young people from taking up the habit are particularly important. Therefore DPPW welcomes the proposals and additional powers to help control the availability of tobacco and its potential health impact.

Part 3: Special Procedures Part 3 of the Bill includes provision to create a compulsory, national licensing system for practitioners of specified special procedures in Wales, these procedures are acupuncture, body piercing, electrolysis and tattooing.

What are your views on creating a compulsory, national licensing system for practitioners of specified special procedures in Wales, and that the premises or vehicle from which the practitioners operate must be approved?

We support WG proposals to regulate for special procedures including the creation of a direct offence of failing to register, a full set of enforcement powers including powers of entry, seizure, prohibition, etc to enable the effective regulation of illegal operators.

DPPW is of the view that current legislation does not adequately protect the public. Environmental Health Officers are relying on legislation that is not made specifically for the purpose of tackling illegal operators.

DPPW has the following concerns regarding existing provisions:

- There is no requirement for a practitioner to have training or experience to set up a tattoo studio. However the need to understand the importance and practical application of hygienic practices and infection control procedures is essential to protect the public. The public need some assurance that a practitioner is competent to perform what they are doing without putting them at risk.
- Currently, an unregistered tattooist applying unsafe practices in unhygienic premises only commits the offence of being unregistered under the byelaws. This may be viewed as a purely administrative offence when Courts are considering sentencing.
- Current registration requirements rely on being able to prove that a person is carrying on a business and this can be difficult because most unregistered tattooists ('scratchers') work from home and deny that they receive payment.

- There is no facility to refuse registration unless a previous successful prosecution has been taken for breach of bye laws,
- Current regulation relies in part on the use of legislation not specifically intended for such use e.g. The Public Health (Control of Diseases) Act 1984 and The Health and Safety at Work etc. Act 1974. Several local authorities in Wales have used Part 2A Orders to seize equipment from unregistered and unhygienic premises, however these provisions do not always provide the appropriate enforcement tools to safeguard the public and to tackle “scratchers”.
- When we last gathered information on this, we found that between July 2012 and July 2013, ten applications for Part 2A Orders had been made by local authorities; all of which related to the carrying out of unregistered tattooing from domestic premises.
- New procedures are being developed and becoming increasingly popular such as body modification, dermal implants, branding, tongue splitting and scarification all of which have potential to spread infection or cause permanent damage.
- Existing legislation does not prevent the sales of relatively cheap tattooing equipment over the internet. Anyone can purchase a kit and start operating, possessing no basic training, no knowledge of infection control and not using an autoclave or equivalent sterilisation procedure.

DPPW agrees with the concerns of the Chartered Institute of Environmental Health (CIEH) that many procedures are being done by people with little if any knowledge of anatomy, infection control or healing processes (CIEH, 2014).

Do you agree with the types of special procedures defined in the Bill?

Yes. We support the proposals to include Acupuncture, Tattooing, Body piercing and Electrolysis. These share a theme of preventing blood borne viruses.

However, we strongly support the view that legislation should enable other body modification procedures to be addressed, some of which present significant risks. The aim must be to ensure that all procedures that involve piercing, body modification / enhancement or any invasive treatment or procedure where there is a risk of infection or injury are covered by some form of control or regulation. We are concerned about a growing range of procedures including Botox, dermal fillers, sculpting, microdermabrasion, dermal rolling and dermal implants. We also recognise that new and novel procedures are continually being developed and WG should ensure that the register and any associated enforcement powers will be applicable to the widest range of circumstances and developing trends

However, we also acknowledge the need to take a considered and incremental approach to encompassing these matters over time. We therefore support framing the provisions in such a way that additional procedures might be added in the future.

We will be pleased to work with WG officials in relation to such matters.

What are your views on the provision which gives Welsh Ministers the power to amend the list of special procedures through secondary legislation?

We absolutely support that (see above) and also welcome the anticipated opportunity to be consulted upon and to work with WG officials in framing any proposals.

We feel that we need to get ahead of the game and be able to address the next body modification development to emerge. E.g. a local studio (in Caerphilly) is keen to expand

into scarification and tongue splitting. Other procedures are already becoming more popular e.g. branding, dermal implants, microdermabrasion. All these procedures provide the potential for serious harm and infection.

Whilst we feel there is a strong case that procedures such as tongue splitting, branding, dermal implants and scarification should be prohibited, we recognise that to do so may drive activities underground and cause further issues or potentially make it more appealing to some people.

The Bill includes a list of specific professions that are exempt from needing a licence to practice special procedures. Do you have any views on the list?

We are content with these because these professions should have the necessary understanding of good hygiene and infection control. However, we support the proposed provision that individual professions could be required to have a licence in relation to certain procedures that their regulating body feels do not fall within the scope of their competence.

Do you have any views on whether enforcing the licensing system would result in any particular difficulties for local authorities?

We feel that the proposed licensing system would enable local authorities to undertake public protection duties more effectively and more readily. The establishment of a licensing scheme enabling local authorities to recover their costs will ensure that finance is available to deliver.

The proposals would give enhanced enforcement powers and greater flexibility to deal with public health risks in relation to both those that operate legitimately and those that chose not to.

There is a loophole in current legislation enforced by the Health Inspectorate Wales in respect of the use of lasers. Class 3b and 4 lasers (4 being what is used in a hospital setting) only have to be registered with the HIW if used in certain circumstances. Where this class of laser is used on a mobile or ad hoc basis there is no requirement to register therefore this highly dangerous equipment could be used unregulated. We will be facing an increase in the use of lasers when fashion dictates that tattoos are no longer "trendy" and the increase in poor artwork by illegal tattooists will see a demand in laser removal.

Do you believe the proposals relating to special procedures contained in the Bill will contribute to improving public health in Wales?

Yes.

See <http://www.wales.nhs.uk/sitesplus/888/news/37472> (The recent Newport case)

Proposals contained in the Bill such as requiring a standard of competency will make a significant contribution to protecting health from risks associated with such procedures.

Part 4: Intimate Piercing Part 4 of the Bill includes provision to prohibit the intimate piercing of anyone under the age of 16 in Wales.

Do you believe an age restriction is required for intimate body piercing? What are your views on prohibiting the intimate piercing of anyone under the age of 16 in Wales?

Yes. Local authority officers are aware that such procedures are taking place and it is our view that such intimate procedures should be illegal on under 16s to protect this vulnerable group from potential risks.

Do you agree with the list of intimate body parts defined in the Bill?

Yes. However we also feel there is a case to add the tongue. In addition to other risks, we are aware that there are sexual connotations with piercing of the tongue and for that reason consider there is a case to include in the list.

Do you have any views on the proposals to place a duty on local authorities to enforce the provisions, and to provide local authorities with the power to enter premises, as set out in the Bill?

We support such proposals including the proposal to make it an offence “to enter into arrangements”. This would support enforcement of the provisions including “test purchasing” by local authorities.

We recognise the need for police support in particular in relation to evidence gathering given the intimate nature of such offences and the provisions need to take account of that.

Any duties placed upon local authorities need to be supported by adequate funding.

Do you believe the proposals relating to intimate piercing contained in the Bill will contribute to improving public health in Wales?

Yes, see above.