

Smokefree Environments and Regulated Products Amendment Bill (No 2)

Government Bill

As reported from the Health Committee

Commentary

Recommendation

The Health Committee has examined the Smokefree Environments and Regulated Products Amendment Bill (No 2) and recommends that it be passed. We recommend all amendments unanimously.

Introduction

New Zealand has a goal to reduce daily smoking rates to less than 5 percent across all population groups by 2025. This is known as the Smokefree 2025 goal. While the use of vaping products as a smoking cessation tool has contributed to a decline in smoking rates, the number of young people vaping is of increasing concern. This bill aims to better protect children and young people by reducing their access to vaping products.

Part 1 of the bill would amend the Smokefree Environments and Regulated Products Act 1990 to:

- ban the manufacture, sale, supply, and distribution of disposable vapes
- increase penalties for unlawful sale of regulated products to minors
- impose restrictions on the visibility of vaping products in retail stores and online advertising
- include early childhood education centres in the proximity restrictions for specialist vape retailers.

Part 2 of the bill would make related amendments to the Smokefree Environments and Regulated Products Regulations 2021.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Definition of “disposable vaping product”

Clause 4 would amend section 2 of the Act to insert a definition of “disposable vaping product” for the purpose of the ban. The definition in the bill as introduced would include vaping devices that are not designed to be recharged or refilled by the user. It would also include single-use pre-filled containers (often referred to as pods or cartridges) that fit into a vaping device and are not designed to be refilled by the user.

Many submitters felt that the current scope of the ban could lead to adverse, unintended consequences. These include diminishing the accessibility to vapes as a cessation tool, people switching back from vaping to smoking, and incentivising a black market for vaping products. Some submitters also suggested that young people and children would be at increased risk of poisoning with the ban of pre-filled pods or cartridges.

In light of these concerns, including those with regards to safety and an illicit market, we suggest amending the definition of “disposable vaping product”. We recommend changing the definition so that the ban would not extend to single-use pre-filled containers that are designed to fit inside a vaping device.

Regulations relating to child safety mechanisms

Submitters have also noted that existing regulations relating to child safety may need review, as they do not prevent young children from sucking on vape devices and inhaling some of the vapour. The intention behind requiring a child safety mechanism is to ensure that children cannot accidentally activate or operate a device. We recommend amending clause 29 so that the regulations make clear that a child safety mechanism must not be able to be overridden or deactivated by a user.

Removing exemptions for specialist vape retailers

As introduced, the bill would not remove the ability for specialist vape retailers to supply a vaping product free of charge, or at a reduced price. Health and youth organisations that submitted on the bill noted that cheap disposable vape products, which would soon be rendered non-compliant by the bill, could still be disseminated through loyalty schemes or giveaways in the immediate period before they were prohibited. We recommend amending clause 13 to remove the exemption by repealing section 33(4).

In addition, we recommend inserting clause 13A. This would remove the exemption in section 36(4) of the Act that allows specialist vape retailers to offer a gift, cash

rebate, or the right to participate in a contest, lottery, or game, as an inducement or reward relating to a vaping product.

Advertising and visibility restrictions

Clause 14 would amend section 37 of the Act to impose further visibility restrictions on vaping products and related advertising. Many submitters have interpreted the bill's restrictions on the visibility of vaping products from outside the business as necessitating blacked-out windows, which they said could risk the safety of staff. However, the bill would not mandate blacked-out windows, and the visibility requirements could be met in other ways. Vaping products could be covered, or could be kept in a back room and brought out when needed. Submitters were also uncertain how these restrictions would be enforced.

We recommend amending clause 14 to make clear that the display, rather than general visibility, of vaping products and related packaging cannot be seen from outside the store. This amendment would recognise that there are occasions when it may not be practicable to avoid a vaping product being visible from outside the store, such as when a door is opened momentarily. Our amendment would enable enforcement officers to issue infringement notices when appropriate, and escalate to prosecution where egregious offences occur.

Clause 11 of the bill would repeal section 24(l) of the Act, which exempts specialist vape retailers from the prohibition on publishing an advertisement about a regulated product in certain circumstances. Some submitters from the vaping industry commented that removing images of vaping products from New Zealand websites could undermine search engine optimisation, which could result in customers being directed to offshore providers of vaping products. This raised the possibility that New Zealand websites might link to other websites with pictures, to circumvent the legislation.

