

Health Bill 2009

Strengthening tobacco control

“If your brand can no longer shout from bill boards or cinema screens at least court smokers from retailers’ shelves.”
World Tobacco (tobacco industry journal) 1999

Executive Summary

1. The Health Bill’s second reading is on Wednesday 4th February and we urge you to speak in support of:
 - The legislation to prohibit retail display of tobacco products;
 - Strengthening the legislation to completely prohibit the sale of tobacco from vending machines;
 - The inclusion of reserve powers to bring in plain packaging of tobacco products by regulation.
2. It is our understanding that supporting amendments will be tabled at committee stage on the above for which we will also seek your support.
3. **See below for a summary of the key arguments followed by a detailed briefing. Please contact ASH on 0207 739 5902 or enquiries@ash.org.uk if you would like any further briefing or speech notes.**

Key points

4. **Young people and smoking** The tobacco industry needs to recruit over a hundred thousand new smokers every year in this country, the vast majority of whom will be children and young people, in order to replace those who die or quit.¹ **(Paragraphs 14-18).**
5. **Evidence for legislative measures** There is strong support for all the legislative measures from the public health community because of the evidence that any promotion of tobacco encourages children to start smoking and reinforces the social acceptability of the habit among adults.² There are considerable potential benefits for all these measures, which are proportionate given the harm caused by tobacco.³ **(Paragraphs 21 to 44 for point of sale displays; Paragraphs 45 to 64 for vending machines; and Paragraphs 65 to 80 for plain packaging).**
6. **Public backing** for strong tobacco control measures came from the vast majority of the nearly 100,000 respondents to the DH Consultation, including many health professionals and most of Britain’s leading public health and welfare organisations.⁴ **(Paragraph 20)**

¹ Department of Health. Consultation on the future of tobacco control. DH. May 2008.

http://www.dh.gov.uk/en/consultations/liveconsultations/dh_085120

² Pierce J., Choi W., Gilpin E. et al. (1998). ‘Tobacco industry promotion of cigarettes and adolescent smoking’, *Journal of the American Medical Association*, 279(7), pp. 511–515.

³ Impact Assessments for the Health Bill. Department of Health, January 2009

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_093305

⁴ Consultation on the future of tobacco control: consultation report. DH. December 2008.

http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382

7. **Opinion polls** also support strong measures to protect people from the harmful effects of tobacco.⁵ **(Paragraph 19)**
8. **Impact on business** Small retailers have legitimate concerns about the implementation of retail display bans. The legislation can be implemented through regulation in such a way as to minimise any potential problems for small businesses. **(Paragraphs 38 to 44 on best practice regulation)**
9. **Timing for implementation**
 - October 2011 for vending machines and prohibition of point of sale display in large retailers: and
 - October 2013 for prohibition of point of sale display in small retailers. Firm commitments need to be given for these timings which need to be embedded in the regulations. **(Paragraphs 40-41 on point of sale and 63 on vending machines).**
10. **Tobacco Industry lobbying** The tobacco industry has misrepresented the evidence and has funded front groups to do the same,⁶ as it did with smokefree legislation. The industry argues that further regulation will harm small businesses, increase smuggling, glamourise smoking to young people and restrict smokers' freedom of choice and will not reduce youth smoking. There is no sound evidence to support any of these arguments. **(Appendix 1, Paragraphs 81 to 101 sets out a detailed rebuttal of industry arguments)**
11. **WHO Framework Convention on Tobacco Control** Such legislation would be in line with the recently adopted guidelines to the world's first health treaty the WHO FCTC. These guidelines define retail display, vending machines and packaging as forms of advertising and promotion and recommend that Parties to the FCTC, which include the UK, ban retail display and sale of tobacco products from vending machines and consider the adoption of plain packaging.⁷
12. **Comprehensive strategy** The legislative measures to control the sale and display of tobacco products are part of government plans for a comprehensive national tobacco strategy to protect children and reduce health inequalities, updating and improving the existing strategy. Following consultation by the Department of Health this plan is now under development, but there is as yet no timetable for its publication.⁴
13. **The Government should be urged to complete and publish an ambitious, comprehensive and well funded national tobacco plan for the next decade with new and tougher targets to reduce smoking prevalence by the summer.** The plan should be in line with the recommendations set out in "Beyond *Smoking Kills*, Protecting Children, Reducing inequalities", published by ASH and endorsed by over 100 health and welfare organisations.⁸

⁵ Poll for ASH by YouGov. Total sample size was 3,329 adults. Fieldwork 20th - 25th February 2008. The survey was carried out online.

⁶ The Tobacco Retailers Alliance which runs 'Responsible Retailers' and the 'Save our Shop' campaign is funded by the Tobacco Manufacturers' Association.

⁷ WHO FCTC guidelines on Article 13. Adopted at the third Conference of the Parties November 2008.

