



## Associate Minister of Health

Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990  
and associated regulations

Date of publishing: 10 April 2024

These documents have been proactively released by the Ministry of Health on behalf of the Associate Minister of Health, Hon Casey Costello.

### **Titles of documents:**

- Cabinet paper - Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and associated regulations
- Cabinet minute - Options to Repeal Amendments to the Smokefree Environments and Regulated Products Act 1990 and Associated Regulations (CAB-23-MIN-0500)
- Briefing - Reversal of legislative changes to the smoked tobacco regulatory regime (H2023033250)
- Briefing - Cabinet paper cover brief: Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and related regulations (H2023033378)

Some parts of this information would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it. Some information has been withheld from the Cabinet minute as it is out of scope of this proactive release.

### **Key to redaction codes:**

- S 9(2)(a) to protect the privacy of natural persons
- S 9(2)(f)(iv) to maintain the constitutional conventions that protect the confidentiality of advice tendered by Ministers and officials
- S 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers and officers and employees of any public service agency
- S 9(2)(h) to maintain legal professional privilege

## In Confidence

Office of the Associate Minister of Health

Cabinet

## Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and associated regulations

### Proposal

- 1 This paper seeks Cabinet's agreement to reverse amendments to the Smokefree Environments and Regulated Products Act 1990 (the Smokefree Act), that came into force on 1 January 2023 via the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (the Amendment Act) and associated regulations relating to the reduction in retail outlets able to sell tobacco products, denicotinisation, and the smokefree generation ban.

### Relation to government priorities

- 2 The Government's 100-day plan includes a commitment to "repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations" [CAB-23-MIN-0468 refers] with specific actions to:
  - 2.1 report to Cabinet by 18 December with repeal options
  - 2.2 introduce and pass a Bill by the end of the 100 days, and
  - 2.3 direct Health officials to provide advice in January on increasing penalties for illegal sales of vaping products to those under 18, as well as increasing oversight of the sale of vapes.
- 3 This paper fulfils the first of these commitments.

### Executive Summary

- 4 As outlined in the 100-day plan, I am recommending that three key changes to the Smokefree Environments and Regulated Products Act 1990 and associated regulations be reversed: the retail reduction scheme, the denicotinisation of cigarettes, and the smokefree generation ban.
- 5 This Coalition Government remains committed to the Smokefree 2025 goal. We will focus on providing people with practical tools and supports to help them to quit, rather than putting in place barriers to prevent or complicate the process by which people access smoked tobacco products.
- 6 I am particularly concerned at the impact the current settings would have had on retailers. The reduction in retail outlets would have meant fewer stores

holding more stock, potentially making those stores more likely to be targets of crime. It could also be challenging for retailers to manage the changing age of purchase eligibility that the generation ban would have introduced, leaving the retail sector, already dealing with elevated conflict situations, to manage enforcement.

- 7 In addition, I am concerned that the reduction in the number of retail outlets and denicotinisation could have led to an increase in black market activity.

## Background

- 8 The Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (the Amendment Act) came into force on 1 January 2023. The Amendment Act introduced three key changes to the Smokefree Act for smoked tobacco:

- 8.1 a significant reduction in smoked tobacco retail stores, from approximately 6,000 to 600 or fewer from 1 July 2024
- 8.2 the requirement for a nicotine level of no more than 0.8mg/g for smoked tobacco products from 1 April 2025 (an almost 95% reduction from current levels of approximately 15mg/g), and
- 8.3 the smokefree generation, which prohibits the sale of smoked tobacco products to anyone born on or after 1 January 2009, from 1 January 2027.

## The three main changes to the Smokefree Act are to be reversed and further changes to follow once further advice is received

- 9 I recommend that the three main changes made to the Smokefree Act in December 2022 be reversed: the retail reduction scheme, denicotinisation, and the smokefree generation.
- 10 These elements reflect both coalition party agreements which explicitly refer to removing requirements for denicotinisation and the reduction in retail outlets (ACT/NZ First and National) and the generation ban (NZ First and National), and further reflect the 100-day plan Cabinet directive [CAB-23-MIN-0468 refers]. I recognise that there are significant timing implications of drafting and passing an Amendment Bill within 100-days of taking office, and this is therefore my focus.
- 11 I note that both coalition agreements and the 100-Day plan also include commitments that may result in further amendments to the Smokefree Act. I have directed officials to provide me with advice in January 2024 on increasing penalties for illegal sales of vaping products to those under 18, as well as increasing oversight of the sale of vapes [CAB-23-MIN-0468 refers].
- 12 I have also asked that all other coalition agreement commitments relating to tobacco, vaping and other products are considered as part of the January 2024 advice. This includes amending vaping product requirements, taxing smoked tobacco products only, reforming regulation of other less harmful

nicotine products, banning disposable vapes and increasing penalties for selling vapes to under 18s. This will allow the range of issues to be considered together, including working through legal implications.

- 13 Following this advice, I intend to come back to Cabinet seeking agreement to progress any further legislative changes needed to further strengthen the regulation of vaping and other nicotine products to better protect children and young people, as well as supporting people to become smokefree.
- 14 I have not ruled out consideration of further changes to the regulatory regime for smoked tobacco in the future if needed.

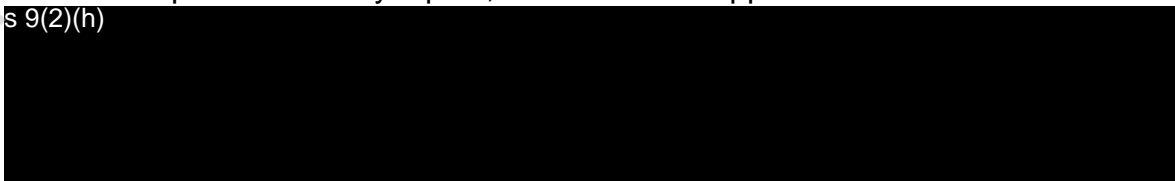
*Rationale for the new direction to tobacco control*

- 15 The 3 key changes made to the Smokefree Act to the regulation of smoked tobacco essentially put barriers in place to access these products. These measures are not yet in place.
- 16 I am particularly concerned that the retail reduction scheme would place significant additional pressure on retailers, on top of the challenges they are currently facing.
- 17 I acknowledge that there was strong support from people working in the health sector for these provisions, including from Māori and Pacific health and community organisations. We remain committed to the Smokefree 2025 target, and to the supports mentioned above. The difference is not the goal but the means by which we think it can be achieved.
- 18 The role of government, to meet this commitment, will be to continue to provide practical solutions to assist people to stop smoking and deter people from starting.

*The retail reduction scheme*

- 19 I propose removing the retail cap of 600. I also propose removing all related aspects of the smoked tobacco retail scheme.
- 20 I recognise that this impacts individuals and businesses who have already applied, and paid a fee, to become an approved smoked tobacco retailer. As at midday on 1 December 2023 when the Smoked Tobacco Retailer scheme was suspended, 439 applications had been completed and the \$1475 +GST application fee paid (totalling over \$744,000 including GST). A further 334 were completed but not yet paid, and additional applications were in draft.

s 9(2)(h)



*Denicotinisation*

- 21 I propose removing the requirement for low nicotine products of 0.8mg/g nicotine content or less. I also propose removing the related requirements of the smoked tobacco product approval scheme.

*The smokefree generation*

- 22 I propose reversing commencement of the provisions in the Amendment Act relating to 'the smokefree generation'. Section 22 of the Amendment Act provides for two new sections (ie sections 40A and 40B) to be inserted into the Smokefree Act to commence on 1 January 2027. These would give effect to the smokefree generation policy by providing that a person must not sell, or supply in a public place, a smoked tobacco product to a person born on or after 1 January 2009. I also propose reversing the corresponding offence and penalty provisions and other consequential amendments as required to ensure the minimum purchase age remains at 18 years of age.

**Some changes made by the Smokefree Amendment Act should be retained**

- 23 I recommend retaining other changes made by the Amendment Act that are largely unrelated to the three main changes but were included to better support compliance and enforcement efforts. Due to the urgency required to pass this legislation, I have not detailed the minor and technical aspects of the Amendment Act. The following represent the more substantive aspects of the Amendment Act that will remain:

23.1 **Notification requirements.** Requiring retailers of vaping, smokeless and herbal smoking products, and distributors of smoked tobacco products to notify the Director-General of Health commenced on 21 September 2023. I recommend retaining the notification requirements. This will support compliance and enforcement efforts by enabling those persons selling certain products regulated under the Smokefree Act to be known to the Ministry.

23.2 **Herbal smoking products.** Vaping products and smokeless tobacco products have been notifiable products under the Act since 11 November 2020. The Amendment Act extended the definition of notifiable products to also include herbal smoking products, and any other regulated product (other than a smoked tobacco product) declared by regulations to be a notifiable product. Retaining this extended definition allows for product safety Regulations to be set for these products, and for importers and suppliers of these products to be required to notify the Ministry in relation to the sale of these products.


23.3 **Underage sales.** The Amendment Act introduced a requirement in regards to the existing prohibition on sales to minors, that a person cannot rely solely on an oral or written statement of the person's age. Retaining this supports compliance and enforcement of underage retail sales.

- 23.4 **Data sharing.** There is now ability to share data between relevant agencies. Retaining this allows for smooth operational efforts between agencies, including integrated compliance and enforcement efforts.

**New tobacco control initiatives to bring smoking rates down further**

- 24 Smoking rates have been steadily decreasing over the past decade, with 16.4% of the adult population being daily smokers in 2011/12, decreasing to 6.8% in 2022/23. I am committed to continuing to support people who wish to quit smoking to do so and provide a range of options to deter smoking uptake.
- 25 I acknowledge the good work that is already underway, and especially the stop smoking workforce and will ensure this work continues to be supported.
- 26 I have asked officials to provide further advice on additional initiatives that will better support people who smoke and wish to quit to do so, and to prevent any increases in smoking uptake. Some of these initiatives are outlined in Appendix 1.

s 9(2)(h)



**Cost-of-living Implications**

- 30 In 2021/22, the percentage of adult New Zealanders that were daily smokers was 8.0%. An average smoker is estimated to spend between \$5,200 - \$7,800 on tobacco products per year (based on an average of 9.6 cigarettes per day). For these households, this is likely to account for a significant proportion of their discretionary income.

- 31 We will focus on providing people who smoke with practical tools and supports to quit. Initiatives to decrease the number of people who smoke, and/or the frequency with which they smoke, would have positive impacts on cost of living for affected households. It could also enable these households to put some or all of the money previously spent on smoking on other goods and services, potentially supporting the local economy.

### Financial Implications

- 32 Costs associated with refunding individuals and businesses who have paid an application fee to be approved as a smoked tobacco retailer will be quantified. Officials advise me the costs are likely to be approximately \$650,000 (exclusive of GST) for the refund of application fees, with the operational costs to complete this work estimated at \$60,000 (which will be met within existing funding).
- 33 Excise revenue is predicted to continue to gradually decline as smoking rates decrease. In the 2022/23 financial year, \$1,666 million excise was collected, down from \$1,980 million in 2018/19.
- 34 In the Pre-Election Economic and Fiscal Update, forecasts of tobacco excise revenue were reduced to incorporate retail and nicotine reduction and the smokefree generation policy. Should the Smokefree measures be removed, then the tobacco excise forecasts will be increased again, most likely for the 2024 Budget Economic and Fiscal Update. Initial work from Treasury suggests this may add \$1.5 billion in total to tax revenue in the 4 years ending June 2028, with a corresponding positive effect on the Crown's operating balance. Should this additional revenue be added back to the tobacco excise forecasts, they would still be on a declining trend, with the assumed decline in tobacco consumption more than offsetting the increase in excise revenue from CPI indexation of tobacco excise rates on 1 January each year.

### Legislative Implications

- 35 This paper proposes a new Government bill.

36 s 9(2)(f)(iv)

### Impact Analysis

- 37 Cabinet has decided to suspend the requirement for Regulatory Impact Statements for decisions relating to 100 Day Plan proposals (taken within the 100 Days) which solely involve the repeal of legislation. Impact analysis was prepared by the Ministry of Health when Cabinet decisions were sought on the Smokefree Aotearoa Action Plan in 2021. This analysis is available on the Ministry of Health website.

### Population Implications

- 38 Some population groups have higher rates of smoking and the harm from tobacco therefore affects these groups disproportionately (both in terms of

direct health impact, and the indirect impact that smoking can have on household disposable incomes).

- 39 This Government is committed to taking a preventative approach to tobacco control to ensure the continued provision and delivery of initiatives specifically targeted to the needs of these populations that are disproportionately impacted by the negative health impacts of smoking..
- 40 We are committed to ensuring that any new measures put in place do not have negative unintended consequences with these population groups.

### Human Rights

- 41 s 9(2)(f)(iv), s 9(2)(g)(i)  
[REDACTED] A NZBORA vet will be completed as part of the legislative process.

### Use of external Resources

- 42 No contractors or consultants have been involved in developing this paper.

### Consultation

- 43 This paper was prepared by the Ministry of Health | Manatū Hauora. The following agencies were consulted: the Crown Law Office, the Department of Prime Minister and Cabinet, Health New Zealand | Te Whatu Ora, Ministry for Ethnic Communities, Ministry for Pacific Peoples, Ministry of Business, Innovation, and Employment, Ministry of Disabled People | Whaikaha, Ministry of Education, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Social Development, New Zealand Customs, New Zealand Police, Oranga Tamariki, Parliamentary Counsel Office, Te Aka Whai Ora | Māori Health Authority, Te Arawhiti | Office for Māori Crown Relations, Te Puni Kokiri | Ministry of Māori Development, the Treasury and the Office for Seniors.
- 44 Officials have confirmed that representatives of the tobacco industry were not involved in the development of this Cabinet paper per New Zealand's obligation under article 5.3 of the World Health Organization's Framework Convention on Tobacco Control in 'setting and implementing public health policies with respect to tobacco control... to protect these policies from commercial and other vested interests of the tobacco industry.'

### Communications

- 45 My office will work with Officials to ensure timely communications as required.

### Proactive Release

- 46 I intend to proactively release this Cabinet paper in whole (subject to redactions to protect legal privilege).



## Recommendations

The Associate Minister of Health recommends that Cabinet:

- 1 **note** that the 100-day plan includes a commitment to “repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations”;
- 2 **agree** to amend the Smokefree Environments and Regulated Products Act 1990 (and related regulations) to remove the changes provided for in the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 that relate to:
  - 2.2 reducing the number of retailers that can sell smoked tobacco;
  - 2.3 limiting nicotine levels in smoked tobacco products;
  - 2.4 introducing a Smokefree Generation policy;
- 3 **agree** to amend the Smokefree Environments and Regulated Products Act 1990 to enable reimbursement of applicants who have applied to be an approved smoked tobacco retailer and paid the \$1475 (including GST) application fee;
- 4 **note** that in the Pre-Election Economic and Fiscal Update, forecasts of tobacco excise revenue was reduced to incorporate retail and nicotine reduction and the smokefree generation policy, but should the Smokefree measures be removed, then the tobacco excise forecasts will be increased again, with initial work by the Treasury suggesting this may add \$1.5 billion in total to tax revenue in the 4 years ending June 2028 with a corresponding positive effect on the Crown's operating balance, and this will be updated for the 2024 Budget Economic and Fiscal Update;
- 5 **note** that the Smokefree Environment and Regulated Products (Smoked Tobacco) Amendment Act also provided for other changes not directly related to the retail reduction, low nicotine levels and the Smokefree Generation policies including minor and technical amendments along with the following more substantive changes:
  - 5.1 requiring retailers of vaping, smokeless and herbal smoking products, and distributors of smoked tobacco products, to notify the Director-General;
  - 5.2 extending the definition of notifiable products;
  - 5.3 introducing a requirement in regards to the existing prohibition on sales to minors, that a person cannot rely solely on an oral or written statement of the person's age;
  - 5.4 ability to share data between relevant agencies;

**IN CONFIDENCE**

- 6 **agree** to retaining the other changes provided for in the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022;
- 7 **agree** to consequential amendments, including to the Customs and Excise Act 2018 and to the Smokefree Environments and Regulated Products Regulations 2021, being made as required to give effect to the above proposals;
- 8 **note** that the Associate Minister of Health will report back to Cabinet before 8 March 2024 on further changes needed to further strengthen the regulation of vaping and other nicotine products;
- 9 **note** that targeted and wrap-around initiatives to support high need groups such as Māori and Pacific peoples to quit smoking will continue;
- 10 **agree** that the Associate Minister of Health issue drafting instructions to the Parliamentary Counsel Office to give effect to recommendations 2, 3, 5, 6 and 7 above;
- 11 **note** that the Amendment Bill must be passed by 8 March 2024.

Authorised for lodgement

Hon Casey Costello

Associate Minister of Health

## Appendix 1

### *A public campaign to tackle social supply of tobacco products*

In New Zealand, social supply plays a much greater role than commercial supply in youth access to tobacco, with an increasing relative influence of family members compared with friends. Māori and Pacific adolescents are more likely to report receiving tobacco in this way.

Social supply of tobacco is a key contributor to the uptake of smoking in young people before they are legally able to purchase.

### *Increased tobacco compliance activities with a greater proportion of offenders progressing to prosecution*

Health New Zealand employs Smokefree Enforcement Officers to undertake smoked tobacco retail-based compliance activity across the country.

Budget 2022 provided for the implementation of a suite of activities to improve smokefree compliance activity. This funding was predicated on the significant reduction of retail premises for smoked tobacco and the current legislative framework. Compliance and enforcement activity and demand will increase in the context of changes that would likely increase the number of smoked tobacco retailers.

Any compliance activities would be most effective if there are comprehensive enforcement tools available to officers, such as the ability to issue notices to address compliance issues (Notices of direction, improvement or similar), to take evidential samples, seizure ability and effective offences and penalties. This is currently not the case. I have directed officials to provide further advice on possible improvements to offences and penalties for all regulated products, including vaping products, in January 2024.

Customs New Zealand note that any review of penalties could include the border-related penalties to see whether any adjustment needs to be made. This would potentially enable the largest source of illicit tobacco to be more effectively addressed through border actions, not just at the New Zealand retail/demand end.

### *Review of Stop Smoking services*

Stop smoking services could be reviewed to assess their effectiveness, particularly in decreasing smoking rates among Māori and Pacific populations. This review should identify if these services are meeting their targets, are culturally appropriate and effectively reaching and engaging these target populations. Implementing necessary changes or enhancements will ensure these services are more targeted and effective for Māori and Pacific peoples.

Services could be funded to allow the provision of vapes to support quit smoking attempts for smokers. A scheme was launched in the United Kingdom (UK) in April this year that provided a free vape starter kit alongside behavioural support to help people wanting to quit smoking.

*Community-led initiatives to enhance engagement and effectiveness of the quit smoking journey*

Implement community-led quit smoking initiatives, where people who smoke and their communities take the lead in their quit journey. When those who smoke have a sense of ownership of how they quit, this fosters greater engagement in actively designing and leading their cessation process. It also allows for the creation of support systems that are more attuned to the unique needs and contexts of different communities and cultures.

*Extend range of subsidised (free) NRT products available*

Currently people who smoke can access subsidised (free) nicotine replacement therapy (NRT), however the choice is limited to a single brand of patches, gum, and lozenges. Expanding this choice to include other products such as a nicotine mouth spray and inhalator would likely motivate quit attempts and give people options that they may not have tried in the past.

*Whānau Ora*

Te Puni Kōkiri note that Whānau Ora services could be harnessed to support Māori who wish to stop smoking. The Whānau Ora Commissioning Agencies employ a whānau-centred and community-based approach that supports and enables whānau to achieve their aspirations – whatever they may be. The initiatives funded by Whānau Ora are holistic, which means they can support whānau achieve an array of goals. This includes any objectives they may have for smoking cessation.



# Cabinet

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Options to Repeal Amendments to the Smokefree Environments and Regulated Products Act 1990 and Associated Regulations

Portfolio Associate Health (Hon Casey Costello)

On 18 December 2023, Cabinet:

- 1 **noted** that the Government's 100-Day Plan includes a commitment to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations;
- 2 **agreed** to amend the Smokefree Environments and Regulated Products Act 1990 (and related regulations) to remove the changes provided for in the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 that relate to:
  - 2.1 reducing the number of retailers that can sell smoked tobacco;
  - 2.2 limiting nicotine levels in smoked tobacco products;
  - 2.3 introducing a smokefree generation policy;
- 3 **agreed** to amend the Smokefree Environments and Regulated Products Act 1990 to enable the reimbursement of applicants who have applied to be an approved smoked tobacco retailer and paid the \$1,475 (including GST) application fee;
- 4 **noted** that:
  - 4.1 in the Pre-Election Economic and Fiscal Update, forecasts of tobacco excise revenue were reduced to incorporate retail and nicotine reduction and the smokefree generation policy;
  - 4.2 should the smokefree measures be removed, then the tobacco excise forecasts will be increased again, with initial work by the Treasury suggesting this may add \$1.5 billion in total to tax revenue in the four years ending June 2028, with a corresponding positive effect on the Crown's operating balance, and that this will be updated for the 2024 Budget Economic and Fiscal Update;

- 5 **noted** that the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 also provided for other changes not directly related to the retail reduction, low nicotine levels and the smokefree generation policies, including minor and technical amendments, along with the following more substantive changes:
- 5.1 requiring retailers of vaping, smokeless and herbal smoking products, and distributors of smoked tobacco products, to notify the Director-General;
  - 5.2 extending the definition of notifiable products;
  - 5.3 introducing a requirement in regard to the existing prohibition on sales to minors, that a person cannot rely solely on an oral or written statement of the person's age;
  - 5.4 ability to share data between relevant agencies;
- 6 **agreed** to retain the other changes provided for in the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022, referred to in paragraph 5 above;
- 7 **agreed** that consequential amendments, including to the Customs and Excise Act 2018 and to the Smokefree Environments and Regulated Products Regulations 2021, be made as required to give effect to the above proposals;
- 8 **noted** that the Associate Minister of Health (Hon Casey Costello) will report back to Cabinet:
- 8.1 in January 2024 with a proposed communications strategy;
  - 8.2 before 8 March 2024 on further changes needed to further strengthen the regulation of vaping and other nicotine products;
- 9 **noted** that targeted and wrap-around initiatives to support high need groups, such as Māori and Pacific peoples, to quit smoking will continue;
- 10 **invited** the Associate Minister of Health (Hon Casey Costello) to issue drafting instructions to the Parliamentary Counsel Office to give effect to paragraphs 2, 3, 5, 6 and 7 above;
- 11 **noted** that the Amendment Bill must be passed by 8 March 2024.

Rachel Hayward  
Secretary of the Cabinet

# Briefing

## Reversal of legislative changes to the smoked tobacco regulatory regime

**Date due to MO:** 6 December 2023      **Action required by:** 7 December 2023

**Security level:** IN CONFIDENCE      **Health Report number:** H2023033250

**To:** Hon Casey Costello, Associate Minister of Health

**Copy to:** Hon Dr Shane Reti, Minister of Health

**Consulted:** Health New Zealand:  Māori Health Authority:

### Contact for telephone discussion

Name	Position	Telephone
<b>Dr Andrew Old</b>	Deputy Director-General, Public Health Agency   Te Pou Hauora Tūmatanui	s 9(2)(a)
<b>Jane Chambers</b>	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:

# Reversal of legislative changes to the smoked tobacco regulatory regime

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**Security level:** IN CONFIDENCE      **Date:** 6 December 2023

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**To:** Hon Casey Costello, Associate Minister of Health

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**Copy to:** Hon Dr Shane Reti, Minister of Health

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## Purpose of report

1. As requested, this paper provides you with options to meet the 100-day plan commitment to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations, along with our advice on specific risks and implications, and seeks your direction to inform the Cabinet paper planned for 18 December 2023.
2. This report discloses all relevant information and implications.

## Summary

3. The Government's 100-day plan includes the repeal of specific amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations [CAB-23-MIN-0468 refers]:
  - a. The coalition agreements between the New Zealand National Party and ACT New Zealand and New Zealand First agreed to remove the requirements for denicotinisation and the reduction in retail outlets.
  - b. The coalition agreement between the New Zealand National Party and New Zealand First also agreed to remove the generation ban.
4. The current law was designed as a mutually reinforcing and comprehensive "endgame" approach. When coupled with health promotion and stop-smoking services, this was designed to accelerate New Zealand towards the smokefree goal of less than 5% daily smoking rates for all population groups by 2025.
5. Given the inequitable impact smoking has on Māori, Pacific peoples and for people living in low socioeconomic communities, reversing the changes is likely to have a disproportionately negative impact on these groups in the absence of alternate measures.
6. There are also reputational, financial, and operational implications of reversing the law.
7. We recommend retaining aspects of the recent changes, and modifying some others, to meet the Government's stated intent of continuing to reduce smoking rates, while addressing concerns around crime and the illicit market, and meeting coalition commitments.



## Recommendations

We recommend you:

- a) **Note** that repealing amendments to the Smokefree Environments and Regulated Products Act 1990 is an action in the Coalition Government's 100-day plan [CAB-23-MIN-0468] **Noted**
- b) **Note** that there are risks and implications in reversing the changes to the Smokefree Environments and Regulated Products Act 1990 (the Smokefree Act) **Noted**
- c) **Note** that an amendment Bill will be needed to reverse all, or part of, the legislative changes made by the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 **Noted**
- d) **Indicate** in the body of this paper the policy direction you would like to take in the Cabinet paper **Yes/No**
- e) **Indicate** whether you would like the Cabinet paper to seek agreement to refund smoked tobacco retailer applications **Yes/No**
- f) **Note** that additional funding might be required for tobacco control initiatives to support people who smoke and wish to quit to do so, and to prevent any increases in smoking uptake **Noted**
- g) **Indicate** if you wish to seek in-principal agreement at the 18 December 2023 Cabinet meeting that additional funding might be sought through the Budget 2024 process. **Yes/No**



Dr Diana Sarfati  
**Director-General of Health**  
**Te Tumu Whakarae mō te Hauora**

Date: 6 December 2023

Hon Casey Costello

**Associate Minister of Health**

Date:



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

Date: 5 December 2023

# Reversal of legislative changes to the smoked tobacco regulatory regime

## Context

1. Smoking continues to be the leading cause of avoidable morbidity and mortality in New Zealand.<sup>1</sup> Around 12 to 13 deaths every day are due to smoking or exposure to second-hand smoke,<sup>2</sup> and smoking remains the single greatest contributor to ethnic inequities in cancer in New Zealand.<sup>3</sup>
2. On 24 November 2023, coalition agreements between the New Zealand National Party and ACT New Zealand and New Zealand First respectively, included agreements to repeal aspects of the recent amendments to the Smokefree Environments and Regulated Products Act 1990 (the Smokefree Act).<sup>4</sup>
3. The Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (the Amendment Act) came into force on 1 January 2023. The Amendment Act introduced three key changes to the Smokefree Act for smoked tobacco. The following changes will progressively come into effect over the next few years unless amended:
  - a. a significant reduction in smoked tobacco retail stores, from approximately 6,000 to 600 or fewer from 1 July 2024
  - b. the requirement for a nicotine level of no more than 0.8mg/g for smoked tobacco products from 1 April 2025 (an almost 95% reduction from current levels of approximately 15mg/g),<sup>5</sup> and
  - c. the smokefree generation, which prohibits the sale of smoked tobacco products to anyone born on or after 1 January 2009, from 1 January 2027.

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<sup>1</sup> Ait Ouakrim D, Wilson T, Waa A, *et al* Tobacco endgame intervention impacts on health gains and Māori:non-Māori health inequity: a simulation study of the Aotearoa/New Zealand Tobacco Action Plan *Tobacco Control* Published Online First: 10 January 2023. doi: 10.1136/tc-2022-057655.

<sup>2</sup> Global Health Data Exchange, <https://ghdx.healthdata.org/>.

<sup>3</sup> Walsh M, Wright K. 2020. *Ethnic inequities in life expectancy attributable to smoking*. New Zealand Medical Journal 133:1509.

<sup>4</sup> The National/ACT agreement stated: *Repeal the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 to remove the requirements for denicotinisation and the reduction in retail outlets*.

The National/NZ First agreement stated: *Repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations before March 2024, removing requirements for denicotinisation, removing the reduction in retail outlets and the generation ban, while also amending vaping product requirements and taxing smoked products only*.

<sup>5</sup> Average nicotine content in tobacco filler per cigarette is around 15mg/g. International research findings vary, but 10 - 15gm per cigarette is commonly noted, which means that the tobacco filler has between 12.5 – 21.4mg/g nicotine. For further information see: Federal Register: Tobacco Product Standard for Nicotine Level of Combusted Cigarettes <https://www.federalregister.gov/documents/2018/03/16/2018-05345/tobacco-product-standard-for-nicotine-level-of-combusted-cigarettes>; Benowitz NL, Donny EC, Edwards KC, Hatsukami D, Smith TT. The Role of Compensation in Nicotine Reduction. *Nicotine Tob Res.* 2019 Dec 23;21(Suppl 1):S16-S18. doi: 10.1093/ntr/ntz120. PMID: 31867654; PMCID: PMC6939759; and WHO Study Group on Tobacco Products Regulation. Report on the Scientific basis of tobacco product regulation; seventh report of a WHO study group. Geneva: World Health Organisation; 2019 (p82).

4. These changes were made in response to the Māori Affairs Committee's Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Māori in 2010.<sup>6</sup> The Committee recommended New Zealand's smokefree 2025 goal,<sup>7</sup> which was subsequently adopted by the National-led government in 2011, and then reaffirmed in 2018 following the joint report of the Māori Affairs and Health Committee's on achieving the Smokefree 2025 goal for New Zealand.<sup>8</sup>
5. In addition, the Amendment Act introduced other changes to the Smokefree Act such as a requirement for any person selling a regulated product (ie, a tobacco, vaping, or herbal smoking product) to notify the Director-General of Health. Amendments were also made to the Customs and Excise Act 2018 to support the low nicotine provisions.
6. Regulations to support the implementation of the new regulatory regime came into force on 21 September 2023. The Smokefree Environments and Regulated Products Amendment Regulations 2023 provide regulatory detail regarding the sale and composition of smoked tobacco products and also introduced additional vaping product restrictions.<sup>9</sup>
7. On 29 November 2023, Cabinet agreed to the Coalition Government's 100-Day Plan [CAB-23-MIN-0468 refers]. You were invited to report to Cabinet by 18 December 2023 with repeal options for amending the Smokefree Act and regulations. This briefing seeks to confirm the direction you wish that Cabinet paper to take.
8. You will also be provided with advice in January 2024 on increasing penalties for illegal sales of vaping products to those under 18, as well as increasing oversight of the sale of vapes. Both coalition agreements also indicated possible vaping-related legislative changes.<sup>10</sup>

#### *Protection from interests of the tobacco industry*

9. New Zealand has an obligation under article 5.3 of the World Health Organization's Framework Convention on Tobacco Control in "setting and implementing public health policies with respect to tobacco control... to protect these policies from commercial and other vested interests of the tobacco industry." Our advice reflects this commitment.

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<sup>6</sup> The report from the Māori Affairs Committee can be found on the Parliament website: [https://www.parliament.nz/resource/en-NZ/49DBSCH\\_SCR4900\\_1/2fc4d36b0fbdfed73f3b4694e084a5935cf967bb](https://www.parliament.nz/resource/en-NZ/49DBSCH_SCR4900_1/2fc4d36b0fbdfed73f3b4694e084a5935cf967bb) (accessed 5 December 2023).

<sup>7</sup> Expressed as an aspirational goal of making New Zealand a smoke-free nation by 2025.

<sup>8</sup> Expressed as reducing smoking levels to less than 5% by 2025.

<sup>9</sup> These include reducing the nicotine levels in disposable vaping products, requiring child safety features, batteries that can be removed and inspected on devices, updating packaging requirements to allow only a specified flavour list, as well as some changes to the approval criteria for specialist vape retailers (proximity to schools and marae, and understanding of requirements under the Act).

<sup>10</sup> The National/ACT agreement stated: *Introduce serious penalties for selling vapes to under 18s, and consider requiring a liquor licence to sell vapes.* The National/NZ First agreement stated: *Reform the regulation of vaping, smokeless tobacco and oral nicotine products while banning disposable vaping products and increasing penalties for illegal sales to those under 18.*

## Tax revenue from tobacco

10. Excise tax is collected on tobacco products, and the amount is adjusted annually.<sup>11</sup> Between 2010 and 2020 New Zealand implemented a series of annual 10% excise increases on tobacco. Evaluation of the impacts from these increases found they were effective at helping some segments of the population to stop smoking, however further increases could have negative impacts on low-income New Zealanders.<sup>12</sup>
11. Despite the 10% excise increases, overall revenue from excise has gradually decreased as smoking rates have declined. In the 2022/23 financial year, \$1,666 million excise was collected, down from \$1,980 million in 2018/19.

## High-level implications of reversing the three smoked tobacco measures

### Overview

12. The retail reduction, low nicotine, and smokefree generation legislative policies were developed as a comprehensive “endgame” package to make a step-change in the broader environment so that smoked tobacco became progressively less accessible, appealing and addictive. Implementation of all 3 policies is modelled to result in a rapid reduction in smoking rates, with a reduction in mortality rates to follow. This modelling was peer reviewed and published in the journal *Tobacco Control*.<sup>13</sup> Vincy Huang et al independently ranked the modelling highest when compared to 25 other international tobacco control models.<sup>14</sup>
13. While smoking rates have been reducing<sup>15</sup> they are still higher for some population groups than others (in particular, Māori, Pacific, those living in areas of high deprivation and disabled adults),<sup>16</sup> and the harm from tobacco therefore affects these groups disproportionately. This has a direct consequential impact on the health of communities, and on the health care system, as smoking is a major cause of ischaemic heart disease, stroke, and other cardiovascular diseases, as well as many cancers and other conditions.
14. Second-hand smoke exposure is associated with a range of childhood illnesses, including lower respiratory tract infections and sudden unexpected death in infancy (SUDI), further driving health inequities.
15. The reversal of changes brought about by the Amendment Act, would limit efforts to reduce smoking rates to health promotion, smoking cessation services, high (existing)

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<sup>11</sup> Excise tax rates are increased every January, in line with the consumer price index.

<sup>12</sup> The Ministry commissioned consultants EY to review tobacco excise tax policy in 2018, and the report is published here. <https://www.health.govt.nz/system/files/documents/pages/evaluation-tobacco-excise-increases-final-27-nov2018.pdf>

<sup>13</sup> Ait Ouakrim D, Wilson T, Waa A, et al Tobacco endgame intervention impacts on health gains and Māori:non-Māori health inequity: a simulation study of the Aotearoa/New Zealand Tobacco Action Plan *Tobacco Control* Published Online First: 10 January 2023. doi: 10.1136/tc-2022-057655.

<sup>14</sup> Huang V, Head A, Hyseni L, et al. Identifying best modelling practices for tobacco control policy simulations: a systematic review and a novel quality assessment framework. *Tob Control* 2022 doi: 10.1136/tobaccocontrol-2021-056825 [published Online First: 2022/01/13]

<sup>15</sup> New Zealand Health Survey data: 8.0% of adults were daily smokers in 2021/22, down from 9.4% the previous year and 16.4% in 2011/12.

<sup>16</sup> 2021/22, daily smoking rates were 19.9% for Māori, 18.2% for Pacific and 7.2% for European/Other. After adjusting for age, gender and ethnic differences, adults living in the most socioeconomically deprived areas were 4.3 times as likely as adults in the least deprived areas to smoke. After adjusting for age and gender, disabled adults were 2.26 times as likely as non-disabled adults to smoke.

excise tax (pricing), plain packaging, advertising restrictions and smokefree areas. These measures were, and remain, vitally important in tobacco control. However, modelling predicts these alone will not achieve the goal of less than 5% smoking rates for all population groups until 2061.<sup>17</sup>

16. An amendment bill is required to reverse the changes made to the Smokefree Act. For the Cabinet paper, we need to confirm the approach you wish to take. In this briefing we canvas options for reversal of the changes, along with providing advice on additional specific risks and implications.
17. This paper also provides some alternative non-regulatory tobacco control options for your consideration as requested.

### *Illicit market*

18. A common tobacco industry tactic is to assert that tobacco control policies will increase an illicit market.<sup>18</sup> The assertion of an increased illicit market is used to oppose tobacco control measures such as excise tax increases. Independent investigation of industry funded estimates of illicit trade document numerous problems with the data collection, analysis, and presentation, resulting in inflated estimates of illicit tobacco trade.<sup>19</sup>
19. Given the above, the Ministry of Health | Manatū Hauora (the Ministry) commissioned the University of Auckland to carry out a multi-year study to estimate the size of the tobacco illicit market in New Zealand. The research will carry on through to 2026.
20. The research has so far found evidence of a decreasing illicit trade in tobacco in New Zealand over the past 10 years. Illicit trade accounted for an estimated 8.4% of the tobacco market in 2022.<sup>20</sup> This is despite New Zealand having some of the highest excise tax internationally, with tobacco excise duties and GST currently accounting for around 70% of the retail price of most cigarettes and loose tobacco.
21. Both the independent research, and New Zealand Customs (Customs), note that the trajectory of the market is hard to measure. Customs believe that the nature of illicit supply is changing. Recent major investigations show that organised crime has become involved which raises additional concerns such as: money laundering; links to importations of other illicit drugs; and funding of other criminal activity.

### *Compliance*

22. Budget 22 included funding for compliance. This included approximately \$11m for Customs and \$16.3m over 4 years for Health (which has been divided between the Public Health Agency and Health New Zealand | Te Whatu Ora). Funding supported the recruitment of an additional 16 new full frontline Smokefree Enforcement Officers

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<sup>17</sup> Ait Ouakrim D, Wilson T, Waa A, *et al* Tobacco endgame intervention impacts on health gains and Māori:non-Māori health inequity: a simulation study of the Aotearoa/New Zealand Tobacco Action Plan *Tobacco Control* Published Online First: 10 January 2023. doi: 10.1136/tc-2022-057655.

<sup>18</sup> Illicit Tobacco Trade, Tobacco Tactics, updated 27 April 2021, accessed 03 December 2023.

<sup>19</sup> Gallagher AWA, Evans-Reeves KA, Hatchard JL, *et al*. *Tob Control* 2019;28:334–345. [Tobacco industry data on illicit tobacco trade: a systematic review of existing assessments \(bmj.com\)](https://doi.org/10.1136/tc-2019-026000)

<sup>20</sup> Bullen C, Gregan MJ, Arachchilage N, Chu J, Exeter D, Kishore S, McCool J, Nosa V, Paynter J, Phyto P, Te Ao B. 2023. *Research, Evaluation and Monitoring of Illicit Tobacco in New Zealand: Baseline report 2022*. Wellington: Ministry of Health. [Research, Evaluation and Monitoring of Illicit Tobacco in New Zealand: Baseline report 2022 | Ministry of Health NZ](https://www.health.govt.nz/publication/research-evaluation-and-monitoring-of-illicit-tobacco-in-new-zealand-baseline-report-2022)

(underway), as well as development of a compliance strategy and a new training package for enforcement officers.

23. Customs funding was applied to employing 11 additional officers to target complex investigations relating to commercial scale importation. This initiative was aimed at raising the level of deterrence to participate in illicit markets through increasing the visibility and effectiveness of tobacco-related enforcement.<sup>21</sup>

#### *Crime and ram raids*

24. Police statistics show that ram raids are trending down, but reported victimisations at all types of retail locations have increased in frequency and seriousness.<sup>22</sup> No data are available specific to tobacco retailers, or analysis on the causes of retail crime.
25. Implementation of the significant retail reduction would reduce the number of retailers that sell tobacco, while also mandating the security, systems and training requirements that must be in place to sell it. The low nicotine policy was also expected to significantly reduce the incentive to steal tobacco from approved retailers. The combination of these policies was therefore expected to reduce the overall risk of crime through fewer targets, more robust security processes, and a less appealing product.
26. Two Government led initiatives are currently in place that subsidise security prevention measures for eligible small retailers: the Retail Crime Prevention Programme and the Fog Cannon Subsidy Scheme.<sup>23</sup> s 9(2)(f)(iv)

## **Detailed advice and options: Retail availability of smoked tobacco products**

### *Status quo*

27. Under current law, entry into the smoked tobacco market is now regulated. Only approved retailers can sell tobacco from 1 July 2024 and the maximum number of retailers across New Zealand who could be approved is 599. This would be a significant reduction from the approximately 6,000 retailers currently selling tobacco products.
28. In addition to significantly reducing availability, the law imposes new minimum requirements retailers must meet. This includes requirements to be a fit and proper

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<sup>21</sup> Customs report that since 2019, their fraud team has concluded investigations into illicit tobacco that has resulted in charges involving 17 million cigarettes and 18 tonnes of loose tobacco. Over \$17m in assets has been referred to Police for potential asset recovery. Also arising from tobacco investigations, charges have been laid involving over \$900,000 in laundered cash and for the importation of 336 kilogrammes of restricted drugs.

<sup>22</sup> Police data is for all types of retail premise. Figures provided by New Zealand Police show an increase of 32.5% of victimisations recorded at Retail Scene Codes by ANZOC Division in the period August 2022-August 2023. There is also an increase in more serious offending, although this makes up less than 10% of the overall volume.

<sup>23</sup> New Zealand Police leads the Retail Crime Prevention Programme that delivers protective equipment and prevention advice for retail stores who have been the victim of ram raids or aggravated robberies and meet eligibility criteria. The Ministry of Business, Innovation and Employment separately administer the Fog Cannon Subsidy Scheme which subsidises up to \$4,000 of the costs of the installation of a fog cannon for small retailers who meet eligibility criteria.

person, to operate from a fixed and appropriate premise, along with minimum security standards, training, sales, delivery, and other business system requirements.

29. Applications for approved retailers and premises opened on 21 September 2023 and were due to close on 3 December 2023. The scheme was suspended on 1 December 2023 pending further Government decisions.

#### *Specific risks in repealing the retail reduction*

30. Pending implementation of the retail reduction, smoked tobacco continues to be widely available in New Zealand, particularly in disadvantaged areas.<sup>24</sup> Higher retailer density has been associated in New Zealand and many other countries with increased youth and adult smoking rates.<sup>25</sup> This widespread availability perpetuates the idea that tobacco is a normal consumer good, and contributes to inequities and poor smoking related outcomes, such as undermining quit attempts and increasing youth smoking rates.<sup>26</sup>
31. Reducing tobacco retail availability is predicted to have the greatest impact on smoking behaviour when the density of tobacco retailers is very low (<10% of current density).<sup>27</sup> The planned reduction to 600 or fewer smoked tobacco retailers was expected to represent a reduction of 90%.

#### *Specific risks in repealing the other retail provisions*

32. A wholesale reversal of the provisions regulating entry into the smoked tobacco market would remove the minimum requirements for entry to market, such as requirements for security and for systems and training to prevent sales to underage people.

#### *Options to consider*

33. If you wish to remove or amend the cap on the maximum number of smoked tobacco retailers, we recommend retaining the other licensing aspects introduced by the Amendment Act to require the sale of smoked tobacco products only by approved retailers. As part of entry to market, we recommend retaining the minimum requirements outlined above. This would mean these retailers would need to demonstrate competence and ability to supply the retail sale of smoked tobacco products, to required standards.
34. Security standards and business system requirements will ensure that retailers have appropriate protections from crime and ram raids, and are likely to be high-quality operators. The fit and proper person requirement would also help with enforcement – to ensure that all sellers have a low risk of law breaches – as would knowing the location of each retail premise.

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<sup>24</sup> Marsh L, Doscher C, Robertson LA. Characteristics of tobacco retailers in New Zealand. *Health and Place* 2013;23:165-70.

<sup>25</sup> Marsh L, Ajmal A, McGee R, *et al* Tobacco retail outlet density and risk of youth smoking in New Zealand *Tobacco Control* 2016;25:e71-e74.

<sup>26</sup> Glasser, A. M., & Roberts, M. E. (2021). Retailer density reduction approaches to tobacco control: a review. *Health & Place*, 67, 102342.

<sup>27</sup> Robertson L, Marsh L. Estimating the effect of a potential policy to restrict tobacco retail availability in New Zealand. *Tob Control* 2019; 28:466-468.

35. Retaining the approval process would also retain the ability to suspend or cancel approvals for non-compliance with any condition of the approval or any requirement under the Smokefree Act (eg, sales to minors). This aligns with signalled Government intention in the vaping space to introduce tougher penalties for non-compliance, and would be consistent with moves to increase oversight of the sale of vaping products. Retaining these aspects of a smoked tobacco retailer approval process and scheme would support compliance and enforcement efforts and signal, albeit in a less explicit way than a cap would, that smoked tobacco is not a normal consumer product.
36. Four interrelated add-on options to consider are:
- increasing the cap to allow more than is currently allowed.** The retail reduction measure is predicted to work best when there is a substantial reduction. Evidence indicates that a critical level of at least a 90% reduction is needed to significantly impact smoking prevalence on its own. This critical level is reflected in the current cap of 600 stores. We do not have modelling to predict the impact on smoking rates of a lesser reduction.  
  
There could nevertheless be value in signalling a downwards trend, by setting a cap, albeit at a higher number, if this is combined with proximity controls to reduce socioeconomic inequities in the availability of smoked tobacco when compared to unregulated entry into market. An added sinking lid could further support achieving very low numbers of retailers, albeit on a slower trajectory.
  - adding proximity controls.** For example, in relation to other retailers, to schools or other areas of community interest, as has been done with specialist vape retail applications. A 2022 study of proximity limits in New Zealand found that a limit of 450m between tobacco retailers would reduce retailers by 58%.<sup>28</sup>
  - introducing a sinking lid.** For instance, by setting a timeframe in which applications must be made and approved (eg, one year), specifying that no further approvals for new retailers can be made, and not permitting transfer of licences. A variant could require retailers to reapply annually with no renewal of licence given to retailers who had breached the terms of the licence.
  - introducing an annually increasing licence fee.** Retaining a licensing scheme that has an annual fee increase (eg, by 15%) could help drive retailers to exit the market. This could be considered either with or without setting a specific limit on the total number of outlets that could be approved.
37. Complexities of implementation would need to be worked through.
38. Please indicate the direction you would like the Cabinet paper to take (if you do not wish to retain any of these, then respond No to all):

Retain the significant retail reduction policy of fewer than 600	Yes/No
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<sup>28</sup> Marsh L, Doscher C, Iosua E, *et al* What impact would tobacco retailer proximity limit have on tobacco availability in New Zealand? *Tobacco Control* Published Online First: 11 August 2022. doi: 10.1136/tc-2022-057462



Retain the need for Director-General of Health approval for entry to the smoked tobacco retail market	<b>Yes/No</b>
Retain the minimum requirements (retailers must be a fit and proper person, must operate from a fixed and appropriate premise, must meet minimum security standards, training, sales, delivery, and other business system requirements)	<b>Yes/No</b>
Retain the ability to suspend or cancel approval to sell smoked tobacco products for non-compliance (ie with the Smokefree Act and Regulations and conditions of approval)	<b>Yes/No</b>
Set a different cap to achieve a reduction in smoked tobacco retailers, and If yes, please indicate a number you would like in the Cabinet paper, and / or Introduce proximity controls, and / or Introduce a sinking lid, and / or Introduce an annually increasing licence fee	<b>Yes/No</b> <b>New cap:</b> _____ <b>Yes/No</b> <b>Yes/No</b> <b>Yes/No</b>
<b>Other Comments:</b>	

## Detailed advice and options: Requirements for low-nicotine smoked tobacco products

### *Status quo*

39. The current law provides that, from 1 April 2025, only approved smoked tobacco may be sold, distributed, manufactured and imported. The Smokefree Act sets up the product approval scheme as well as the upper limit for the nicotine content for tobacco at 0.8 mg/g. The amendment Act also updated the annual testing and reporting requirements, and regulation making powers, and enabled cancellation of approvals for non-compliant products.
40. The Institute of Environmental Science and Research Ltd (ESR) has carried out work on a testing methodology. The Ministry met with the National Retail Group in September 2023. This group has signed an exclusive distribution agreement with 22<sup>nd</sup> Century, a producer of low nicotine tobacco, regarding supply of low nicotine smoked tobacco products, and are looking to introduce low nicotine tobacco in advance of the legislative requirements coming into effect.<sup>29</sup>

<sup>29</sup> [https://www.health.govt.nz/system/files/documents/pages/moh\\_minutes\\_-\\_nrg\\_meeting\\_-\\_25\\_september\\_2023.pdf](https://www.health.govt.nz/system/files/documents/pages/moh_minutes_-_nrg_meeting_-_25_september_2023.pdf)

41. A scheme to manage imports of tobacco and collect excise tax has existed for many years under the Customs and Excise Act 2018. Changes have been made to this, to require that most imports of tobacco would also need product approval by the Director-General of Health. Depending on the options you select for low nicotine, consequential changes will be needed to the Customs and Excise Act 2018.

#### *Specific risks in repealing denicotinisation*

42. Modelling estimates that, if implemented in 2023, reducing nicotine alone would reduce daily smoking prevalence for Māori women from 37.3% (rate at the time of modelling) to 10.1% in 2025 and 1.3% in 2030. It would achieve the smokefree goal for all men and non-Māori women. It would have the most impact of the 3 new policies in the current law, accounting for 97% of the health adjusted life years gained from the package of measures.<sup>30</sup>
43. Nicotine, because of its addictive properties, is the primary reason why people continue to smoke. Reducing the nicotine content of smoked tobacco to very low levels has been shown in clinical trials to reduce appeal and addictiveness. Removing the denicotinisation requirement will enable ongoing dependence on smoked tobacco and the associated morbidity and mortality. New Zealand data shows that most people who smoke regret starting smoking (at 83%)<sup>31</sup> and a majority make annual quit attempts, averaging 1.5 attempts per year.<sup>32</sup>

#### *Specific risks in repealing the other smoked tobacco product provisions*

44. The introduction of smoked tobacco product approval by the Director-General of Health allows for product quality and safety to be checked, including enabling accurate information about nicotine content of tobacco filler to be provided to the Ministry.
45. The ability to regulate the content of any constituent of smoked tobacco products (other than nicotine) also contributes to reducing their appeal and addictiveness. For example, products containing menthol, "crush balls,"<sup>33</sup> filters and other features have been shown to contribute to smoker purchasing and consumption behaviours, and open new avenues for industry targeting.

#### *Options to consider*

46. If proceeding with denicotinisation, we recommend retaining a product approval scheme. Retaining a product approval scheme has value independently of any limit on nicotine in tobacco.
47. Requiring products to be registered with the Ministry would allow for improved product safety and quality, and makes enforcement at the compliance officer level easier, as

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<sup>30</sup> Ait Ouakrim D, Wilson T, Waa A, *et al* Tobacco endgame intervention impacts on health gains and Māori:non-Māori health inequity: a simulation study of the Aotearoa/New Zealand Tobacco Action Plan *Tobacco Control* Published Online First: 10 January 2023. doi: 10.1136/tc-2022-057655.

<sup>31</sup> Wilson N, Edwards R, Weerasekera D. High levels of smoker regret by ethnicity and socioeconomic status: national survey data. *N Z Med J*. 2009;122(1292):99-100.

<sup>32</sup> Li J, Newcombe R. Past 12-month quit attempts and the use of cessation aids. [In Fact]. Wellington: Health Promotion Agency Research and Evaluation Unit. 2013.

<sup>33</sup> A small, flavoured capsule that can be inserted into a cigarette filter.

products can be compared to an approved list, rather than having to be assessed against criteria and requiring legal advice on a product-by-product basis.

48. The wider elements of the product approval scheme provided for in the Smokefree Act support easier identification of illicit tobacco products and will improve data collection and compliance of smoked tobacco retailers.
49. We also recommend retaining the regulation making powers in relation to features and constituents of smoked tobacco products, which were reorganised through the Amendment Act. These allow for the setting of limits for specific chemicals in smoked tobacco product content and emissions, as well as banning or limiting product features such as “crush balls.”
50. There is a strong body of expert evidence based on clinical trials that reducing nicotine levels in smoked tobacco makes these products less appealing and addictive for all population groups. Consideration of how best to achieve this included:
- a. **Gradually reducing the level of nicotine over time.** This is more likely to lead to compensatory smoking behaviours,<sup>34</sup> sustaining addiction. Researchers have found that making one immediate transition to a significantly lower amount may be associated with better smoking outcomes.<sup>35</sup>
  - b. **Setting a different nicotine limit.** Reducing the level of nicotine by an insufficient amount also risks sustaining addiction. The lower the nicotine level, the more effective it has been found to be.<sup>36</sup> The existing limit was based on the available evidence of the effectiveness of different levels of nicotine, statements from existing manufacturers of low nicotine tobacco products, and possible testing uncertainties. A nicotine limit of 1.3mg/g may still be effective at achieving adequate quit rates.<sup>37</sup>
51. Please indicate the direction you would like the Cabinet paper to take (if you do not wish to retain any of these, then respond No to all):

Retain the denicotinisation policy:	<b>Yes/No</b>
- As currently provided 0.8mg/g	<b>Yes/No</b>
- At a higher level of nicotine (1.3mg/g)	<b>Yes/No</b>
- Either of the above, but over a longer implementation timeframe	<b>Yes/No</b>
Retain the broader smoked tobacco product approval scheme	<b>Yes/No</b>

<sup>34</sup> People who smoke seek to obtain the amount of nicotine they need to sustain their addiction by smoking more cigarettes per day, taking more and deeper puffs, and/or puffing with a faster draw rate.

<sup>35</sup> Tobacco Product Standard for Nicotine Level of Combusted Cigarettes, Food and Drug Administration, HHS.

<https://www.federalregister.gov/documents/2018/03/16/2018-05345/tobacco-product-standard-for-nicotine-level-of-combusted-cigarettes> 3/16/2018.

<sup>36</sup> Cigarettes with 0.4 mg/g nicotine, or approximately 95% less nicotine compared to conventional cigarettes, have the most evidence supporting positive behaviour change including the largest observed reductions in cigarettes per day and biomarkers of nicotine and toxicant exposure compared to conventional cigarettes and with minimal evidence of compensatory smoking or other unintended consequences.

<sup>37</sup> Unpublished evidence summary *The estimated nicotine dose for a low nicotine product standard for smoked tobacco in New Zealand*, Rachel Denlinger-Apte, PhD MPH, Assistant Professor, Wake Forest University School of Medicine, Winston Salem, NC, 27157 USA, July, 2022.

Retain the ability to set regulations for constituents of smoked tobacco products	Yes/No
<b>Other Comments:</b>	

## Detailed advice and options: Prevent young people, and successive generations, from ever taking up smoking

### *Status quo*

52. From 1 January 2027, the law would prohibit the sale, delivery and supply in a public place of smoked tobacco products to anyone born on or after 1 January 2009.<sup>38</sup> As with the current minimum age requirements, the retailer would need to confirm a person can legally be sold the product by sighting an evidence of age document that the person was born before 1 January 2009.

### *Specific risks in repealing the smokefree generation policy*

53. The harm from smoking is well documented. The smokefree generation policy takes a prevention first approach by actively protecting future generations from a potentially life-long and life-threatening dependence on smoked tobacco, rather than relying on those same children and young people giving up later. Given that smoking is an issue that particularly impacts Māori, taking a preventative approach helps to meet the Crown's Te Tiriti o Waitangi obligations of equity and active protection.<sup>39</sup>
54. A product with such significant and obvious harms would not be allowed to proceed to market if introduced today. And yet a complete ban on cigarettes does not take account of the severe addiction that many people already carry. A gradual phase out recognises that this not a normal consumer product without punishing people who have become addicted in a less regulated market.
55. If well enforced, the benefits of a smokefree generation are modelled to halve smoking rates within 10 to 15 years of implementation.<sup>40</sup> Given higher smoking rates and a younger population, the health gains per person would be 5 times larger for Māori than for non-Māori.
56. Implementation of the smokefree generation would have a dramatic impact on younger age groups. The risk of reversing this provision is that ongoing generations continue to

<sup>38</sup> It does not make it a crime for a person of that age to possess tobacco.

<sup>39</sup> The principle of active protection under Te Tiriti requires the Crown to act, to the fullest extent practicable, to achieve equitable health outcomes for Māori. This means we must go beyond a business-as-usual approach, to ensure the actions we take will increase equity.

<sup>40</sup> Ait Ouakrim D, Wilson T, Waa A, *et al* Tobacco endgame intervention impacts on health gains and Māori:non-Māori health inequity: a simulation study of the Aotearoa/New Zealand Tobacco Action Plan *Tobacco Control* Published Online First: 10 January 2023. doi: 10.1136/tc-2022-057655 Supplementary table 23

take up smoking. This risk is exacerbated if the low nicotine policy is also reversed – from what we know about addiction it is much easier to prevent than to stop once addicted.

57. In New Zealand, social supply plays a much greater role than commercial supply in youth access to tobacco, but with an increasing relative influence of family members compared with friends. Research found Māori female respondents were more than twice as likely as other female respondents to have been given cigarettes by their parents or caregiver.<sup>41</sup> As the current young generation become parents themselves and remain smokefree, the smokefree generation policy will protect children from the effects of parental smoking behaviour and attitudes that evidence shows can impact whether young people initiate smoking.<sup>42</sup>
58. A New Zealand study of people who smoke or have recently quit smoking found over 75% support the smokefree generation policy.<sup>43</sup> Young people are also supportive of the smokefree generation policy, and research has found that they view the policy as liberating rather than restrictive.<sup>44</sup>

#### *Options to consider*

59. If you wish to remove the smokefree generation policy you may wish to instead consider an increase to the purchase age gradually, for example year on year to 25 years, to account for young people who are already addicted. This approach would not achieve the overarching objective of preventing young people, and successive generations, from ever taking up smoking, by suggesting that tobacco harm reduces, or that smoking becomes safe, once a person reaches 25. However, it is preferable to the current minimum age of 18 years, which has not been effective in preventing most smoking initiation occurring between ages 13-18 – due largely to the issue of social supply.
60. Policies based on increasing age limits have been considered in other jurisdictions. Where implemented, they have been found to gradually lower the number of young people initiating smoking. There is strong evidence that starting smoking after 25 is uncommon.<sup>45</sup>
61. Increasing the age outright, for example to 25 years, would retrospectively outlaw the purchase of tobacco by a cohort of young people who could previously legally purchase it. This option would not cater to the cohort that are already addicted to nicotine.

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<sup>41</sup> Gendall P, Hoek J, Marsh L, *et al* Youth tobacco access: trends and policy implications. *BMJ Open* 2014;4:e004631. doi: 10.1136/bmjopen-2013-004631 ([PDF](#)) [Youth tobacco access: trends and policy implications | Janet Hoek - Academia.edu](#)

<sup>42</sup> Glover M, Scragg R, Nosa V, Bullen C, McCool J, Kira A. Keeping Kids Smokefree: Rationale, Design, and Implementation of a Community, School, and Family-Based Intervention to Modify Behaviors Related to Smoking among Māori and Pacific Island Children in New Zealand. *International Quarterly of Community Health Education*. 2010;30(3):205-222. doi:10.2190/IQ.30.3.c

<sup>43</sup> Edwards R, Johnson E, Stanley J, *et al*. Support for New Zealand's Smokefree 2025 goal and key measures to achieve it: findings from the ITC New Zealand Survey. *Australian and New Zealand Journal of Public Health* 2021;45(6):554-561.

<sup>44</sup> Hoek J, Lee E, Teddy L, Fenton E, Ball J, Edwards R. How do New Zealand youth perceive the smoke-free generation policy? A qualitative analysis. *Tob Control*. 2022 Oct 25;tc-2022-057658. doi: 10.1136/tc-2022-057658. Epub ahead of print. PMID: 36283832.

<sup>45</sup> Bonnie RJ, Stratton K, Kwan LY, editors. Public health implications of raising the minimum age of legal access to tobacco products. Washington (DC): National Academies Press; 2015. Available: <https://www.ncbi.nlm.nih.gov/books/NBK310412/> (accessed 2017 Jan. 25).

62. Please indicate the direction you would like the Cabinet paper to take (if you do not wish to retain any of these, then respond No to all):

Retain the Smokefree Generation policy	<b>Yes/No</b>
Introduce a graduated minimum age for sale (for example to 25 years over time)	<b>Yes/No</b>
<b>Other comments:</b>	

### Confirming status of other changes made by the Amendment Act

63. The Amendment Act also introduced a range of other changes which we recommend retaining and seek your confirmation as to whether reversal of these changes is also intended. We can provide further detailed advice regarding any of these changes (listed below for brevity).
64. Please indicate the direction you would like the Cabinet paper to take (if you do not wish to retain any of these, then respond No to all):

<b>Description of change</b>	<b>Rationale</b>	<b>Direction</b>
Retain minor and technical changes provided for in the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act that are not directly related to the retail reduction, low nicotine levels and the Smokefree Generation policies	Support the cohesiveness of the Smokefree Act which has been amended several times	<b>Yes/No</b>
Retain the requirement for general retailers of regulated products (including vaping products) to notify the Director-General of Health that they are selling these products <sup>46</sup>	Enables all retailers of products regulated under the Act to be known to the Ministry, supporting compliance and enforcement work	<b>Yes/No</b>
Retain the requirement for distributors of smoked	As above, but for distributors	<b>Yes/No</b>

<sup>46</sup> The notification scheme for regulated products has commenced – on 4 December, 2,767 retailers had notified and paid the fee, with a further 225 awaiting payment. The fee is set at \$80+GST.

Description of change	Rationale	Direction
tobacco products to notify the Director-General of Health that they are selling these products		
Retain the changes in relation to products that are notifiable under the Act, to include Herbal smoking products, and 'other' products	Allows for product safety Regulations to be set for these products, for importers and suppliers of these products to be required to notify the Ministry in relation to the sale of these products	<b>Yes/No</b>
Retain the requirement for sales to minors, that a person cannot rely solely on an oral or written statement of the person's age	Supports compliance and enforcement of underage retail sales	<b>Yes/No</b>
Retain data sharing provisions	Allows for smooth operational efforts between agencies, including integrated compliance and enforcement efforts	<b>Yes/No</b>
Retain relevant offence provisions and increased penalties	A penalty of \$150,000 for underage sales is to come into effect with the smokefree generation provisions. The existing provision with a maximum penalty of \$10,000 is less than that proposed in the government policy manifesto for vaping products, and does not meet the public interest test to prosecute as a standalone offence <sup>47</sup>	<b>Yes/No</b>
<b>Other comments:</b>		

65. The purposes of the Smokefree Act and the Te Tiriti provisions will likely need to be reviewed and amended depending on the direction taken to reversing the changes. We

<sup>47</sup> We note both coalition agreements indicated intent to introduce higher penalties for vaping sales to minors and that we will provide advice on this in late January 2024.

will include advice in the draft Cabinet paper to reflect the direction you have indicated in this paper.

*Amendments to the Smokefree Environments and Regulated Products Regulations 2021*

66. We will include provisions in the draft Cabinet paper for any consequential amendments required to the Smokefree Environments and Regulated Products Regulations 2021.
67. Changes to the regulation of vaping products were made through the same regulations as those relating to the smoked tobacco regulatory regime. These changes were to require Product Safety Requirements (reduced nicotine limits, removable batteries, child safety mechanisms, and labelling requirements), and to add to the approval criteria for specialist vape retailers (proximity to schools and marae, and understanding of requirements under the Act).
68. Please confirm the direction you would like the Cabinet paper to take regarding the new vaping regulations:

Retain the changes to the regulation of vaping products made by the Smokefree Environments and Regulated Products Amendment Regulations 2023	<b>Yes/No</b>
<b>Other comments:</b>	

**High-level advice and options: other tobacco control options**

69. Considering the Government's stated intent to repeal Smokefree Act amendments, you may wish to consider additional non-regulatory options to support people who smoke and wish to quit to do so, and to prevent any increases in smoking uptake. Some potential options are outlined below, noting that these are not expected to have the same impact as the three key policies discussed above.

*A public campaign to tackle social supply of tobacco products*

70. In New Zealand, social supply plays a much greater role than commercial supply in youth access to tobacco, with an increasing relative influence of family members compared with friends. Māori and Pacific adolescents are more likely to report receiving tobacco in this way.
71. Social supply of tobacco is a key contributor to the uptake of smoking in young people before they are legally able to purchase.

*Increased tobacco compliance activities with a greater proportion of offenders progressing to prosecution*

72. Health New Zealand employs Smokefree Enforcement Officers to undertake smoked tobacco retail-based compliance activity across the country.



73. Budget 2022 provided for the implementation of a suite of activities to improve smokefree compliance activity. This funding was predicated on the significant reduction of retail premises for smoked tobacco and the current legislative framework. Compliance and enforcement activity and demand will increase in the context of changes that would likely increase the number of smoked tobacco retailers.
74. Any compliance activities would be most effective if there are comprehensive enforcement tools available to officers, such as the ability to issue notices to address compliance issues (Notices of direction, improvement or similar), to take evidential samples, seizure ability and effective offences and penalties. This is currently not the case. We have suggested in the section above (**Confirming status of other changes made by the Amendment Act**) that where relevant, offence provisions are retained from the Amendment Act. We can provide further advice on possible improvements to offences and penalties for all regulated products, including vaping products, in January 2024.

#### *Review of Stop Smoking services*

75. Stop smoking services could be reviewed to assess their effectiveness, particularly in decreasing smoking rates among Māori and Pacific populations. This review should identify if these services are meeting their targets, are culturally appropriate and effectively reaching and engaging these target populations. Implementing necessary changes or enhancements will ensure these services are more targeted and effective for Māori and Pacific peoples.
76. Services could be funded to allow the provision of vapes to support quit smoking attempts for smokers. A scheme was launched in the United Kingdom (UK) in April this year that provided a free vape starter kit alongside behavioural support to help people wanting to quit smoking.

#### *Community-led initiatives to enhance engagement and effectiveness of the quit smoking journey*

77. Implement community-led quit smoking initiatives, where people who smoke and their communities take the lead in their quit journey. When the smoking community have a sense of ownership of how they quit, this fosters greater engagement in actively designing and leading their cessation process. It also allows for the creation of support systems that are more attuned to the unique needs and contexts of different communities and cultures.

#### *Extend range of subsidised (free) NRT products available*

78. Currently people who smoke can access subsidised (free) nicotine replacement therapy (NRT), however the choice is limited to a single brand of patches, gum, and lozenges. Expanding this choice to include other products such as a nicotine mouth spray and inhalator would likely motivate quit attempts and give people options that they may not have tried in the past.

## Te Tiriti o Waitangi

79. The right to be smokefree is entrenched in Te Tiriti o Waitangi. Article 2 guarantees active protection of taonga, including wellbeing and tiaki whakapapa. **s 9(2)(g)(i)**
80. The Māori Affairs Select Committee identified inequities specifically attributable to tobacco. The tobacco control measures implemented via the amendments to the Smokefree Act were specifically identified as means to reduce these inequities. The Wai2575 enquiry is due to focus on tobacco next.
81. Section 6 of the Pae Ora (Healthy Futures) Act 2022 (the Pae Ora Act) requires the Government to give effect to Te Tiriti o Waitangi. This includes that the Minister, the Ministry, and all health agencies be guided by the health sector principles, which, among other things, are aimed at improving the health sector for Māori and improving hauora Māori outcomes.

## Equity

82. Repealing the legislative changes made to the regulation of smoked tobacco by the Amendment Act will have quantifiable negative impacts on equity particularly for Māori, Pacific, those living in low socio-economic communities and disabled adults.
83. The smoked tobacco legislative changes together (combined with media promotion) are modelled by 2040, to reduce the gap in Māori: non-Māori all-cause mortality rates for people 45+ years old by 22.9%<sup>48</sup> for females and 9.6%<sup>49</sup> for males.
84. The smokefree generation policy was expected to be a significant step forward for intergenerational equity – creating a better set of conditions for young people and future generations. Children are also unfairly impacted by tobacco use as they are exposed to second-hand smoke without the ability to mitigate this and suffer a significant burden of preventable illness.
85. Section 7 of the Pae Ora Act provides health sector principles to assist in achieving equitable health outcomes. The measures implemented via the amendments were designed to give effect to these principles, and they are a helpful framework to test the equity impact of any future amendments.

## Financial implications

86. Early estimates of the combined package of the amended Smokefree Act's smoked tobacco changes predicted savings to health expenditure of \$5.25 billion, and increased productivity of \$5.88 billion over the lifetime of the New Zealand population alive in 2020.<sup>50</sup>

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<sup>48</sup> 95% UI: 19.9% to 26.2%.

<sup>49</sup> 95% UI: 8.4% to 11.0%.

<sup>50</sup> