Submission

By

THE NEW ZEALAND INITIATIVE

To the Associate Minister of Health and the Health Select Committee

on the Government's bill

Smokefree Environments and Regulated Products (Vaping) Amendment Bill

1 April 2020

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1. INTRODUCTION AND SUMMARY

1.1 This submission on Smokefree Environments and Regulated Products (Vaping) Amendment Bill (**the Bill**) is made by The New Zealand Initiative, a think tank supported primarily by chief executives of major New Zealand businesses. The purpose of the organisation is to undertake research to contribute to the development of sound public policies in New Zealand to help create a competitive, open and dynamic economy and a free, prosperous, fair and cohesive society.

1.2 The Initiative has, over the past several years, undertaken research into tobacco harm reduction policies. That research includes *Smoke and Vapour: The changing world of tobacco harm reduction* (2018) and *The Health of the State* (2016). We have maintained a watching brief in this policy area and regularly provide public commentary on policy developments.

1.3 Three of the Initiative's 60+ member companies are in the tobacco industry; they have not been provided any early draft of this submission. The Initiative's work is independent.

1.4 We would welcome the opportunity to speak to the Committee about this Bill.

1.5 We support the premise and purpose of the Bill. There needs to be a regulatory framework for vaping that is fit for purpose, that recognises the harm reduction when smokers switch to reduced-harm alternatives, and that enables as many people as possible to make that switch. We have two broad concerns with the legislation, one substantive and one procedural. In response to those concerns, we suggest improvements to the legislation to enable more people to switch from smoking to vaping. We also recommend that a second round of submissions should be allowed after the Alert Level 4 lockdown has ended, as well as revised reporting dates on the Bill.

1.6 On the substantive matters, we *support* the Bill's pre-notification regime for product ingredients. But we are seriously concerned that measures taken to restrict vaping in public places and in business premises, to restrict advertising of reduced harm alternatives to smoking, to restrict the promotion of reduced-harm alternatives to smoking and to limit the sales of some vaping products to specialist retailers will work to reduce the number of smokers who switch to vaping. The legislation weighs too heavily the risk of non-smokers taking up vaping relative to the benefits of smokers shifting to vaping. The evidence to date, from a period in which vaping has been largely unregulated, is not consistent with any substantial uptake of vaping from non-smokers. There is no 'gateway' path from vaping to smoking.[1]

1.7 Procedurally, we urge that the House extend the deadline by which the Select Committee reports back to Parliament. This legislation is *important,* but it is not *urgent*. Members of the Health Select Committee have more pressing pandemic-related business over the coming month. Ministry officials charged with drafting revisions to the legislation and with examining submissions have more pressing pandemic-related business to attend to over the coming month. Equally important, setting a deadline for submissions that falls within the period of a

[1] See, for example, Shahab L, E Beard and J Brown. "Association of initial e-cigarette and other tobacco product use with subsequent cigarette smoking in adolescents: a cross-sectional, matched control study." *Tobacco Control* 17 March 2020. https://www.ncbi.nlm.nih.gov/pubmed/32184339 The study finds "for adolescents initiation with e-cigarettes is associated with a **reduced risk** of subsequent cigarette smoking" and that "e-cigarettes were unlikely to have acted as an important gateway towards cigarette smoking and may, in fact, have acted as a gateway away from smoking for vulnerable adolescents…". See also expert reaction to that study at the Science Media Centre: https://www.sciencemediacentre.org/expert-reaction-to-study-on-gateway-effect-of-e-cigarettes/

Level 4 lockdown will substantially affect the ability of many vapers to engage with the submission process. Pushing out the reporting deadline will enable the Committee to extend the submission deadline.

2. PROCEDURAL FAIRNESS AND DEMOCRATIC DELIBERATION

2.1 The Select Committee process is important. Submissions by members of the public, non-governmental organisations and companies involved in the legislative area help to inform Parliament about technical matters in the legislation that may need to be improved. And submissions by members of the public affected by regulation can help to inform members of the committee about the real-world effects of proposed regulations.