⁸ Beyond *Smoking Kills*. Published by Action on Smoking and Health and funded by British Heart Foundation and Cancer Research UK. 2008. http://www.ash.org.uk/files/documents/ASH_691.pdf

Detailed brief

Smoking, health and young people

14. Tobacco use is still the major preventable cause of death in the UK, killing over 100,000 smokers each year and responsible for one sixth of all deaths, including 29% of all cancer deaths, 13% of deaths from cardiovascular disease and 30% of deaths from respiratory disease.⁹
15. It is estimated that each year some 340,000 children under the age of 16 who have never smoked before try smoking cigarettes.³ While prevalence of smoking amongst 11-15 year olds is down from 13% in 1996 to 6% in 2007¹⁰, with more girls than boys smoking, it remains a serious concern and more needs to be done to discourage children and young people from taking up the habit.
16. Smoking is highly addictive and two thirds of regular smokers take up the habit before they reach 18, by which time boys have caught up and one in five young people, both boys and girls, are regular smokers.¹¹
17. The younger smokers are when they take up the habit, the harder they find it to quit and the more likely they are to develop smoking-related diseases such as cancer and heart disease.¹² Only about one half of those who take up smoking succeed in quitting before they die, most of them from smoking-related diseases.¹³
18. The ASH factsheet on young people and smoking gives more detailed background and can be found on our website at:
http://www.ash.org.uk/files/documents/ASH_108.pdf

Public Opinion

19. There is clear evidence of public support, amongst smokers as well as non-smokers, both for existing tobacco control measures and for further legislative steps. A YouGov poll of adults commissioned by ASH (fieldwork in February 2008)⁵ found that:
 - Smokefree legislation was supported by 77% of respondents;
 - 86% supported licensing of tobacco retailers;
 - 61% supported raising the price of cigarettes by more than the rate of inflation;
 - 65% backed ending sale of cigarettes from vending machines;
 - 59% wanted to end point of sale displays; and
 - 43% wanted to require cigarettes to be sold in plain packaging, with 17% against and 40% don't know.
20. 79,000 out of 96,000 respondents to the DH Consultation were members of the

⁹ Peto R et al. Mortality from smoking in developed countries, 1950-2000 (2nd edition). Oxford University Press, Oxford. [View report](#).

¹⁰ Drug use, smoking and drinking among young people in England in 2007. National Centre for Social Research 2007 www.ic.nhs.uk

¹¹ Smoking and drinking among adults. General Household Survey 2006. ONS, 2008

¹² BMA Board of Science. Breaking the cycle of children's exposure to tobacco smoke. British Medical Association, London, 2007.

¹³ Aveyard, P & West, R. Managing smoking cessation. BMJ 2007;335:37-41

public, sending in postcards or responding to email campaigns and supporting all three legislative measures.¹⁴ The Smokefree Action Coalition and various public health organisations put a great deal of effort into encouraging members of the public to respond, but this effort would not have been effective without considerable public commitment to tackling the harm caused by tobacco, particularly to children and young people. In contrast campaigns run by the retail sector and FOREST¹⁵ against the legislation resulted in fewer than 3,000 responses.

Point of Sale Display (POS) prohibition

21. Clause 19 of the Health Bill sets out a new section 7A of the Tobacco Advertising and Promotion Act making it an offence to display tobacco products in a place or on a website in England, Wales or Northern Ireland, with exclusions and defences set out in 7B and displays on a website in 7D. Clause 18 sets out an exemption for specialist tobacconists. The detailed definitions will be set out in regulations.
22. The “appropriate Minister” for the purposes of the Bill will be the Secretary of State (in relation to England) the Welsh Ministers (in relation to Wales) and the DHSSPSNI (in relation to Northern Ireland). A detailed explanation of the Bill is set out in the explanatory notes.¹⁶

POS display prohibition – the evidence

23. There is good evidence to support the prohibition of display of tobacco products as both proportionate and necessary for our children’s health.
24. Tobacco advertising and promotion have been shown to encourage children to smoke, which was the justification for the Tobacco Advertising and Promotion Act (TAPA) 2002.¹⁷ Since this Act was passed, cigarette packaging has become the most potent remaining form of advertising for tobacco products, and the tobacco industry has spent large amounts of money on point of sale displays. For example, Imperial Tobacco has stated that because of advertising restrictions, cigarette packs and their display in retail outlets are now a major marketing tool and that pack redesign alone had increased their share of the market.¹⁸
25. Research contained in a report for Cancer Research UK has found that¹⁹:
 - Since the ban on advertising was implemented in 2003 (TAPA) point of sale has taken over as the most important source of tobacco marketing for young people. In 2006 almost half (46%) of UK teens were aware of tobacco marketing at POS.

¹⁴ Consultation on the future of tobacco control: consultation report. DH. December 2008.

http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382

¹⁵ The “Freedom Organisation for the Right to Enjoy Smoking Tobacco” – a lobby group established and funded by the tobacco industry.

¹⁶ <http://services.parliament.uk/bills/2008-09/health.html>

¹⁷ Smee et al (1992) Effect of tobacco advertising on tobacco consumption: a discussion document reviewing the evidence. Department of Health 1992.

¹⁸ Imperial Tobacco, UBS Tobacco Conference, 01 December 2006, London

¹⁹ Point of sale display of tobacco products. The Centre for Tobacco Control Research. August 2008. http://info.cancerresearchuk.org/images/pdfs/tobcon_pointofsalereport1

- Whilst TAPA has reduced overall awareness of tobacco promotion, and brands among the young, awareness of new pack design/size has increased from 11% to 18%.
- When other risk factors are controlled for, the likelihood of young people who have never previously smoked to start smoking increased with greater brand awareness, and awareness of tobacco marketing at point of sale.
- International evidence suggests that removing packs from sight at point of sale could reduce adolescents' exposure to cigarette brand impressions in stores by as much as 83%.

