

In Confidence

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Office of the Associate Minister of Health
Chair, Cabinet Social Wellbeing Committee

Smokefree Environments and Regulated Products (Vaping) Amendment Bill: Approval for Introduction

Proposal

1. I propose that the Cabinet Social Wellbeing Committee approve the Smokefree Environments and Regulated Products (Vaping) Amendment Bill (the Bill) for introduction.

Executive Summary

2. There is broad agreement in New Zealand that the regulation of vaping products and smokeless tobacco devices needs to be improved, reflecting concerns about the lack of product safety standards and an increase in young people experimenting with vaping. However, there are very different views among stakeholders about how these products should be regulated.
3. The Bill seeks to strike a balance between protecting young people from the risks associated with vaping and supporting smokers to switch to a much less harmful product.
4. The Bill will extend regulatory coverage to all vaping products and smokeless tobacco devices. The Bill prohibits:
 - 4.1. sales of vaping products and smokeless tobacco devices to under-18s
 - 4.2. advertising and sponsorship of vaping products and smokeless tobacco devices
 - 4.3. vaping and using smokeless tobacco devices in indoor workplaces, early childhood centres and schools.
5. The Bill contains provisions which differentiate vaping products from tobacco products. This recognises the relatively lower risk of vaping compared with smoking and provides an environment in which smokers can be encouraged to switch to a less harmful product.
6. The Bill achieves this by allowing retailers to have products on display within a store. It also allows retailers to display cessation information at point-of-sale to provide, for example, relative risk information about vaping compared with smoking. The Bill does not prevent bundling of vaping products; for example, a device may be sold with several vaping liquids and a spare coil.

7. Specialist vape stores provide important support for smokers seeking to switch successfully to vaping. The Bill, therefore, provides a range of exemptions from the regulatory controls on tobacco, including the ability to discount products and give loyalty points, to provide information and advice about products to customers, to allow customers to sample products in-store, and to use trading names that include the words 'vape' and 'vaping'.
8. In addition, specialist vape stores have no restrictions on the flavours they may sell compared with generic stores which may sell only tobacco, mint and menthol flavoured products.
9. The Bill also places product safety requirements on vaping and smokeless tobacco products and supports the Ministry of Health to take corrective action if it has concerns that a product may be or is causing harm.
10. Most of the provisions in the Bill come into effect on the day after the Bill is given Royal assent, however, transitional provisions are provided as follows:
 - 10.1. six months for generic retailers to remove flavours other than tobacco, mint and menthol from sale (specialist vape retailers are exempt from this restriction)
 - 10.2. six months for manufacturers and importers to notify products to the Ministry of Health.
11. Regulations are needed to bring the Bill fully into effect. A key area of interest to stakeholders will be packaging requirements (New Zealand has implemented standardised packaging for tobacco products). These requirements will be specified in regulations. Tobacco-style standardised packaging is not appropriate for a reduced harm product. I propose that the United Kingdom model, which is risk-proportionate, be followed for vaping and smokeless tobacco products.
12. I propose that the Committee agree to approve the Bill for introduction to Parliament and referral to the Health Committee for a period of three months, with a view to passage by the end of July 2020.

Background

13. Vaping products and smokeless tobacco devices are inadequately regulated in New Zealand. This has led to a significant increase in advertising and event sponsorship by the companies who sell these products. In addition, we are seeing an increase in young people experimenting with vaping, but our data does not yet tell a coherent story about youth vaping¹.
14. Vaping does, however, provide an option for smokers to reduce the risks to their health if they stop smoking and switch completely. Smokers who find it hard to quit may be able to switch to much less harmful alternatives, such as vaping.

¹ We have good Year 10 (14-15-year olds) data but limited information at this stage about vaping beyond this age.

15. There is broad agreement in New Zealand that we need to regulate vaping products and smokeless tobacco devices, but there are different views about how they should be regulated.
16. On 12 November 2018, Cabinet agreed to a set of proposals to improve the regulation of vaping and smokeless tobacco products [CAB-18-MIN-0569 refers]. The decisions took a precautionary approach, primarily reflecting concerns about young people's access to and use of vaping products.
17. Following subsequent discussions, the balance of the provisions in the Bill has been shifted towards a regulatory regime for vaping products that better supports smokers to switch. This is achieved by allowing display of vaping products and relative-risk information in retail stores and making a greater distinction between generic retailers (eg, dairies, supermarkets and service stations) and specialist vape retailers, as set out below.

