

Briefing

Departmental feedback on Cabinet paper *Smokefree 2025: progressing Coalition Agreement commitments*

Date due to MO:	29 February 2024	Action required by:	4 March 2024
Security level:	IN CONFIDENCE	Health Report number:	H2024036808
To:	Hon Casey Costello, Associate Minister of Health		
Copy to:	Hon Dr Shane Reti, Minister of Health		
Consulted:	Health New Zealand: <input checked="" type="checkbox"/> Māori Health Authority: <input checked="" type="checkbox"/>		

Contact for telephone discussion

Name	Position	Telephone
Dr Andrew Old	Deputy Director-General, Public Health Agency Te Pou Hauora Tūmatanui	s 9(2)(a)
Jane Chambers	Group Manager, Public Health Policy and Regulation, Public Health Agency Te Pou Hauora Tūmatanui	s 9(2)(a)

Minister's office to complete:

- | | | |
|---|------------------------------------|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Decline | <input type="checkbox"/> Noted |
| <input type="checkbox"/> Needs change | <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn | |

Comment:

Departmental feedback on Cabinet paper *Smokefree 2025: progressing Coalition Agreement commitments*

Security level: IN CONFIDENCE **Date:** 29 February 2024

To: Hon Casey Costello, Associate Minister of Health

Purpose of report

1. This report provides you with a summary of key issues raised by departments regarding the draft Cabinet paper *Smokefree 2025: progressing Coalition Agreement commitments* and indicates where your decision is needed to finalise the paper so that it can be late lodged on Monday 4 March 2024 for consideration by the Cabinet Social Outcomes Committee (SOU) next week.

Summary

2. On 27 February the draft Cabinet paper was sent to departmental agencies for comment. Due to the intended timeframe for lodging this paper, we requested a rapid 24-hour period turnaround for any feedback.
3. The overarching nature of the feedback was identifying potential risks, particularly legal and financial, to the Crown and noting that further work was needed across a range of issues to ensure the potential impact of the proposals was understood.
4. We understand you would like to submit the paper so that it can be considered at SOU on Wednesday 6 March and, on that basis, we have amended the paper where possible to mitigate identified risks. A tracked copy of these changes is attached to this briefing along with a clean version (refer to **Appendix 1** and **Appendix 2**, respectively).
5. Due to the compressed timeframes, there are some matters raised which we have not been able to address. These include completion of a regulatory impact analysis, Treaty of Waitangi analysis of each proposal, and a thorough assessment of the financial implications.
6. We will work closely with your office to confirm further changes to the paper, and/or whether you would like to proceed with lodging the Cabinet paper with a view to late lodging on Monday 4 March 2024 as currently intended.

Recommendations

We recommend you:

- a) **Note** the feedback received on the draft Cabinet paper via departmental consultation **Yes/No**
- b) **Advise** officials of any further changes needed to the revised draft Cabinet paper (clean version is attached as **Appendix 2**) **Yes/No**
- c) **Confirm** that the paper be lodged on Monday 4 March 2024 **Yes/No**



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Dr Andrew Old
Deputy Director-General
Public Health Agency | Te Pou Hauora
Tūmatanui

Date:

Hon Casey Costello
Associate Minister of Health

Date:

Departmental feedback on Cabinet paper *Smokefree 2025: progressing Coalition Agreement commitments*

Context

1. On 26 February 2024 we provided you with a copy of the draft Cabinet paper *Smokefree 2025: progressing Coalition Agreement commitments* that was then sent out for departmental consultation. The paper had been updated to reflect feedback received from your Office on 26 February 2024.
2. The following departments provided feedback that has immediate implications for the technical workability of the draft Cabinet paper, or raised legal or financial implications: Crown Law, New Zealand Customs, Department of the Prime Minister and Cabinet, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry for the Environment, and the Treasury. We have summarised that feedback and sought your approval as required below.
3. We understand you wish to lodge a final version of the Cabinet paper this week so that it can be considered by SOU next week. On this basis, we have updated the draft Cabinet paper considering the departmental feedback received (A copy with tracked changes is attached to this briefing along with a clean version at **Appendix 1** and **Appendix 2**, respectively).