26. POS display prohibitions have already been implemented in a number of jurisdictions with others on the way:

- Iceland (from August 2001)
- Canada (12 out of 13 provinces have now passed legislation; implementation started with Saskatchewan in 2002)
- Thailand (from September 2005)
- Ireland (legislation due to come into effect in 2009)
- Norway (awaiting EEA/EU approval)
- New Zealand (consulted on and expected to be implemented in 2009)
- Australia (due to come into force in Tasmania and Victoria in 2011, consultations completed in New South Wales and Queensland)
- Scotland (under consideration by the Scottish Parliament)

27. Industry counter arguments The tobacco industry and other business lobby groups have attempted to argue that ending point of sale displays could make smoking more glamorous to young people and therefore fail to reduce prevalence rates, but there is no evidence to support this assertion. Indeed there is clear evidence to the contrary.

28. POS bans reduce youth smoking For example, the Public Health Institute of Iceland's survey of 10th graders (aged 15-16) shows a significant fall in youth smoking from 18.6% in 1999 (two years' prior to the cigarette display ban) to 13.6% in 2003 (two years after the ban came into effect). This is twice the rate of decline in the previous 4-year period.²⁰ **(see paragraph 82-87 for detailed rebuttals of the industry arguments).**

29. Similar trends have been found in Canada where such legislation has now been implemented in a number of provinces.²¹

30. POS bans help smokers trying to quit There is also good evidence that retail display encourages 'impulse buying' so undermining smokers' attempts to quit.²²

31. For more information on the evidence base for prohibition of display at point of sale see the ASH briefing²³ and the report for Cancer Research UK.¹⁹

POS display prohibition – impact assessment

²⁰ The European School Survey Project on Alcohol and Other Drugs (ESPAD).

www.espad.org/sa/node.asp?node=730

²¹ Canadian Tobacco Use Monitoring Survey.

http://www.hc-sc.gc.ca/hl-vs/tobac-tabac/research-recherche/stat/ctums-esutc_2008-eng.php

²² Wakefield M. The effect of retail cigarette pack displays on impulse purchase. *Addiction*. Nov 2007

<http://www.addictionjournal.org/viewpressrelease.asp?pr=69>

²³ ASH briefing: Tobacco Displays at the point of sale.

http://www.ash.org.uk/files/documents/ASH_701.pdf

32. **The DH Regulatory Impact Assessment**³ finds a substantial benefit from the proposed legislation. The benefits of prohibition of retail display are found to exceed the costs if at least 475 children do not start smoking each year. This is a very small reduction given each year 340,000 children under 16 try smoking and the RIA estimates that up to 2,786 fewer young people will start smoking each year as a result of this policy.
33. The DH has estimated the capital cost to be a total of £66 million spread over three years, an average of £1,000 for each of the 66,000 retail outlets selling tobacco.³
34. **Evidence from other jurisdictions** has shown that the cost of adjustment for retailers is likely to be significantly lower than this as tobacco companies are likely to bear much of the cost. In Canada the tobacco industry funds marketing costs to retailers to handle and sell their products, including paying for gantries, and has continued to do so even once display bans come into effect.²³
35. Canadian data published by Health Canada shows that the amount of money being paid by the tobacco industry to retailers has actually risen over the time when point of sale display bans have come into operation, from a total of £45 million in 2002 to £63 million in 2007 (current exchange rates).²⁴
36. The Association of Convenience Stores, the retailers trade body, admits in its response to the DH consultation that the tobacco industry often pays for gantries in this country too.²⁵ Unfortunately we do not have access to published data on this as is the case in Canada.
37. **The Department of Health should be urged to require the industry to report on marketing spend** as is the case in Canada²⁶ so an effective track can be kept of industry marketing developments.

POS display prohibition – implementation

38. There are around 66,000 retailers selling tobacco, of which around 50,000 are small businesses.³ Small businesses are understandably particularly concerned about the potential impact of the legislation on their business. There is, however, no evidence from jurisdictions which have brought in POS display bans that there are significant difficulties for small businesses in bringing it into effect and compliance levels have been high from the start.⁶²
39. The government has quite rightly committed to consult widely on the regulations to ensure that the concerns of affected businesses are fully taken into account in their drafting. The key issues will be the timing of implementation and the conditions placed on retailers in prohibiting display.
40. **Timetable** After the final regulations have been published, it is envisaged that *“larger retailers will be given at least 18 months to comply and smaller retailers would have an additional two years.”*²⁷ This is not unreasonable on the basis that the final regulations should be available from at least by March 2010 and

²⁴ Source: Data provided to ASH by Health Canada.

²⁵ Association of Convenience Stores Consultation Response on the ‘Future of Tobacco Control’. August 2008

²⁶ Health Canada Tobacco Reporting Regulations 2002.

²⁷ Impact Assessment of prohibiting the display of tobacco at point of sale. DH January 2009. Page 4 point 9

commenced and enforced from October 2011 for larger stores and October 2013 for smaller stores.