Smokefree Environments and Regulated Products (Vaping) Amendment Bill

18. The Bill applies many of the existing provisions of the Smokefree Environments Act 1990 (the Act) to vaping products and smokeless tobacco devices (the tobacco component is already regulated). This includes prohibitions on:
 - 18.1. the sale, and supply in a public place, of vaping products and smokeless tobacco devices to children and young people under 18 years of age
 - 18.2. advertising and sponsorship of vaping products and smokeless tobacco devices
19. The Bill also prohibits vaping and using heated tobacco products in indoor workplaces, early childhood centres and schools.
20. There are three ways in which smokefree areas are designated in New Zealand:
 - 20.1. the Smoke-free Environments Act prohibits smoking in indoor workplaces, early childhood centres and schools
 - 20.2. local authorities designate smokefree areas, for example, outdoor dining areas and children's playgrounds
 - 20.3. business owners, employers and private persons set their own policies, for example, Parliament has designated its grounds to be smokefree.
21. The Bill distinguishes between specialist vape retailers and generic retailers (eg, dairies, supermarkets, service stations) to acknowledge the role of a specialist vape retailer in supporting smokers who wish to switch to reduce the risks to their health or to help them to quit smoking.
22. Retailers will be able to seek the Director-General of Health's approval for status as a specialist vape store. The key criteria set out in the Bill are that the retail premise is a fixed permanent structure and that 85 percent of total sales are from vaping products.

23. The Bill allows specialist vape retailers to:
 - 23.1. use trading names that include the words 'vape' or 'vaping'
 - 23.2. provide giveaways, discounts and loyalty points
 - 23.3. provide advice and recommendations about vaping products
 - 23.4. allow customers to sample vaping products in-store.
24. Only tobacco, mint and menthol flavoured products may be sold by generic retailers, however, there are no restrictions on the flavours that may be sold by specialist vape retailers.
25. In contrast to tobacco, the Bill allows all retailers to display products within stores and to display information about, for example, the relative-risks of vaping compared with smoking. The information that may be displayed within stores will be set out in regulations. Officials will provide me with advice about what would be permitted as care is needed to ensure that the Medicines Act 1981 is not breached through the inadvertent making of a therapeutic claim.
26. The Bill also allows for the setting of safety requirements for vaping and smokeless tobacco products (eg, maximum nicotine levels, child resistant closures etc).
27. To further support product safety, the Bill requires manufacturers and importers to notify a vaping or smokeless tobacco product to the Ministry of Health before marketing it and to certify that the product meets any safety requirements. The notification system supports rapid follow-up and remedial action should any safety issues arise with a product or product part.
28. Other product safety provisions include adverse reactions reporting, product recalls, suspensions and cancellations of product notifications, and an ability for the Director-General of Health to issue warning statements about products.
29. The Bill provides for the Act to come into force on the day after it receives Royal assent, with the following exceptions to give businesses additional time to comply:
 - 29.1. the requirement that only tobacco, menthol and mint flavoured products may be sold in generic stores commences six months after Royal assent
 - 29.2. the requirement for products to be notified commences six months after Royal assent.
30. The Bill also gives effect to Cabinet decisions unrelated to the regulation of vaping and smokeless tobacco products, as follows:
 - 30.1. an assessment tool may be provided for in regulations to support a determination of whether a space within a premise, such as a bar, is an open area (where smoking is allowed) or an internal area (where smoking is prohibited). This aims to provide clarity to business owners and Smokefree Enforcement Officers.

- 30.2. allowable content for manufacturers' price lists may be set out in regulations to prevent price lists from being used for promotional purposes
 - 30.3. repeal of the provision that allows an exemption from the Act's advertising and sponsorship prohibitions for multi-national sporting events.
31. This Bill is necessary to amend the Smokefree Environments Act 1990 to give effect to these proposals.

Other nicotine-delivery products

32. Nicotine products that do not contain tobacco are now available in New Zealand. For example, nicotine toothpicks, nicotine 'drops', and a tobacco-free version of snus (an oral tobacco product) are now being sold in New Zealand. These products are not clearly covered by either the Smokefree Environments Act or the Medicines Act 1981. Work is needed to ensure that nicotine products that are not for a therapeutic purpose are adequately regulated.