Summary of substantive feedback on draft Cabinet paper

§ 9(2)(h)

§ 9(2)(h)

4. § 9(2)(h)

§ 9(2)(h)

5. § 9(2)(h)

6. § 9(2)(h) [Redacted]
[Redacted]
[Redacted]
[Redacted]

§ 9(2)(h) [Redacted]

7. § 9(2)(h) [Redacted]
[Redacted]
[Redacted]

8. § 9(2)(h) [Redacted]
[Redacted]
[Redacted]
[Redacted]

§ 9(2)(h) [Redacted]

9. § 9(2)(h) [Redacted]
[Redacted]

§ 9(2)(h) [Redacted]

10. § 9(2)(h) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

11. § 9(2)(h) [Redacted]
[Redacted]
[Redacted]

12. § 9(2)(h) [Redacted]
[Redacted]
[Redacted]

§ 9(2)(h) [Redacted]

13. § 9(2)(h) [Redacted]
[Redacted]
[Redacted]

§ 9(2)(h) [Redacted]

14. s 9(2)(h) [Redacted]

Feedback from the Department of the Prime Minister and Cabinet (DPMC) - [legally privileged]

s 9(2)(h) [Redacted]

15. s 9(2)(h) [Redacted]

s 9(2)(h) [Redacted]

16. s 9(2)(h) [Redacted]

17. s 9(2)(h) [Redacted]

18. s 9(2)(h) [Redacted]

19. s 9(2)(h) [Redacted]

20. s 9(2)(h) [Redacted]

- a. s 9(2)(h) [Redacted]
- b. s 9(2)(h) [Redacted]
- c. s 9(2)(h) [Redacted]

21. s 9(2)(h) [Redacted]

s 9(2)(h) [Redacted]

22. s 9(2)(h) [Redacted]

23. s 9(2)(h) [Redacted]

s 9(2)(h) [Redacted]

24. s 9(2)(h) [Redacted]

Feedback from Ministry of Foreign Affairs and Trade - [legally privileged]

s 9(2)(h) [Redacted]

25. s 9(2)(h) [Redacted]

s 9(2)(h) [Redacted]

26. s 9(2)(h) [Redacted]

27. s 9(2)(h) [REDACTED]
[REDACTED]

s 9(2)(h) [REDACTED]

28. s 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

s 9(2)(h) [REDACTED]

29. s 9(2)(h) [REDACTED]

Feedback from New Zealand Customs Service (Customs)

s 9(2)(f)(iv) [REDACTED]

30. s 9(2)(f)(iv) [REDACTED]
[REDACTED]

Proposed change to Cabinet paper

31. We have updated the recommendations in the paper to reflect Customs advice.

Operational issues

32. Customs identified several key operational issues from its perspective. These are set out below.

33. The first is requesting the addition of the following sentences:

a. s 9(2)(g)(i) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b. Paragraph 44 (end): *"This includes adding them to the permit regime to import tobacco products, to allow for visibility over any changes in the market behaviours."*
(This presumes seeking a permit is desired; see discussion in following paragraph)

34. Customs note that snus was excluded from the import permit regime as it was not considered a problem at the time (2020), along with some of the other tobacco products that are smoked (cigars and cigarillos). There is a risk of inconsistency as the other proposed new product (nicotine pouches) will be counted as "manufactured tobacco" by default under [section 95A\(1\)](#) of the Customs and Excise Act 2018. This means a permit would be required to import it.

35. As the permit regime has an important risk management function and would enable monitoring of changes in the market, Customs recommends that it should generally apply to the import of items containing tobacco. Ministers will need to make an explicit

decision if nicotine pouches will not require a permit to import them if the new smokeless products are to be placed outside of the permit regime.

36. A legislative amendment to add them to [section 95A\(2\)](#) would be required. If snus are to be added to the permit regime (which would to treat them consistently), this would also require a primary legislation change - they would need to be removed from section 95A(2).
37. In terms of the proposed ban on disposable vapes, Customs note this does not seem to cover restricting import (whether for sale or personal use). Consideration will also need to be given to the wider issues of any control regime, including possession (for your own use), distribution (other than for sale) and manufacture or export. Given the intent is to reduce vaping by young people, and that young people (collectively) are very comfortable ordering materials online, restricting retail sales in New Zealand may not necessarily limit their access if they can simply import it.
38. If import restrictions are required, Customs would have to consider and advise on the desired mechanisms to put in place. Customs note that an import ban would be very difficult to practically enforce, given the low-weight and low value of these products, and that its current tools are not well designed to detect them (particularly through the mail stream). Also, given the way these items and their components are currently classified in many different ways for import purposes, it will be a complicated process to effectively identify the items that might be subject to the ban.

Proposed change to Cabinet paper

39. We have updated the paper to include the additions requested to paragraphs 35 and 44. We have also noted in the paper that further work will need to be undertaken with Customs regarding the permit regime and its application to any new products such as snus and nicotine pouches – Cabinet decisions will need to be sought as part of this work. We have also noted that further work with Customs will be required regarding the issue raised around disposable vapes and potential for any ban to be thwarted via import.