41. It is crucial, given that there is likely to be an election between the passing of the Health Bill into law, that parliament makes clear its commitment to bringing this legislation into force. **The timetable is not on the face of the Bill but the government could, and should, be pressed to include it in the consequent regulations with an extended timetable for small retailers.** A precedent for this is set out in Smokefree regulations where a timetable was set out in the published regulations with a temporary exemption for mental health units.²⁸
42. **Definition of size of business** The definition of 'smaller' and 'larger' has not yet been decided. One option would be to use the definition of 'small shops' currently in existence for the purposes of Sunday Trading Act (1994), whereby small shops are those up to 280 square metres (3,000 square feet). The Act is enforced by trading standards officers, who will also be responsible for enforcing the point of sale display law, and there will be clarity for shops about which category they belong to.²⁹
43. **Compliance and enforcement** The regulations on how tobacco products can be kept in shops will need to be such as to ensure compliance and enforcement are made as simple and easy as possible, to the benefit of the retailer, enforcement officers and the general public. The DH Regulatory Impact Assessment states that *"Very low-cost compliance options such as screens or curtains are available if the retailer chooses."*³⁰ Such solutions would not ensure either easy compliance or enforceability and should not be supported.
44. The minimum requirement should be a method which would default to compliance. For example, in Canada, and in Thailand, a low cost option of a system of hinged slats for each shelf has been developed which can easily be attached to an existing gantry. Gravity ensures that the slats cover the display, until they are lifted up by the retailer to remove a product.³

Prohibition of the sale of tobacco from vending machines

45. Subsection (1) of clause 20 inserts a new section 3A (sales from vending machines in England and Wales) into the 1991 Act. New section 3A provides power for the appropriate national authority (defined as the Secretary of State in relation to England, and the Welsh Ministers in relation to Wales) by regulations to prohibit, or impose requirements on the sale of tobacco from vending machines.
46. The UK should meet its obligations under the WHO Framework Convention on Tobacco Control (FCTC) to ensure that vending machines selling cigarettes are not accessible to minors. This can only effectively be achieved by ending cigarettes sales from vending machines altogether, as recommended in the recently adopted guidelines on Article 13 to the WHO FCTC.⁷
47. **This could be achieved by amendments to the legislation to remove all**

²⁸ The Smoke-free (Exemptions and Vehicles) Regulations 2007 http://www.opsi.gov.uk/si/si2007/uksi_20070765_en_1

²⁹ BERR guidance on Sunday Trading laws <http://www.businesslink.gov.uk/bdotg/action/layer?topicId=1074014065>

³⁰ Impact Assessment of prohibiting the display of tobacco at point of sale. DH January 2009. Page 6 point 14.d

options apart from a straightforward prohibition. Amendments will be laid after second reading for which we seek your support.

48. This would bring the UK in line with a large number of other European countries. There are currently 22 countries in Europe which ban or have never allowed sales from cigarette vending machines, including France, Norway and Poland.³¹

Vending machines – the evidence

49. It is estimated that there are around 70,000 tobacco vending machines in the UK, not including Scotland, nearly 80% of which are in public houses.³ However, their location has not inhibited youth access. On the basis of Government statistics showing that 17% of regular smokers aged 11-15 usually buy their cigarettes from vending machines¹⁰ the British Heart Foundation has estimated, that machines are the source of cigarettes for around 46,000 children.³² Ending the sale of cigarettes from vending machines would be an important measure to restrict underage sales of cigarettes and tobacco products.
50. In contrast vending machines are not a regular source of cigarettes for adults. Only 5% of adult daily smokers say they bought cigarettes from vending machines over the last six months.³³
51. Since the increase in the age of sale from 16 to 18 it is now much more likely that under-age smokers will be able to buy cigarettes from vending machines.
52. A survey by the local government regulatory body LACORS, reporting on test purchases carried out by trading standards officers, showed a rise in under-age sales in the six months from October 2007 to March 2008. In particular, young people were able to buy cigarettes from coin-operated vending machines on more than four in ten occasions, with a number of councils reporting that test purchases by young people failed to be prevented on any occasion.³⁴ The most recent study found that in eight out of ten test purchases, 15 and 16 year olds were able to purchase cigarettes from vending machines without difficulty.³⁵
53. **Smuggling** The industry claims that prohibiting vending machine sales will increase smuggling but there is no evidence to support this. Vending packs are typically 20% more expensive yet have 20% fewer cigarettes. This high cost, low volume convenience market is the opposite of the low cost, high volume illicit market.

Vending machines – impact assessment

54. The three options examined in the regulatory impact assessment³ (RIA) are:
- (Option 1) Retain the status quo, including the voluntary NACMO guidelines on the siting of vending machines.
 - (Option 2) Introduce age restriction mechanisms onto all tobacco vending

³¹ The European Tobacco Control report, WHO 2007. Page 69
<http://www.euro.who.int/document/e89842.pdf> (accessed 7 Nov 08)

³² Briefing note on EDM 2502 on tobacco vending machines. British Heart Foundation, October 2008

³³ Omnibus survey of adults in England. Fieldwork was conducted between January and April 2008, interviews were conducted with 3,426 adults including 822 current and recent smokers.

³⁴ Lacors. Test purchasing of Tobacco Products. Results from Local Authority Trading Standards. 1 October-31 March 2008.

³⁵ East of England Trading Standards Association. Test purchasing of Tobacco Products. July 1st – October 31st 2008.

machines. Systems in place elsewhere include:

- (a) Electronic age verification using an ID card obtained from tobacco companies(used in Germany, Netherlands and Japan);
 - (b) ID coin mechanism obtained from staff (used in Ireland);or
 - (c) Remote control by staff member (used in New Zealand)
- (Option 3) Prohibit the sale of tobacco from vending machines.

55. **Option 2a** is in operation in a number of jurisdictions. In Florida proof of age is required to buy cigarettes and enforcement is rigorous. A test case compliance study showed that one third of attempts by minors to access cigarettes through vending machines were successful. A report by the American Lung Association concludes that “*a ban on vending machines is the most effective way to reduce youth access to vending machines*”.³⁶ Age verification cards have also been issued in Japan to tackle underage sale of cigarettes, but the evidence shows that underage smokers manage to circumvent the system by borrowing age verification cards from friends, family or falsifying cards with photos of older people.³⁷
56. **Options 2b and 2c** require staff to exercise significant control. To quote the Lacors report on test purchases of cigarettes from retailers, “*Despite a comprehensive national media campaign to advise businesses prior to the change in the age of sale on October 1st, and considerable resources applied at a local level by Trading Standards Services, 19% of businesses still failed to comply with the law and sold tobacco to an underage person.*” What this means is that even when retailers are required to check age of sale there is a significant failure rate, much higher than the 10% assumption for the RIA. There is no reason to assume that the failure rate would be any lower for a remote control purchase system.
57. The best estimate of the net benefit of option 2, (age restrictions) is £265 million and of option 3 (prohibition) is -£245 million.³ It is worth noting that the interim cost benefit analysis for complete prohibition found a positive net benefit of £49 million.¹
58. The costs calculation for the prohibition of sales from vending machines includes £70 million annual opportunity cost of lost tobacco duty. Even if this is an appropriate cost to include, which is arguable given that at least some of the money not spent on tobacco is likely to be spent on other taxable goods which will also benefit the Exchequer, this £70 million “*opportunity cost*” is significantly higher than the £39.6 million estimate in the RIA at consultation stage and much higher than the estimate of £52.5 million a year from the introduction of picture warnings.⁵¹ This needs to be questioned.
59. The impact assessment for option 3 (prohibition) also includes a £21.5 million annual cost to legitimate smokers who no longer have the convenience of vending machines. This seems excessive given that for adult smokers vending machines are not an important source of cigarettes. Indeed two thirds of adult smokers support the idea of tobacco vending machines being available only in age-restricted premises.⁵

³⁶ American Lung Association (ALA) report *State Legislated Actions on Tobacco Issues*. 2007

³⁷ See article on <http://www.pinktentacle.com/2008/06/magazine-photos-fool-age-verification-cameras/> (accessed 7 Nov 08)

60. **The cigarette machine market is dominated by Imperial Tobacco.** The biggest player in the cigarette vending machine market is Sinclair Collis, a subsidiary of Imperial Tobacco with a turnover of £136m per year and 281 employees. Sinclair Collis has 14% of the tobacco vending machine market by value.³⁸
61. **Cigarette machine sales are already in decline** Currently 1 in 10 vending machines in the UK is a cigarette machine, with sales worth £1 billion annually. Cigarettes are a high value product and in 2007 sales amounted to 29% of goods sold by vending machine by value, but sales are declining and by 2012 this is expected to fall to 22%.³⁸ Between 2006 and 2007 it is estimated that the number of cigarette vending machines in use in the UK declined by 8%.³⁸
62. **The UK is a net importer of vending machines** Vending machines contribute £10m to the UK trade deficit. The UK's £60m export market in vending machines will be virtually unaffected by prohibiting tobacco sales from vending machines, but imports are likely to decline.³⁸

Vending machines – implementation

63. **Timetable** The DH press statement on 9 December 2008 stated that *“We have committed to applying age restrictions first, from October 2011, and assessing whether underage access is still a problem in 2013. If it is, we will then use the power to ban vending machine sales.”*³⁹
64. Age restriction mechanisms are expensive and difficult to enforce. A more effective alternative to complete prohibition would be only allowing tobacco vending machines to be sited in premises which are restricted to those 18 and over.

Plain Packaging

65. **Department of Health Definition¹:**
“Plain packaging, also known as generic, standardised or homogeneous packaging, means that the attractive, promotional aspects of tobacco product packages are removed and the appearance of all tobacco packs on the market is standardised. Except for the brand name (which would be required to be written in a standard typeface, colour and size), all other trademarks, logos, colour schemes and graphics would be prohibited. The package itself would be required to be plain coloured (such as white or plain cardboard) and to display only the product content information, consumer information and health warnings required under the law.”
66. Plain packaging has not yet been put into effect in any jurisdiction, but has been under consideration in Canada since the 1990s, and is now under active consideration by Australia, Brazil, the European Commission and France, as well as the UK. It has also been recommended by the Chief Medical Officer in his annual report.⁴⁰

³⁸ Key Note Market Report on Automatic Vending. February 2008.

³⁹ Department of Health (National) press release. Johnson stubs out recruitment of young smokers. Tuesday 9 December 2008

⁴⁰ Chief Medical Officer. Annual report of the CMO 2003. Department of Health.

