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Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

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Dear David,

Public Health (Wales) Bill

I would like to thank you and the Committee for the opportunity to discuss the Public Health (Wales) Bill on 21 October 2015.

I am pleased to provide the Committee with further information on the following issues, which were raised during the session and in your subsequent letter, dated 27 October:

a) clarification on whether tattooing, as defined within the Bill, would encompass similar procedures such as ‘tashing’;

b) details of how the Welsh Government intends to amend Part 4 of the Bill (Intimate Piercing) to include tongue piercing;

c) discussions the Welsh Government has had with professional bodies representing electrolysis in developing the Bill, and the Welsh Government’s response to the British Institute and Association of Electrolysis’ suggestion that its members should be exempt from the licensing requirements under the Bill;

d) the Welsh Government’s interpretation of how a number of scenarios would be dealt with under Part 2 of the Bill (Tobacco and Nicotine Products); and

e) an update on the Secretary of State consents required for the Bill, in relation to Sections 4(7), 5(6) and 11(7), and paragraphs 6 and 9 of Schedule 1.

This information is presented below.

Definition of 'tattooing'

It is the Welsh Government's view that the current definition of tattooing is broad enough to cover similar procedures such as 'tashing'. 'Tashing' is the use of cremated remains in the act of tattooing. We believe that the ash would be classed as a "colouring material" designed to leave a semi-permanent or permanent mark, and so captured by the current definition. Further, if the ash was to be mixed with other pigments (normal tattoo dye), then both the ash and the pigment would be considered colouring materials and captured by the definition of tattooing.

Tongue piercing

Committee Members will be aware that a tongue piercing is a body piercing usually done directly through the centre of the tongue to allow jewellery, typically of the barbell type, to be placed. It is a procedure that has gained in popularity in recent years, and is no longer considered an "extreme" piercing.

I have closely followed the evidence provided to the Committee during Stage 1 by a number of stakeholders who put forward a view that the list of intimate body parts in Part 4 of the Bill should be extended to cover tongue piercings. I have given careful consideration to this issue and, on the basis that tongue piercing can cause particular health complications and damage to teeth, I can confirm that I intend to bring forward a Government amendment at Stage 2 to add the tongue as an intimate body part within Part 4 of the Bill. This would have the effect of prohibiting the performance of, or making arrangements to perform, a tongue piercing on a child under the age of sixteen years in Wales.

During the Committee session on 21 October, I also offered to clarify my current policy position in relation to tongue splitting. Tongue splitting is a type of extreme body modification in which the tongue is cut centrally from its tip to as far back as the underside base, forking the end.

Whilst body modification procedures such as tongue splitting are not currently captured by the Bill, the legislation would enable the Welsh Ministers to amend, via regulations, the list of special procedures in the future. This provision is intended to enable the list to remain flexible and respond to changing practices and societal trends. As I indicated at the session on 21 October, my current position is that it is most appropriate to initially regulate the four procedures currently covered by the Bill (body piercing, tattooing, acupuncture and electrolysis). This will capture a high proportion of the procedures being performed in Wales, and enable local authorities to embed enforcement activity in these areas in the first instance. The list could then be reviewed and amended if necessary over time, in order to respond to new evidence and trends in this rapidly evolving area.

Electrolysis

My officials engaged with professional bodies representing electrolysis practitioners, such as the British Institute and Association of Electrolysis (BIAE), during the development of

the Bill. These bodies were notified of the public consultation events, and invited to comment on the proposals in the White Paper.

I note the suggestion made by BIAE that its members should be exempt from the licensing requirements. The Bill provides the Welsh Ministers in section 49(3) with a regulation-making power to exempt individuals who are (a) members of a profession; and (b) are registered in the capacity of a member of that profession in a qualifying register. A qualifying register is defined in section 49(4) as a register maintained by the Health and Care Professions Council that is specified in regulations, or a voluntary register accredited by the Professional Standards Authority for Health and Social Care and specified in regulations. The regulation-making powers in section 49(3) and (4) are designed to allow flexibility to exempt those professions who are already subject to a robust regulatory regime which meets or goes further than that required by the special procedure licensing provisions.

In order for members of any body to be exempt from the licensing requirements under the Bill, the relevant regulatory regime would have to meet these criteria. This process applies to electrolysis in the same way as the other special procedures such as acupuncture. I am not aware that the BIAE voluntary register currently meets the criteria set out above.

Scenarios under Part 2 of the Bill (Tobacco and Nicotine Products)

In your letter you asked for my view on how a number of specific scenarios would be dealt with under Part 2 of the Bill. My interpretation of these is set out below.

As a general point, the Statement of Policy Intent document makes clear the intention that the Welsh Ministers will make regulations under section 10(1) of the Bill to provide for exemptions from the smoke-free requirements. These regulations will be subject to consultation and debate. In making the regulations, we will consider whether any exemptions are required for private dwellings used as workplaces. Guidance will accompany the regulations to assist enforcement authorities.

Scenario 1 – A member of the clergy working from home, working ‘indefinable’ hours given the nature of the work.

Section 6 of the Bill provides that, if no relevant exemptions are made under section 10, a part of a dwelling that is a workplace is smoke-free, but only during the time it is being used as a place of work.

The relevant parts of a clergy member’s dwelling would therefore only be smoke-free when actually being used as a place of work. This would be determined by applying the ordinary, day to day, meaning of ‘being used as a place of work’. Even if a person’s working hours were generally considered to be ‘indefinable’, a Court could still determine whether, on an ordinary interpretation, the premises were in fact being used as a place of work at a specific time.

Scenario 2 – A person who works from home during the hours of 9am to 5pm, but takes a work call in his / her lounge at 8pm, and checks work emails on his / her laptop or phone every 15 minutes during the night. The home is a workplace.

Similarly to Scenario 1, the question of whether taking a work-related telephone call or checking work emails every 15 minutes throughout the night constitutes using the relevant parts of the premises 'as a place of work' would be determined by reference to its ordinary, day to day, meaning. In this scenario, the Court would consider whether receiving one work-related telephone call would be sufficient to make the lounge a place of work, or whether checking work emails throughout the night would be sufficient to make, for example, a bedroom, a place of work.

If, on an ordinary interpretation, the lounge and/or bedroom were considered to be being used as a place of work, only those parts of the premises would be required to be smoke-free, and only when the relevant work activity (taking the telephone call, checking work emails) takes place.

Scenario 3 – How does the Bill address Scenario 2 where the home is a studio flat.

The premises would only be smoke-free when actually being used as a place of work. Again, the question would be determined through the application of the ordinary day to day meaning of 'being used as a place of work'.

If the premises are being used as a place of work and there are no distinct parts to the studio flat, the whole of the premises would be smoke-free, but only during the time that they are used as a place of work. If the studio flat has more than one part, only the part that is used as a place of work would be smoke-free.

Scenario 4 – A person works from home, but the kitchen is not used as a workplace. The person smokes in the kitchen during working hours (which is allowed) but smoke drifts from the kitchen into the working area of the home (e.g. the kitchen is separated from the working area by nothing more than an open archway). The home is a workplace.

Section 4 of the Bill provides that it is an offence to smoke in smoke-free premises. Section 6(3) provides that, in relation to workplaces, if only part of the premises is being used as a place of work, the premises are only smoke-free to that extent.

Therefore, in this scenario, if the kitchen is considered on an ordinary day to day interpretation to be a different 'part' of the premises to the adjoining room, the smoke-free requirements will not apply to the kitchen. However, if the kitchen is considered on an ordinary day to day interpretation to not be a different 'part' of the premises to the adjoining room, the smoke-free requirements will apply to the kitchen.

Secretary of State consent

The Secretary of State for Wales wrote to the First Minister on 28 October 2015 in response to our formal request for Secretary of State consent for provisions in the Bill. The letter provides the required consent for sections 4(7), 5(6) and 11(7) of the Bill and paragraphs 6 and 9 of Schedule 1. I am including a copy of this letter for your information. You will note that the section numbers listed in the letter are for the corresponding provisions in the Health Act 2006 where Minister of the Crown functions are being removed (sections 6(8), 7(6) and 8(7), and paragraphs 5 and 8 of Schedule 1).

The First Minister will shortly be responding to the Secretary of State's letter on the matters of clarification requested.

I hope that the information provided in this letter is helpful, and I look forward to the Committee's report on the general principles of the Bill.

Best wishes

Mark Drakeford

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