We are concerned about this possibility and want to ensure that the visibility restrictions are not undermined. We therefore recommend amending clause 12 to make it clear that New Zealand-based websites must not link to any advertisement that does not comply with New Zealand legislation, such as an overseas website showing images of vaping products.

Out-of-scope submissions

Just under a quarter of submissions received made recommendations for changes that were outside the scope of this bill. We would like to acknowledge those who submitted on these areas:

- licensing all retailers
- introducing a sinking lid on retailers so that when a store closes a new one is prevented from opening in its place
- introducing density limits for specialist vape retailers
- introducing further flavour restrictions on vaping products, such as limiting flavours available to tobacco, mint, and menthol

- reducing allowable nicotine levels
- increasing the minimum age requirement for purchasing vape products
- imposing specific requirements on the disposal of vaping products for safety and environmental protection
- mandating plain packaging for vaping and other products
- future-proofing the Act to ensure the legislation captures the broadest range of products, including new emerging products, to ensure tamariki and rangatahi are protected from all forms of nicotine and tobacco, both now and in the future
- providing additional education funding both for directly communicating to young people and for public health campaigns
- providing additional funding for compliance and enforcement, including employing more smokefree enforcement officers
- introducing minimum price on vaping products.

The Minister has indicated that she will undertake further work that will tackle vaping concerns, and we look forward to receiving this.

Labour Party and Green Party of Aotearoa New Zealand differing view

The Labour Party and Green Party view is that the bill does not go far enough in restricting the availability of vapes and risks ongoing harms to young people. Many submitters' practical solutions were ruled out of scope for this bill, and we have no indication what further initiatives the Minister is considering as part of tranche 2. We call for urgent work on these additional measures.

Appendix

Committee process

The Smokefree Environments and Regulated Products Amendment Bill (No 2) was referred to us on 12 September 2024. The House instructed us to report the bill back no later than 31 October 2024.

We invited the Associate Minister of Health, Hon Casey Costello, to provide an initial briefing on the bill. She did so on 7 October 2024.

We called for submissions on the bill with a closing date of 27 September 2024. We received and considered submissions from 849 interested groups and individuals. We heard oral evidence from 41 submitters in Wellington and by videoconference.

Advice on the bill was provided by the Ministry of Health. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Sam Uffindell (Chairperson)

Dr Hamish Campbell

Dr Carlos Cheung

Ingrid Leary

Cameron Luxton

Hūhana Lyndon

Jenny Marcroft

Debbie Ngarewa-Packer

Hon Dr Ayesha Verrall

Camilla Belich, Ricardo Menéndez March, Dr Tracey McLellan, Hon Dr Deborah Russell, Hon Phil Twyford, Dr Vanessa Weenink and Helen White also participated in the consideration of this bill.

Related resources

The documents received as advice and evidence are available on the Parliament website.

**Smokefree Environments and Regulated Products
Amendment Bill (No 2)**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Casey Costello

Smokefree Environments and Regulated Products Amendment Bill (No 2)

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Smokefree Environments and Regulated Products Amendment Act **(No 2) 2024**.

2 Commencement

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- (1) This Act comes into force on the day after Royal assent.

- (2) However, **sections 4, 6, 7, 11 to 14, 16, 18, 22(1), (3)-(2A), and (4), 23, 23A, 25 to 27, and 29** come into force 6 months after Royal assent.

3 Principal Act

This Act amends the Smokefree Environments and Regulated Products Act 1990.

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Part 1 Amendments to principal Act

4 Section 2 amended (Interpretation)

In section 2(1), insert in its appropriate alphabetical order:

disposable vaping product-device means a vaping product-device that is not designed or intended to be reused, and includes a vaping device that—

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(a) is not designed to be refilled by the user with a vaping substance or by using a pod, cartridge, or similar storage container; or

(b) is not designed to be recharged; or

(c) is described by both **paragraphs (a) and (b)**

15

(a) a vaping device that—

(i) ~~is not designed to be refilled by the user with a vaping substance; or~~

(ii) ~~is not designed to be recharged; or~~

(iii) ~~both **subparagraphs (i) and (ii)** describe; and~~

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(b) a container that—

(i) ~~is pre-filled with a vaping substance; and~~

(ii) ~~is designed to be fitted into a vaping device; and~~

(iii) ~~is not designed to be refilled by the user with a vaping substance~~

5 Section 3A amended (Purposes of this Act)

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After section 3A(d), insert:

(da) to reduce access to regulated products by children and young people; and

6 Section 3AA amended (Guide to this Act)

After section 3AA(2), insert:

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(2A) **Part 1AA** prohibits the sale, manufacture, supply, and distribution of disposable vaping products-devices.

7 New Part 1AA inserted

After section 20F, insert:

Part 1AA**Prohibition of disposable vaping products ~~devices~~****20FA Prohibition of disposable vaping products ~~devices~~**

- (1) A person must not sell, offer for sale, manufacture, supply, or distribute a disposable vaping product ~~device~~. 5
- (2) A person who without reasonable excuse contravenes **subsection (1)** commits an offence and is liable on conviction to a fine not exceeding,—
- (a) for a notifier or large retailer, \$400,000; and
- (b) for any other person, \$50,000.

8 Section 20P amended (Application for approval as specialist vape retailer) 10

- (1) After section 20P(2)(a), insert:
- (aa) the retail premises in which the vaping products are or will be sold are—
- (i) at least 300 metres from the boundary of a registered school listed, on the date on which the application for approval is received, on an Internet site provided by the Ministry of Education; and 15
- (ii) at least 300 metres from the boundary of a marae listed, on the date on which the application for approval is received, on an Internet site provided by the Ministry of Māori Development—Te Puni Kōkiri; and
- (iii) at least 100 metres from the boundary of a licensed early childhood service listed, on the date on which the application for approval is received, on an Internet site provided by the Ministry of Education; and 20
- (2) Replace section 20P(2)(c) with:
- (c) the applicant understands its obligations under this Act (including about sales to minors); and 25
- (d) any requirements in regulations have been met.

9 Section 20R amended (Obligation of person selling notifiable products)

In section 20R(1), after “selling the products”, insert “and the name and address of each premises from which they are selling the products”. 30

10 Section 23 amended (Publishing regulated product advertisement prohibited)

Replace section 23(5)(c) with:

- (c) in any other case, to a fine not exceeding \$50,000.

- 11 Section 24 amended (Specified publications exempt from advertising prohibition)**
- (1) In section 24(g)(i), replace “or on the Internet site of the retailer” with “of a specialist vape retailer”.
- (2) Repeal section 24(1). 5
- 12 Section 25 amended (Retailers, vending machines, and Internet sellers exempt from advertising prohibition in certain circumstances)**
- (1) After section 25(4), insert:
- (4A) To avoid doubt, subsection (4) does not permit publication on an Internet site of a link to a regulated product advertisement that does not comply with this Act or regulations. 10
- (2) Repeal section 25(5).
- 13 Section 33 amended (Free distribution of regulated product prohibited)**
- ~~In section 33(4), after “approved Internet site.”, insert “However, see **section 20FA**, which prohibits the sale, manufacture, supply, and distribution of disposable vaping products.”~~ 15
- Repeal section 33(4).
- 13A Section 36 amended (Rewards involving regulated product prohibited)**
- Repeal section 36(4).
- 14 Section 37 amended (Regulated product (other than vaping product) must not be visible from place of business)** 20
- (1) In the heading to section 37, delete “(other than vaping product)”.
- (2) In section 37(1), delete “other than a vaping product”.
- (3) After section 37(3), insert:
- (3A) Subsection (1)(b) does not apply to a specialist vape retailer in relation to a vaping product. 25
- (3B) A specialist vape retailer must not display a vaping product or its packaging in a way that makes it visible from outside their place of business.
- (4) ~~In section 37(4), replace “\$10,000” with “\$50,000”.~~
- (4) Replace section 37(4) with: 30
- (4) A person who, without reasonable excuse, contravenes subsection (1) or (3B) commits an offence and is liable to a fine not exceeding \$50,000.
- 15 Section 40 amended (Sale and delivery of regulated product to people younger than 18 years prohibited)**
- (1) In section 40(2)(a), replace “\$10,000” with “\$100,000”. 35
- (2) In section 40(2)(b), replace “\$5,000” with “\$10,000”.

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16	Section 46 amended (Regulated product (other than vaping product) must not be visible from outside automatic vending machines)
(1)	In the heading to section 46, delete “(other than vaping product)”.
(2)	In section 46(1), delete “other than a vaping product”.
17	Section 60 amended (Notifier must not sell product unless it has been notified) 5
	After section 60(1)(b), insert:
(c)	complies with any applicable requirements in this Act or regulations.
18	Section 62 replaced (Pre-notification requirements) 10
	Replace section 62 with:
62	Pre-notification requirements
	Before notifying a notifiable product that is intended for sale in New Zealand, the notifier must ensure that the product complies with any applicable requirements in this Act or regulations.
19	Section 65 amended (Obligations of retailers) 15
	After section 65(1)(e), insert:
(f)	unless it complies with any applicable requirements in this Act or regulations.
20	Section 74 amended (Director-General may suspend product notification) 20
	After section 74(1)(d), insert:
(e)	the Director-General has reasonable grounds to believe that the product does not comply with any applicable requirements in this Act or regulations.
21	Section 75 amended (Cancellation of product notification) 25
	After section 75(1)(d), insert:
(e)	the Director-General has reasonable grounds to believe that the product does not comply with any applicable requirements in this Act or regulations.
22	Section 87 amended (Infringement offences)
(1)	In section 87, definition of infringement fee , paragraph (b), delete “37(4), 40(2);”.
(1A)	In section 87, definition of infringement fee , paragraph (b), delete “40(2);”.
(2)	In section 87, definition of infringement fee , paragraph (c), replace “\$500” with “means \$500; and”.
(2A)	In section 87, definition of infringement fee , after paragraph (c), insert: 35

- (ca) ~~in relation to an infringement offence against section **20FA**, 23(5), or **37(4)**, means \$2,000; and~~
- (3) In section 87, definition of **infringement fee**, after paragraph (c), insert:
- (d) ~~in relation to an infringement offence against section **20FA**, 23(5), or 37(4), means \$2,000; and~~
- (ed) in relation to an infringement offence against section 40(2), means—
- (i) \$2,000 in the case of a manufacturer, an importer, a distributor, or a retailer; or
- (ii) \$1,000 in any other case
- (4) In section 87, definition of **infringement offence**, replace “sections 20R(4), 20S(4),” with “sections **20FA(2)**, 20R(4), 20S(4), 23(5),”.
- (5) In section 87, definition of **infringement offence**, replace “43(4),” with “43(3),”.
- 23 Section 90A amended (Liability for action of employee)**
In section 90A(1), after “against section”, insert “**20FA**,”.
- 23A Section 90B amended (Burden of proof of reasonable excuse)**
In section 90B, after “(8C),”, insert “**20FA(2)**,”.
- 24 Section 94 amended (Enforcement officer may require identifying information)**
In section 94(2)(b)(i), replace “name and address” with “name, address, and, in the case of an individual, date of birth”.

Part 2

Amendments to Smokefree Environments and Regulated Products Regulations 2021

- 25 Principal regulations**
This Part amends the Smokefree Environments and Regulated Products Regulations 2021.
- 26 Regulation 3 amended (Interpretation)**
In regulation 3, revoke the definitions of **reusable vaping device** and **single-use vaping device**.
- 27 Regulation 57 amended (How information about tobacco products offered for Internet sale must be provided)**
- (1) In the heading to regulation 57, replace “**tobacco products**” with “**regulated products**”.

- (2) In section 57(1), replace “tobacco products” with “regulated products”.
- (3) In section 57(4)(a), replace “tobacco product, the variant” with “regulated product, the variant name”.
- (4) In section 57(5), replace “At the top” with “If the Internet site contains information about tobacco products, at the top”.
- (5) In section 57(6), replace “At the bottom” with “If the Internet site contains information about tobacco products, at the bottom”.

28 Part 6B revoked

Revoke Part 6B.

29 Schedule 5 amended

- (1) In Schedule 5, ~~Part 1~~, revoke clause 1A.
- (2) In Schedule 5, ~~Part 1~~, clause 14, delete “and is intended for use in a reusable vaping device”.

(2A) In Schedule 5, after clause 19A, insert:

19B A child safety mechanism must not be able to be overridden or deactivated by a user.

- (3) In Schedule 5, ~~Part 2~~, revoke clause 24A.

Legislative history

5 September 2024
12 September 2024

Introduction (Bill 75–1)
First reading and referral to Health Committee