67. The tobacco industry is more concerned about plain packaging than it is about retail display prohibition. After the Department of Health announced it was considering plain packaging the front page story in the key industry journal was headlined *"Plain packaging can kill your business"*.⁴¹
68. Amendments will be laid after second reading to give the government reserve powers to bring in plain packaging by regulation for which we seek your support.

Plain packaging – the evidence

69. **Government view** In its announcement of the legislation on 9 December 2008, the Department of Health stated that *"Whilst support was clear for the idea of plain tobacco packaging to prevent promotion of tobacco products, the evidence base needs to be developed. The Government has committed to keep this under review and build on the evidence before taking further action."*⁴²
70. **Evidence base** In fact, there have already been numerous studies supporting the introduction of plain packaging^{43 44}; including research carried out recently for ASH specifically with young people which has found that young people find cigarettes in plain packaging less attractive and smokers are less likely to be misled about the safety of the cigarettes they smoke.⁸
71. Packaging is the most ubiquitous form of tobacco advertising. Since the introduction of the Tobacco Advertising and Promotion Act, packaging has become increasingly sophisticated and appealing with careful use of imagery, colours and design. Each smoker displays their brand every time they take their pack out to smoke. Cigarette packaging has been called *"the silent salesman"*. Since 2002, the number of cigarette brand variants has more than doubled as the tobacco companies increasingly use the pack itself as a promotional tool.⁴⁵
72. **Tobacco industry in its own words** The importance of pack design in branding and promotion is explicitly recognised by the tobacco industry in its own documents.^{46 47 48} Imperial Tobacco in the UK has stated that *"additional brands and pack design in the United Kingdom have a significant impact on profit improvement"*. Imperial's Global Brand Director Geoff Good said in December 2006 that pack re-design had been worth *"over £60 million in additional turnover and a significant profit improvement... the UK had become a dark market, the pack design was the only part of the mix that was changed and therefore we knew the cause and effect"*.⁴⁹

⁴¹ Tobacco Journal International. September 2008.

⁴² http://www.dh.gov.uk/en/News/Recentstories/DH_091689

⁴³ Beede, P. Lawson, R. "The Effect of Plain Packages on the Perception of Cigarette Health Warnings" Public Health 1992;106:315-322.

⁴⁴ d'Avernas, J.R., Northrup, D., Foster, M.K., Burton, D., Ferrence, R., Pollard, J., Rootman, I., Flay, B.R. "Cigarette Packaging and Event Marketing Increases the Attractiveness of Smoking: A Study of Youth". Ontario Tobacco Research Unit, Working Papers Series No. 28, October 1997.

⁴⁵ Pricechecker 1998, 2003, Safeway and Bookers price list

⁴⁶ Donald Brown, Imperial Tobacco Vice-President of Marketing, RJR-Macdonald Inc. v. Canada (Attorney General), Quebec Superior Court, Transcript, September 28, 1989, p.661.

⁴⁷ Pollay, R.W. "The Role of Packaging seen through Industry Documents" March 2001, Exh. D-166, JTI-Macdonald v. Canada (Attorney General), Quebec Superior Court, 2002.

⁴⁸ Wakefield, M., Morley, C., Horan, J.K., Cummings, K.M., "The cigarette pack as image: new evidence from tobacco industry documents" Tobacco Control 2002; 11(Suppl 1): i73-i80.

⁴⁹ Imperial Tobacco. UBS Tobacco Conference. December 2006 http://www.imperial-tobacco.com/files/financial/presentation/011206/ubs_transcript.pdf

73. The evidence in favour of prohibition of retail display also supports the introduction of plain packaging as it is the pack which is used to promote the product in retail displays.
74. **Legal opinion** According to a recent opinion from a former Lord Justice of Appeal, the form of packaging currently in use by the tobacco industry, and therefore its use in displays in shops, meets the definition of advertising set out in the 2003 EU Directive on tobacco products which is '*any form of commercial communication with the aim or direct or indirect effect of promoting a tobacco product*'.
75. **To summarise**, plain packaging would reduce tobacco consumption by:⁵⁰
- Preventing the pack from being used to advertise the product;
 - Increasing the effectiveness of health warnings; and
 - Making it less likely that smokers would be misled about the relative safety of different brands.

Plain packaging – impact assessment

76. There was no regulatory impact assessment for plain packaging in the DH Consultation.
77. **Benefits** There is evidence that plain packaging is likely to reduce smoking uptake amongst young people and it is not unreasonable to assume that it will have an impact as significant as that of prohibiting retail display, of reducing smoking uptake amongst young people by between 579 and 2,786 fewer smokers a year.³
78. **The implementation costs will be limited.** The DH RIA on tobacco picture warnings estimated that the one off costs of introducing picture warnings on all tobacco products ranged between £3.4 to £4.1 million a year.⁵¹ This is likely to be a maximum cost for implementation of plain packaging as picture warnings are considerably more complex.
79. **Enforcement costs** As with health warnings there would be no extra enforcement costs as enforcement arrangements would not change and Trading Standards Officers would enforce plain packaging as they do health warnings.
80. **Ongoing costs to the tobacco industry** There will also be ongoing costs to the tobacco industry resulting from a decrease in smokers, however, as the DH states in the regulatory impact assessment on retail display lost manufacturers' profit from reduced tobacco sales is "*largely not an economic cost as it is offset by increased expenditure (and profit) elsewhere in the economy*".⁵²

⁵⁰ Plain packaging of tobacco products – Implementation needed. Canadian Cancer Society 2008.

⁵¹ The introduction of picture warnings on tobacco packs: final regulatory impact assessment. DH August 2007.

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_077961

⁵² Impact Assessment of prohibiting the display of tobacco at point of sale. DH January 2009. Page 9 point 19 c.

Appendix 1 Tobacco Industry arguments rebutted

81. The tobacco industry has repeatedly misrepresented the evidence to delay regulation: first denying smoking caused cancer and more recently that secondhand smoke is not deadly. The core tactics are to:
- **Create uncertainty:** According to one tobacco executive *“doubt is our product since it is the best means of competing with the body of fact that exists in the minds of the general public. It is also the means of establishing controversy”*.⁵³
 - **Challenge causality:** On the advice of PR advisors the tobacco industry has consistently emphasised three points: *“that cause and effect relationships have not been established in any way; statistical data do not provide the answers and that much more research is needed”*.⁵³
 - **Use “Third party” advocates:** The tobacco industry has consistently used apparently independent researchers and front organisations as message carriers to undermine health research and create the impression of unbiased scientific opinion in support of their interests.⁵⁴
 - **If you can't win, delay:** Argue the evidence at each step to delay and discourage future reforms. In a presentation to the Board of Directors, Philip Morris International's Head of Government Affairs described the strategy as throwing *“sand in the gears”* of regulatory reform.⁵⁵

Tobacco industry claims that retail display won't reduce youth smoking

82. Data from Iceland and Canada are mis-used by the Tobacco Manufacturer's Association (TMA)⁵⁶ to support this assertion.
83. The Public Health Institute of Iceland, a statutory body of the Icelandic Government has written to complain about inappropriate use of their data by the tobacco industry and its front organisations. The data cited by the TMA is of a small sample of 15-19 year olds (in 2007 the sample size was 322) with a confidence interval of +/- 4% which means that it does not accurately measure changes in youth smoking prevalence.⁵⁷
84. The Public Health Institute of Iceland recommends using instead the ESPAD data which measures smoking prevalence among 15-16 year olds and includes 80-90% of the age group in question. The results are therefore much more reliable and show a significant decline in smoking prevalence amongst young people over the time the legislation came into effect. **(see paragraph 28).**
85. Despite the letter and the provision of more reliable data, the TMA and other industry lobbyists have persisted in their claims and indeed in the TMA briefing for peers criticises the DH for using the data recommended by the Public Health Institute of Iceland.

⁵³ Michaels D, Monotforton C. Manufacturing Uncertainty: Contested science and the protection of the public's health and environment. *AJPH* 2005; 95(81) (suppl):S39-48

⁵⁴ Landman A, Cortese DK, Glantz S. Tobacco industry sociological programmes to influence public beliefs about smoking. *Soc Sci Med* 2008;66:970-981

⁵⁵ Muggli E et al. The smoke you don't see: Uncovering tobacco industry scientific strategies aimed against environmental tobacco smoke policies. *AJPH* 2001;91(9):1419-1424

⁵⁶ Tobacco Manufacturers' Association briefing on the Health Bill 2009 – Proposals to ban the display of tobacco products at the point of sale. January 2009.

⁵⁷ Jonsson SH. Letter to Tobacco Retailers Alliance copied to the Tobacco Manufacturer's Association and FOREST. Public Health Institute of Iceland, 26 November 2008

86. The TMA also misuses Canadian data to state categorically that *“the display ban did not reduce youth smoking”*.⁵⁸ Firstly, the Canadian Tobacco Use Monitoring survey⁵⁸ which it quotes has only small sample sizes for each province so the figures need to be treated with caution and are not statistically significant. Secondly the TMA misleadingly compares adult smoking prevalence rates in Saskatchewan with youth smoking rates across Canada and claims incorrectly that smoking among youth in Saskatchewan increased.⁵⁸
87. Finally, the legislation in Saskatchewan was suspended in October 2003 and only came back into effect in 2005. Over this longer time period smoking prevalence amongst 15-19 year olds in the province has continued to decline to 25% in 2005 and 22% by 2007.⁵⁸ The sample sizes are small but the survey results contribute to a wider body of evidence that youth smoking rates decline after a retail display ban is introduced.

Tobacco industry claims of high costs to retailers

88. A Tobacco Retailers Alliance (TRA) commissioned report⁵⁹ on the impact of POS display asserts that the costs of the legislation will far outweigh the benefits. This report was funded by the tobacco industry, through the Tobacco Manufacturer's Association which funds the Tobacco Retailers' Alliance.
89. This report and the TMA briefing for peers both assert that the DH estimate of costs is 'uncorroborated' but the DH estimate is based on Canada where the average actual compliance cost has been found to be significantly lower at only £550.³
90. The evidence set out in the tobacco industry funded report has been fully taken into account in the final RIA and found wanting. The calculations of costs in the report are unrealistically high, including estimates that:
- Capital costs of changing displays would be at least £427.5 million
 - Additional transaction costs would amount to a further £100 million, increasing ongoing costs to be in excess of £830 million at net present value; and that as a result
91. The trade itself has widely differing views on the capital costs. The Association of Convenience Stores (ACS), an independent trade body not linked to the tobacco industry, estimates that at most *“the cost for retailers of refitting their stores to comply with a display ban could be as high as £252 million pounds”*,⁶⁰ not much more than half the tobacco industry-funded assessment.
92. The tobacco industry-funded report's estimates of the ongoing costs of £100 million a year is also high and is based on assumptions that transaction time will be increased.⁵⁹ There is no reason why this should be the case, as there is good evidence that well over 90% of smokers have already decided what brand to buy before entering the shop.⁶¹

⁵⁸ Canadian Tobacco Use Monitoring Survey.

<http://www.hc-sc.gc.ca/hl-vs/tobac-tabac/research-recherche/stat/index-eng.php>

⁵⁹ Centre for Economics and Business Research (2008). A review of the DH regulatory impact assessment on banning point of sale of tobacco undertaken by CEBR on behalf of the Tobacco Retailers' Alliance.

⁶⁰ Association of Convenience Stores. Consultation response on 'The Future of Tobacco Control'. ACS 2008.

⁶¹ BMRB Omnibus Survey, August 2008. Commissioned for Cancer Research UK.

93. The report also asserts that there will be additional costs due to increased theft and workplace injury⁵⁹, without providing any evidence. In other jurisdictions where point of sale display has been prohibited this has not been the case, indeed in Saskatchewan, when the legislation was reversed for a period of time many retailers kept tobacco out of sight on the basis that it reduced the likelihood of robbery.⁶²

94. Other additional costs referred to include:

- Increased stock-taking/restocking time;
- Additional storage space requirements;
- Increased use of black market cigarettes; and
- Cost of replacement 'focal point' stock.

None of these have been found to be significant problems in other jurisdictions which have brought in point of sale display bans.⁶²

Tobacco Industry claims that it will put small retailers out of business

95. The prohibition of retail display is not expected to reduce consumption significantly, but only to discourage youth uptake and relapse by smokers trying to quit, so it is not expected to have a significant effect on total sales.³

96. The tobacco-industry funded report claims that 2,600 stores could stop being profitable leading to a loss of 8,000 jobs.⁵⁹ This assumes that there will be displacement of tobacco sales from small to larger retailers. Given that smaller retailers will have a longer run-up time there does not appear to be a logic for this assumption, indeed to quote the DH RIA *"we do not accept that there is a rational reason why such displacement will occur"*.⁶³

97. The TMA goes further and claims that tobacco is *"crucial to the viability of small shops"* and that *"about a third of the income of small shops is derived from tobacco sales"*.⁵⁶ However, tobacco products are low margin products so are much less significant in terms of net profits. Small retailers ASH has talked to estimate tobacco accounts for less than 5% of their profits.

98. The TMA briefing also claims that in Iceland *"the total number of tobacco sales outlets has declined from 1100 in 2001 to the present 800"*. Key points to note are that:

- This is the number of outlets which stopped selling tobacco. It does not mean that they went out of business;
- Indeed the TMA admits that the types of outlets affected were those with a low turnover in tobacco sales;
- As there is no data from before the legislation was implemented it is not clear whether this decline was a result of the ban or a continuation of a pre-existing trend.

Tobacco industry claims that POS display bans will increase smuggling

99. The TMA asserts that prohibition of retail display will encourage the illicit trade in tobacco. There is no evidence of this from other jurisdictions. Smuggling is a serious issue which needs tackling at local, national and international level.

⁶² Thomson G, Edwards R, Hudson S. Out of sight: Evidence on the retail environment in New Zealand and overseas. University of Otago, Wellington, New Zealand. February 2008.

⁶³ Impact Assessment of prohibiting the display of tobacco at point of sale. DH January 2009. Page 11 point 26.

Tobacco industry claims that tobacco displays have not significantly changed since the advertising ban

100. Whether they have or not is irrelevant as they are clearly being used to get round the advertising ban. A recent survey of 153 stores by trading standards officers⁶⁴ found that:
- In all premises the packs are prominently displayed near checkouts in such a way as to promote the product to customers.
 - Display gantries are clearly used as a marketing tool.
 - The display area was always significant in size with the largest display found to be 3.6 m x 1.9m.
 - In 19% of premises the health warnings on the packs were obscured by shelf markers.
 - In 53% of premises confectionery was placed within 1 metre of tobacco sales.
- For photos illustrating the above see the report on the ASH website at: http://www.ash.org.uk/files/documents/ASH_693.pdf

Tobacco industry claims that the government is ignoring alternative measures to tackle underage smoking

101. The legislation is in fact part of a new national plan to continue to drive down smoking prevalence which centres around protecting children. This was consulted on by the Department of Health in 2008 and is due to be published in 2009. Only the measures requiring legislation are mentioned in the Bill. The new national plan will build on the current strategy which already includes measures:
- Supporting smokers to quit;
 - Reducing exposure to secondhand smoke;
 - Running effective communications and education campaigns;
 - Reducing tobacco advertising, marketing and promotion;
 - Regulating tobacco products; and
 - Reducing the availability and supply of tobacco products (including by increasing the price through taxation and tackling tobacco smuggling).

⁶⁴ MacGregor, J. *Tobacco Advertising at Point of Sale*. 2008.
http://www.ash.org.uk/files/documents/ASH_693.pdf