2.2 Sometimes, the limits of the Government's knowledge of an area are shown dramatically during the Select Committee process. Select Committee hearings on ridesharing, for example, very quickly revealed huge deficiencies in the proposed regulation and in understanding of the area being regulated. This led to substantial improvements in the legislation. It is vitally important that members of the public can engage with the submission process.

2.3 Smokers are disproportionately from severely disadvantaged communities; vaping ex-smokers are from those same communities. While legislators may be familiar with the kinds of vapers more typical in Wellington, New Zealand is broader than that. Wellington is well served by specialist vape shops and many Wellington vapers are from more advantaged communities. That is not true across the country. Restrictions on access to vaping products will have important effects on people living further away from specialist shops, especially in rural areas. The Select Committee must be able to hear from those communities to understand the implications of the proposed legislation.

2.4 It is difficult enough to engage disadvantaged communities with select committee processes in normal times. It is harder to produce submissions when a person relies on computers at the library rather than a home office. It is harder to produce submissions if an individual is unfamiliar with legislative processes. During normal times, community groups can engage with affected members of the public to explain the consequences of proposed legislation, to help them to engage with Select Committee processes.

2.5 During the pandemic lockdown, those usual ways of connecting with harder-to-engage communities are nearly impossible. If one relies on library resources for internet and computer access, a submission cannot be produced. While locked down and struggling to deal with closed schools, incredible uncertainty about employment and difficulty in everyday tasks like shopping, producing submissions on legislation will not be any kind of priority.

2.6 Similarly, convenience stores affected by the legislation will be utterly consumed by pandemic considerations recently—their participation matters.

2.7 Frankly, it boggles the mind that the House of Representatives is spending any time whatsoever on this legislative process during the current pandemic. Vapers will be unlikely to find the time to submit on this process. It is incomprehensible that the Health Select Committee is making this process a priority now. Every Member of the Committee and every official reviewing submissions have far more important things to do – pressing matters that cannot be delayed until after the pandemic.

2.8 On 26 March, the New Zealand Initiative released a short policy document[2] urging that all legislation with submission processes due within the Alert Level 4 period which are not immediately urgent be pushed back to allow for proper democratic scrutiny and consideration, to allow Members of Parliament and officials to attend to more pressing concerns, and to allow members of the community and appropriate opportunity to participate in the process. Where vaping has operated under a form of self-regulation since March 2018, it is impossible to believe that it cannot continue in that form during the period of the pandemic. It is *important,* but it is clearly not *urgent*. If it were urgent, this legislation would have passed through the House over a year ago.

2.9 The simplest explanation for the House's refusal to extend deadlines and suspend this process during the pandemic is that the Government does not wish to hear from vapers affected by this legislation, or considers their views on the legislation to be trivial relative to risking the legislation being tabled for reconsideration after the election. The Government knows vapers will strongly protest many of the legislation's provisions and will testify to the effects of the proposed restrictions on others who may wish to follow their paths out of smoking. If this simplest explanation is the correct one, the Government's refusal to amend deadlines as a consequence of the Covid-19 lockdowns is a deliberate effort to suppress submissions by those who would oppose the Government's proposed legislation. It is deeply antidemocratic.

2.10 I hope that this simplest explanation is incorrect and that the Committee will push out the deadline for submissions until well after the Alert 4 period[3] while asking the House to extend the reporting deadline to allow appropriate time for consideration. The Fair Trading Act Amendment Bill has had submissions extended by four weeks to 26 April. Why not extend the dates for this legislation as well?

3. MATTERS OF SUBSTANCE

3.1 Vaping and other non-combusted alternatives like Swedish snus and heated tobacco products are far less harmful than smoking. Vaping and snus are very low risk.[4] Switching from smoking to less harmful alternatives massively reduces experienced risk.

3.2 Since the court decision in Ministry of Health v Philip Morris in March 2018, uptake of vaping among non-smoking youths has remained very low. The most recent survey, ASH's 2019 Year 10 Snapshot, showed that fewer than 1% of Year 10 students who never smoked reported daily use of e-cigarettes; 3% of year 10 students overall use e-cigarettes. While many youths experiment with vaping, and over a third have tried at least a single puff or vape, few pick up a regular habit. ASH concludes that vaping may be displacing smoking among youths.

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[2] https://nzinitiative.org.nz/reports-and-media/reports/policy-point-time-to-proces/

[3] Speaker Mallard affirmed that it is the Committee's call as to whether it should extend submission deadlines: "Individual committees need to make their own new timelines."
https://twitter.com/SpeakerTrevor/status/1242613569448894464

[4] The Select Committee will be familiar with the evidence on the relative safety of vaping. The Select Committee may not be familiar with the evidence on Swedish snus. Our report, *Smoke and Vapour*, surveyed that evidence, including an analysis published in The Lancet showing there to be no sufficient evidence that the relative risk ratio for snus was greater than one for any health outcome.
See Global Burden of Disease 2016 Risk Factors Collaborators,"Global, regional, and national comparative risk assessment of 84 behavioural, environmental and occupational, and metabolic risks or clusters of risks, 1990–2016: a systematic analysis for the Global Burden of Disease Study 2016," Lancet (2017) 390: 1345–422, p1364.

3.3 The Government is not wrong to worry about youth uptake of vaping. But, given the absence of youth uptake during the two years since vaping became commonly available, it would be a mistake to implement regulations that weigh concerns about youth uptake heavily if those regulations risk reducing the number of smokers able to switch from smoking to vaping. The legislation currently gets that balance wrong.

3.4 Part 1 of the Bill prohibits vaping in places where the Act prohibits smoking, including indoor workplaces, early childhood centres and schools. Some of these restrictions are intended to avoid normalising vaping, due to fears of youth uptake. But youth uptake remains low despite two years of a largely unregulated environment. And vaping is far less harmful than smoking. Forcing vapers to go outside with smokers will not encourage people to switch from smoking to vaping. While Parliament should be ready to modify the rules should greater evidence of second-hand vaping harms become established, it should not set legislation based on a presumption that those harms are substantial.

3.4.1 Rather than ban vaping in bars and restaurants, Parliament should allow individual business owners to choose whether vaping should be allowed on their premises. Some bars and restaurants will choose to ban vaping because it annoys other patrons. Others will instead choose to cater to the vaping community. Since nobody is forced to work in any particular bar or restaurant, and since nobody is forced to attend any particular bar or restaurant as a customer, and since no significant harms of "second-hand" vaping have been established, it is wrong to treat vaping as smoking in this case. Similarly, schools should be free to ban vaping on school premises should they wish.

3.4.2 It is too easy to be dismissive of the needs of vapers. Bans on vaping in indoor workplaces encompass rest homes and residential disability care institutions, many of which will be unable to afford the dedicated smoking rooms with mechanical ventilation systems required if they wish to allow smoking.[5] The legislation, as drafted in Section 12, only amends Section 6 of the SFEA to add vaping wherever smoking is mentioned in relation to these institutions. Many mental health patients self-medicate with nicotine. The legislation as drafted bans them from vaping even in their own homes. It is utterly unjustifiable.

3.4.3 We encourage the Committee to remove the restrictions in Part 1 ("Smoking and vaping prohibited in workplaces and public areas") in their entirety. Decisions about whether to allow vaping on premises should be left entirely to the owners of the properties. Councils could then choose to ban vaping in playgrounds if they wished because councils own the playgrounds. Bars and restaurants could choose the environment that works for their staff and patrons. Residential care facilities could choose to do that which is in the best interests of their residents. None require Parliament's direction in making those choices.

3.5 Part 2 Subpart 1 of the of the Legislation imposes restrictions on advertising regulated products. At 22(1), it notes that the purpose of these restrictions is to reduce the social approval of smoking, particularly among children and young people and to discourage non-smokers, particularly children and young people, from vaping and using tobacco products. Subpart 2 further restricts sponsorship and related activities.

[5] See https://www.healthed.govt.nz/system/files/resource-files/HE1617.pdf for the requirements of the Smoke-Free Environments Act 1990 relating to hospitals, rest homes, and residential disability care institutions.

3.5.1 We suggest that the purpose of Part 2 is strongly misguided because it ignores the vital purpose of advertising in encouraging smokers to shift to less harmful alternatives. Controls on advertising will discourage smokers from switching.

3.5.2 Work published in the Journal of Health Economics in December 2019 showed that bans on television advertisements for e-cigarettes in the US would have reduced the number of smokers quitting by approximately 3%, and that if advertising for e-cigarettes were as pervasive as advertising for other nicotine replacement therapies, the number of smokers quitting would have increased by 10%.[6]

3.5.3 The legislation should be amended to allow the advertising of reduced-harm alternatives to smoking. It could require that warnings be provided outlining that nicotine is highly addictive. But it seems utterly contrary to the purposes of the SmokeFree Environments Act to prohibit vendors telling anyone about reduced harm alternatives to smoking. Regulations here should not have been made stricter than those in place for the advertising of alcohol.

3.5.4 We also note potential for overreach in the application of the framework for restricting advertising and sponsorship. Advertising is defined expansively and can include any written, printed, or spoken words used to encourage the use of a regulated product. This submission could be considered an advertisement for snus, by that standard, and an advertisement for reduced-harm products in general. Where both "advertising" and "publish" are defined very broadly, undoubtedly to encompass ways that manufacturers or distributors might wish to circumvent less restrictively worded alternatives, they strongly risk overreach.

3.5.5 Potential for overreach could include but is not limited to:

3.5.5.1 Publication of or discussion of research results about the harm-reduction potential of regulated products;

3.5.5.2 Policy research into ways of encouraging uptake of reduced-harm alternatives which are regulated products;

3.5.5.3 Genuine smoking cessation advice provided by parties not specifically approved by the Director-General.

3.5.6 The Committee should consider safe-harbour provisions that do not limit freedom of speech. We note that the Attorney General concluded that the limits on freedom of expression here are **not** in due proportion to the importance of the Bill's objective and that the limitations cannot be justified. The restrictions need to go back to the drawing board, or broad safe harbour provisions need to be drafted. Since the Committee has decided not to provide anyone with any of the time required to consider these matters, it should not expect to receive the advice it clearly needs in fixing this problem. Again, delaying the Bill to allow for a real consultation process rather than the current pantomime would be well warranted.

3.6 Subpart 3 prohibits the free or reduced-cost distribution of regulated products by any manufacturer, distributor, importer or retailer of regulated products other than specialist vape retailers distributing specialist vape products. This would restrict manufacturers and distributors against providing free products to, for example, quit-smoking services for distribution to people seeking help to stop smoking. Does Parliament really intend to prohibit the manufacturers of vaping devices from providing devices to stop-smoking services? Surely

[6] See Dave, Dhaval, Daniel Dench et al, 2019. "Does e-cigarette advertising encourage adult smokers to quit?" *Journal of Health Economics* (68). https://doi.org/10.1016/j.jhealeco.2019.102227

it would be consistent with the purposes of the Act that stop-smoking service providers be able to be provided with vaping kit for distribution to smokers to help them to find the options that work best for them.

3.7 Subpart 7 of the legislation restricts the sale, delivery and supply of vaping products to those under the age of 18. We urge that this section be replaced with a framework mirroring restrictions against the sale and supply of alcohol to those under the age of 18. Youths can be supplied with alcohol by or with the permission of a parent or guardian (see section 241 of the Sale and Supply of Alcohol Act 2012).[7] Parents and guardians should be able to encourage minors in their care to switch from smoking to vaping should the need arise.

3.7.1 We note that a minimum age for sale of e-cigarettes, in the US, has been shown to increase youth smoking rates, at least until youths reach the age of minimum e-cigarette legal sale. There, prohibitions on sale to youths have been shown to be associated with a one percentage point increase in youth smoking participation.[8] Parliament likely has not considered the risk that legislation against youth vaping may have unintended consequences for youth smoking rates. Allowing parents to provide access to vaping would help to alleviate the costs Parliament may here be imposing.

3.8 Part 3 of the Bill imposes packaging and labelling requirements. We view these restrictions as rather too onerous and too close in form to the plain packaging requirements for smoked cigarettes. Warnings that nicotine is addictive are justifiable. Warnings that reduced-harm products, while far safer than smoking, may have yet-undiscovered harms could be defended. But measures which make reduced-harm products look too much like cigarettes, whether through packaging restrictions or restrictions on retail display in earlier sections, risk encouraging users to view the harms of cigarettes and reduced-harm products as equivalent. Similarly, any retailer selling tobacco products should be able to display vaping products prominently as an alternative and to distribute promotional materials about vaping to customers purchasing cigarettes, to help encourage customers to switch.

3.8.1 There is one particularly sneaky bit of legal drafting to which we would like to draw attention. Section 53 effectively bans Swedish snus in an underhanded way. 53(4) defines oral use to mean absorption of the product primarily through the oral mucosa. The drafting here is perverse and is absolutely contrary to the harm-reduction purposes of the Act.

3.8.1.1 The decision in Ministry of Health vs Philip Morris held that "or other oral use" must be read as modifying chewing. While Ministry of Health officials often *asserted*, without legal foundation, that "or other oral use" meant absorption through the oral mucosa, that definition was *nowhere* in the original SmokeFree Environments Act. The court very rightly held that prohibiting the sale of heated tobacco products was both inconsistent with the Act as legislated *and contrary to the purposes of the Act in reducing harm*. Use of Philip Morris's Iqos device was nothing like chewing. So provisions banning the sale of oral products similar to chewing could not apply to Iqos. Further, use of the device was considered consistent with the harm-reduction purposes of the Act.

3.8.1.2 Here, the Ministry has snuck in a ban on snus by changing the definition at 53(4). It has sought to ban snus via a provision hidden in opaque packaging regulation headed: "Regulated product not to be advertised or labelled as suitable for chewing, etc.". There is a lot hidden in

[7] http://www.legislation.govt.nz/act/public/2012/0120/latest/whole.html#DLM3339743

[8] See Dave, Dhaval, Bo Feng and Michael Pesko. 2019. "The effects of e-cigarette minimum legal sale age laws on youth substance use." *Health Economics* 28:3 pp.419-36. https://doi.org/10.1002/hec.3854

that “etc”. It is comparable to the case in the Hitchhiker’s Guide to the Galaxy when Council hid the “public” plans for the demolition of Arthur Dent’s house at the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying ‘Beware of the Leopard.’

3.8.1.3 The explanatory notes pretend that snus is currently prohibited. But that reading is inconsistent with the Court’s finding in Ministry of Health vs Philip Morris. It is, at best, highly debatable whether the sale of snus is currently prohibited. The use of snus is entirely unlike chewing. I have purchased snus to verify this for myself: sucking on a small sachet placed between the lip and gum is entirely unlike chewing. The Court held that “other oral use” was restricted, under the Ejusdem Generis Rule, to products “used for chewing or an activity similar to chewing.” Whether sucking on a small sachet is “similar to chewing” is, at best, debatable. One might as well consider that a suck candy would fall under a prohibition on chewing gum.

3.8.1.4 Again, I believe this sort of nonsense is precisely why the Government is shielding this legislation from effective scrutiny by rushing it through in the middle of a pandemic and national emergency. The drafters should be ashamed of themselves. Snus has been remarkably effective in helping people quit smoking in Nordic countries and is very low risk. We detailed the advantages of snus in our 2018 report *Smoke and Vapor: The Changing World of Tobacco Harm Reduction.*[9] The regulation here is utterly inconsistent with the purposes of the Act in reducing harm. The regulation is harmful. It should be deleted and replaced with a line affirming that snus does *not* fall under any prohibition on the sale of oral tobacco productions.

3.8.1.5 If the Government really wants to ban snus, it should be upfront about it. Put up the evidence on harms if it can find any. And justify the ban, rather than hiding it in opaque packaging regulations.

3.9 Part 4 of the Bill sets out a notification regime. We support a notification regime. Making it easy to find the products that include an ingredient that proves harmful is important.

3.10 Schedule 2 restricts the sale of flavoured vaping products to specialist vaping retailers. This prohibits dairies and other vendors from selling vaping products containing flavours other than tobacco, menthol and mint.

3.10.1 While we commend the Government for allowing specialist retailers to sell a range of flavours smokers find effective in helping them to quit smoking, we note that restrictions at other retailers hinder those without easy access to specialist vendors. Internet vendors should be treated as specialist retailers to enable greater access to reduced-harm alternatives.

3.10.2 If the Government does not rescind this restriction, we urge that it at least monitor whether it proves a substantial barrier in practice and review the regulation in a year’s time. We especially urge this monitoring in rural areas without access to the kinds of specialist vape vendors prevalent in Wellington.

3.11 We commend the Government for not imposing excise on vaping products; the price differential between excised tobacco and vaping product will encourage greater uptake of vaping. We note, however, that heated tobacco products and snus, if not banned, will remain subject to excise rates inconsistent with their harms. Both will be taxed by tobacco weight on a basis comparable to cigars and cigarillos; the Government should consider a reduced-harm

[9] https://nzinitiative.org.nz/reports-and-media/reports/smoke-and-vapour-the-changing-world-of-tobacco-harm-reduction/

excise category for noncombusted tobacco, with excise set at perhaps 10% of the excise set on smoked tobacco. The category could be reassessed over time to monitor for any slippage of tobacco product meant for non-combusted use into roll-your-own use, and to adjust rates should evidence on harms change. For example, a "5% of the tobacco excise rate by weight" category could apply for Swedish snus. In comparison, a "20% of the tobacco excise rate by weight" category could apply for heated tobacco products, if evidence developed suggesting that those were the proportionate rates of harm as compared to cigarettes. The Government may have resisted implementing this kind of treatment for fear of having to draw precise lines between different risk categories; even coarse categories would be better than lumping all reduced-harm products into the category reserved for cigarillos.

3.12 We note that the Bill provides broad regulatory discretion in Section 76(2) through Order in Council. For example, the Government seems able through Order in Council to prohibit the sale of tobacco products at dairies, to implement sinking lid policies on the number of allowed outlets in different places, or to require that any staff at any outlet selling tobacco products obtain a Masters Degree in Public Health – the scope seems broad. It seems to allow for discrimination that might have no connection to relative harm reduction effectiveness, or costs. It may enable officials in practice to give criminalising effect to theories or prejudices that would not withstand disciplined cost-benefit analysis. The kind of authority granted to health officials is justified as being for the benefit of people not otherwise capable of knowing their own best interests. With addictive substances that may sometimes be true. But too often worthy intent has been used to excuse failure to evaluate the practical effect of such rules. The result of a prohibition may be more dire than the targeted harm, if it is not properly considered against the likely response of those subject to the regulation, and the limits on enforcement.

3.12.1 We accordingly recommend humility by those entrusted with power to criminalise consensual behaviour. Small dairy owners may well be better at encouraging vaping in place of smoking than officially endorsed groups. The Initiative prefers to trust Members of Parliament to keep their feet on the ground; what may emerge from well-meaning officials under Order in Council may be insufficiently respectful of the broader community's diversity of preferences. We urge that Parliament retain some degree of oversight over this, or ability to review regulations undertaken under these provisions. There needs to be more scrutiny of what precisely is allowed through regulation.

3.12.2 Normal judicial overview may be insufficient where the purpose of the Act is as unconfining as "harm-reduction". Normal politics strikes a balance between harm reduction and the burden of any imposition; judicial review may deem a rather broader range of measures as being consistent with harm reduction than the House of Representatives might have wished. The Initiative is advised that for judicial review to be an effective discouragement to abuse of the regulation making power, the purposes should be much more fully described. Or more effectively the power should only be exercised within an explicit discipline requiring cost benefit analysis, and proportionality in the regulatory regime.

3.12.3 The Committee may wish to take advice on just what bounds might be useful to prescribe, from officials or lawyers *outside* of the department which will otherwise get to exercise the regulatory powers authorised by the Bill.