



Mr. Oliver Smith
Deputy Director, Tobacco and Health & Wellbeing Policy
Department of Health
Room 702, Wellington House,
133-155 Waterloo Road,
London SE1 8UG

3 September 2009

Dear Mr. Smith,

Electronic Cigarettes

As the Department is aware, electronic battery powered vaporising e-cigarettes are not caught by the definition of "smoking" in the Health Act 2006. The definition of tobacco in the Children and Young Persons Act 1933 (as amended) does not extend to include e-cigarettes, nor are these devices captured by any of the Consumer Protection legislation which control the sale, promotion, advertising and labelling of tobacco products as detailed in Annex 1.

Whilst currently in order to be sold legally in the UK, e-cigarettes are required to meet the requirements of the General Product Safety Regulations 2005 and associated safety regulations. Research carried out by LACORS thus far has shown however that many brands available in the UK fail to meet these product safety requirements.

Furthermore there has been no approval given by the Medicinal & Healthcare products Regulatory Agency for these products and yet we are aware that there have been instances of health care establishments advocating the medicinal and treatment benefits of using them.

It would appear that the products are able to by-pass all the legislative controls that are in place to deal with conventional tobacco products and this is giving rise to a multitude of concerns amongst local councils which have been shared with LACORS, CIEH and TSI, who echo those concerns.

Advertising and Promotion of product

The advertising and promotion of electronic cigarettes is not specifically controlled; any statement made about the product will need to be capable of substantiation BUT there is currently nothing to prevent these products being promoted to anyone, in any location and by any means.

To date, promotion has included the use of hoarding and billboards alongside major transport routes (M25), print media, internet webpages, radio advertising as well as the usual methods employed within retail premises such as posters, moving images etc. There are even reports that they are being given away as prizes in Bingo Halls and at least one publican stated in court that he was lending them out to patrons. This is in stark contrast to the control that is exercised over tobacco products by the Tobacco Advertising and Promotions Act 2002 and associated Regulations.

There are concerns that the proposed removal of the display of tobacco products in retail premises may give rise to opportunities to “fill the gap” with images of electronic cigarettes and possibly “power walls” of product being used. This is conjecture at this stage but cannot be ruled out.

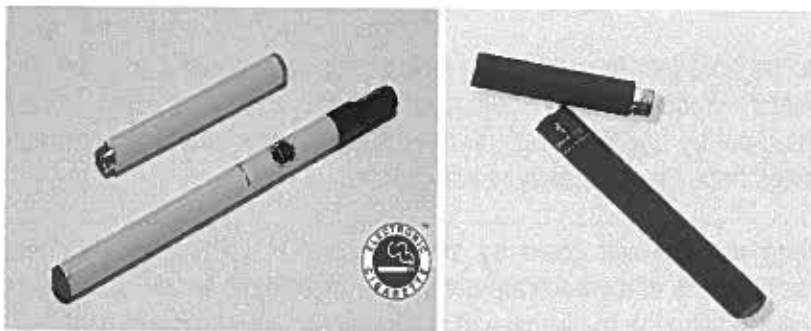
We believe that the currently uncontrolled advertising of e cigarettes sends potentially mixed messages to consumers particularly young consumers.

Sales to Young People

There is no existing legislation to deal with Electronic Cigarettes as age restricted products and thus the product may be legally sold to young persons of any age. Contrast this with the legislation controlling for example, tobacco products, alcohol, solvents and fireworks all of which are age restricted in order to protect the health and well being of young people.

This is therefore a major concern given the nature of the product (contains a highly addictive substance – nicotine) and the likely appeal of the product (either brightly coloured OR very close representation of a real cigarette) to young people.

Examples of e-cigarettes shown below



Product Safety

A number of safety concerns have already come to light including electrical safety, and the need for adequate hazard labelling (in respect of the nicotine content) and the provision of child resistant packaging for the nicotine cartridges.

There is no recognised standard or safety specific regulations for this product and it is very likely that variations of the electronic cigarette will continue to appear in the market place requiring individual testing to assess compliance with product safety legislation. This will inevitably stretch the resources of those Councils who have importers and distributors within their Council area.

Whilst Councils can continue to apply the General Product Safety Regulations and other safety legislation to these products, in the interest of consumer protection, it is considered that further product specific controls may be required.

Enforcement of Smokefree legislation

As the number of electronic cigarettes being sold increases so does the likelihood of confusion between the use of e-cigarettes and smoking normal cigarettes when enforcing smokefree legislation.

To date LACORS and CIEH have provided guidance on factors that enforcement officers can observe and record and include in their evidence to assist them in making the necessary differentiation, as well as reminded them that their prosecution statements for smoking offences need to include sufficient description of the evidence that smoking has been observed so as to be able to rebut any assertion that what they had actually seen was the use of electronic cigarettes.

Officers in Halton Council were recently successful when a lorry driver lost his bid to overturn a smoking fine despite claiming he was using an "electric" cigarette, as they had been fastidious in recording the evidence. However, the increasing range of these electronic smoking products now on the market will make it more and more difficult to provide definitive guidance to officers as to what constitutes an e-cigarette to enable them to effectively enforce the smokefree legislation.

Furthermore, the inability to easily distinguish between a normal and an e-cigarette leads to confusion and upset amongst the public which can give rise to complaints as they believe that breaches of the legislation are taking place, and they are being subjected to cigarette smoke whilst in a no-smoking area. The use of e-cigarettes in premises where the law prohibits smoking could well encourage people to smoke, either in the mistaken belief that the law does not apply or is not being enforced, or that the individuals concerned will not be noticed and reported. There is also real potential for public order offences being committed where individuals are approached and asked or told to stop and this is challenged.

Next Steps

We strongly urge the Department of Health to review the definition of "tobacco products" within existing legislation. An amendment to the legislation to include e-cigarettes in the same category as other tobacco products would assist regulatory officers in the control of these products and help businesses in understanding what compliance is being required. Such legislative change would need to be future-proofed to ensure that other "creative" or "novel" devices and products which may be developed would not fall outwith the legislative controls. An alternative position would be for the MHRA to regulate these products in the same way that they currently regulate Nicotine delivery systems.

In the interim period, we would welcome correspondence from the Department setting out its intentions and the course of action that council regulatory officers should take when dealing with e-cigarettes.

Yours sincerely

Handwritten signature of Derek Allen in black ink.

Derek Allen
Executive Director, LACORS

Handwritten signature of Graham Jukes in black ink.

Graham Jukes
Chief Executive, CIEH

Handwritten signature of Ron Gainsford in black ink.

Ron Gainsford
Chief Executive, TSI

Annex 1

Definition of Smoking in the Health Act 2006

(2) In this Chapter—

(a) “smoking” refers to smoking tobacco or anything which contains tobacco, or smoking any other substance, and

(b) smoking includes being in possession of lit tobacco or of anything lit which contains tobacco, or being in possession of any other lit substance in a form in which it could be smoked.

(3) In this Chapter, “smoke” and other related expressions are to be read in accordance with subsection (2).

Definitions of Tobacco Products from Consumer Protection Legislation

Children and Young Persons Act 1933 as amended

“tobacco” includes cigarettes, any product containing tobacco and intended for oral or nasal use and smoking mixtures intended as a substitute for tobacco, and the expression “cigarettes” includes cut tobacco rolled up in paper, tobacco leaf, or other material in such form as to be capable of immediate use for smoking.

Note : Under this legislation Herbal Cigarettes are included in the definition and thus must not be sold to young people under the legal age of sale (18 years)

Children & Young Persons (Protection from Tobacco) Act 1991 (as amended)

4. Display of warning statements in retail premises and on vending machines.

— (1) A notice displaying the following statement— “It is illegal to sell tobacco products to anyone under the age of 18” shall be exhibited at every premises at which tobacco is sold by retail, and shall be so exhibited in a prominent position where the statement is readily visible to persons at the point of sale of the tobacco; and where—

a) any person carries on a business involving the sale of tobacco by retail at any premises, and

b) no notice is exhibited at those premises in accordance with this subsection, that person shall be guilty of an offence.

Note : In this case ; “tobacco”(except where it appears in the warning statement required by subsection (1)) has the same meaning as in section7 of the Children and Young Persons Act 1933.

This implies that although it is illegal to sell herbal cigarettes to a young person, it is not a requirement to have the statutory warning notice in place where such products are sold

Tobacco Products Labelling (Safety) Regulations 1991

“tobacco product” means a product made wholly or partly of tobacco for the purpose of being smoked, sniffed, sucked or chewed, but does not include a product which is made partly of tobacco and is intended to help a consumer of tobacco products to stop or reduce his use of such products.

Tobacco for Oral Use (Safety) Regulations 1992

“tobacco for oral use” means any product made wholly or partly of tobacco which is—

- a) intended for oral use, unless it is intended to be smoked or chewed; and
- b) either—
 - (i) in powder or particulate form or any combination of these forms, whether presented in sachet portions or porous sachets or in any other way, or
 - ii) presented in a form resembling a food product

Note: if the product is smoked or chewed (as most smokeless tobacco products are) they will NOT be dealt with by these Regulations. These Regulations deal with products such as Snus.

Tobacco Advertising & Promotions Act 2002 (TAPA)

“tobacco product” means a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed.

Note : there must be tobacco in the product. Contrast this with the definition given in 1933 Act which includes “ smoking mixtures intended as a substitute for tobacco” .

Herbal Cigarettes are not dealt with by TAPA.

Electronic Cigarettes are not dealt with.

Tobacco Products (Manufacture , Presentation & Sale) Regulations 2002

“tobacco for oral use” means any product made wholly or partly of tobacco which is—

- a) intended for oral use, unless it is intended to be smoked or chewed; and
- b) either—
 - (i) in powder or particulate form or any combination of these forms, whether presented in sachet portions or porous sachets or in any other way, or
 - ii) presented in a form resembling a food product;

“tobacco product” means a product consisting wholly or partly of tobacco, whether genetically modified or not and intended to be smoked, sniffed, sucked or chewed;

Note: these Regulations set out the form of health warnings that must be applied to different tobacco products.

Reg 7(5) sets out the required warning for smokeless tobacco products " This tobacco product can damage your health and is addictive " .

The Tobacco Products (Manufacture, Presentation and Sale) (Safety) (Amendment) Regulations 2007

Definition of tobacco products is the same as that given in the Main Regulations above (2002)

Note : Picture warnings are not applicable to smokeless products.