Feedback from the Treasury

Financial implications

40. **s 9(2)(f)(iv)**
[Redacted]
41. **s 9(2)(f)(iv)**
[Redacted]

Proposed change to Cabinet paper

42. **s 9(2)(f)(iv)**
[Redacted]

s 9(2)(f)(iv)

s 9(2)(f)(iv)

s 9(2)(f)(iv)

Regulatory impact analysis

43. The Treasury noted that both the in-principle and more fulsome policy decisions in this paper trigger the Regulatory Impact Assessment (RIA) requirements. The lack of RIA will constitute a failure to meet the RIA requirements. Cases of non-compliance are recorded by the RIA team and are also reported to the Minister for Regulation. This reporting typically occurs prior to the planned Cabinet date for the proposal.

Proposed change to Cabinet paper

44. The upcoming Cabinet paper progressing Coalition agreement commitments will not have an accompanying RIS given the timeframes under which the policy decisions need to be made. We have included the following text (supplied by the Treasury RIA team) in the Cabinet paper:

"Cabinet's impact analysis requirements apply to the proposals to progress a new legislative direction towards achieving Smokefree 2025 but there is no accompanying Regulatory Impact Statement, and the Treasury has not exempted the proposal from the impact analysis requirements. Therefore, it does not meet Cabinet's requirements for regulatory proposals.

The Regulatory Impact Analysis team at the Treasury and the Ministry of Health have agreed that supplementary analysis or a post-implementation assessment will be developed and provided to Cabinet later in the year."

Feedback from Ministry of Justice

Penalties

45. The Ministry of Justice note the proposed penalty increases are significant and would benefit from consultation. Consultation would give opportunity to consider whether these changes will have the intended effect, whether they are proportionate, and whether they will disproportionately impact some groups.

Proposed change to Cabinet paper

46. We have not made any change to the paper.

Feedback from Ministry for the Environment

Disposable vapes and relationship to other reform

47. s 9(2)(f)(iv)

Proposed change to Cabinet paper

48. We have removed the reference to the change likely taking 12 months.

Other substantive changes we have made

s 9(2)(f)(iv)

49. s 9(2)(f)(iv)

Snus

50. Paragraph 41 is edited to better reflect the evidence brief on snus previously sent to you.

Penalties

51. Paragraph 62 is added to clarify that penalty increases apply to all regulated products (ie, vaping products, smoked tobacco products, smokeless tobacco products, herbal products for smoking), as per your previous agreement (H2024035870).
52. Recommendation 22.2 is reworded to align with the body of the paper (by referring to manufacturer, importer, distributor and by adding retailer to this category (as previously agreed H2024035870), rather than using the wording of body corporate) so as to avoid drafting issues.

Equity

53. Justice noted the significant increase in penalties may disproportionately affect young employees on low to medium wages. We have reflected this in the Cabinet paper. They also note reducing access to vapes may have disproportionate impacts on groups such as youth, Māori and Pacific communities, which may engage section 19 of the New Zealand Bill of Rights Act (NZBORA) (freedom from discrimination). An increase to penalties for strict liability offences may also trigger section 25(c) of that act (the right to be presumed innocent). Any legislation required as a result of the decisions will be scrutinised for its consistency with NZBORA before introduction. At this point where any of the rights are engaged an analysis will be undertaken to determine whether this is justifiable in terms of section 5 of NZBORA.

54. The Ministry for Pacific Peoples note that Pacific peoples are disproportionately impacted by smoking and vaping, and question how we will ensure the most disadvantaged groups are not disproportionately impacted by these proposals. They note that Pacific peoples have not been included as a target group for the plan on non-legislative measures, and request that they be added.
55. The Ministry for Social Development recommend the addition of comparative data expanding on the inequities between different populations, and description of the stage in life course at which health harms accrue to various population groups. They recommend discussion of the likely impacts on disabled people (which is echoed by Whaikaha), and are concerned that the paper acknowledges the potential of the proposal to disproportionately impact Māori and Pacific people without careful consideration of the significant effects.

Next steps

56. Once you have indicated your preferences, we will finalise the Cabinet paper.
57. We will work closely with your office to confirm whether you would like to proceed with lodging the Cabinet paper with a view to late lodging on Monday 4 March 2024.

ENDS.

PROACTIVELY RELEASED

Minister's Notes

PROACTIVELY RELEASED