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

Impact analysis

34. A regulatory impact statement was prepared for the Cabinet meeting of 12 November 2018.

Compliance

35. This Bill complies with:

35.1. the principles of the Treaty of Waitangi

35.2. the disclosure statement requirements (a disclosure statement has been prepared and is attached to the paper)

35.3. the principles and guidelines set out in the Privacy Act 1993

35.4. relevant international standards and obligations

35.5. the *Legislation Guidelines (2018 edition)*.

36. An assessment of compliance with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act has yet to be completed. It will be available for Cabinet's consideration of the Bill.

Consultation

37. The following departments were consulted on the Bill: Ministry of Justice, Ministry of Social Development, Oranga Tamariki–Ministry for Children, Ministry of Business, Innovation and Employment (Commerce and Consumer Affairs), New Zealand Customs Service, and the Environmental Protection Authority.

38. The following additional departments were consulted ^{9(2)(f)(ii)} [REDACTED] Health Promotion Agency, New Zealand Police, Te Puni Kōkiri, Ministry for Pacific Peoples, The Treasury, and the Department of Prime Minister and Cabinet.
39. The Prime Minister, Deputy Prime Minister, Minister of Social Development, Minister of Children, Minister of Education, Minister for the Environment, Minister of Health, Associate Ministers of Health, Minister of Commerce and Consumer Affairs, Minister of Regional Economic Development, Minister of Justice, Minister of ACC, Minister of Māori Affairs, Minister of Pacific Peoples, Attorney General and the Leader of the House were consulted on the Bill.
40. New Zealand First and the Green Party were also consulted on the Bill.

Binding on the Crown

41. The principal Act binds the Crown.

Creating new agencies or amending law relating to existing agencies

42. The Bill will not create new agencies or amend law relating to existing agencies.

Allocation of decision making powers

43. The Bill does not involve the allocation of decision making powers.

Associated regulations

44. Regulations will be needed to bring the Bill into operation, prescribing detailed requirements for:
- 44.1. determining whether an area within a premise is an open area (where smoking is allowed) rather than a closed area (where smoking is not allowed)
 - 44.2. approval of and rules applying to specialist vape stores
 - 44.3. the content of price lists given to retailers of regulated products
 - 44.4. the content of retail (including vending machines and Internet) information and notices about regulated products
 - 44.5. point of sale health information or warning signs
 - 44.6. testing, and further testing where required by the Director-General of Health, for constituents of regulated products
 - 44.7. reporting, including annual sales information for regulated products that must be reported to the Ministry of Health
 - 44.8. standardised packaging requirements, including messages and information, for vaping and smokeless tobacco products

- 44.9. maximum quantity of smokeless tobacco sticks that may be included in a package
 - 44.10. pre-notification and notification requirements for vaping and smokeless tobacco products
 - 44.11. specifying the changes to the parts or components of a vaping or smokeless tobacco product that will require a new product notification
 - 44.12. prescribing safety requirements for vaping products
 - 44.13. empowering the prescribing of fees and levies payable, by notice in the Gazette
 - 44.14. temporary transitional arrangements to enable the continuation of the Act's existing provisions for tobacco products up until new provisions covering all regulated products come into effect.
45. It is expected that all regulations will be in effect within six months of commencement of the Act. This is to allow time for consultation and drafting.

Other instruments

46. The Bill does not specify any other instruments.

Definition of Minister/department

47. The Bill does not contain a definition of Minister or department.

Commencement of legislation

48. The Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

49. The Bill should be introduced on before the end of February 2020 and passed by 31 July 2020.
50. It is proposed that the Bill be referred to the Health Committee for a period of three months.

Proactive Release

51. Once Cabinet decisions have been made, I intend to proactively release this Cabinet paper on the Ministry of Health's website.

Recommendations

The Associate Minister of Health (Hon Jenny Salesa) recommends that the Committee:

1. note that a priority 2 is being sought for the Smokefree Environments and Regulated Products (Vaping) Amendment Bill on the 2020 Legislation Programme (must be passed in 2020)
2. note that the Bill will improve the regulation of vaping and smokeless tobacco products and seeks to strike a balance between protecting young people from the risks associated with these products and supporting smokers to switch to much less harmful alternatives
3. approve the Smokefree Environments and Regulated Products (Vaping) Amendment Bill for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives
4. agree that the Minister may authorise minor and technical changes to the Bill ahead of its introduction
5. agree that the Bill be introduced before the end of February 2020
6. agree that the Government propose that the Bill be:
 - 6.1. referred to the Health Committee for a period of three-months
 - 6.2. enacted by 31 July 2020.

Authorised for lodgement

Hon Jenny Salesa
Associate Minister of Health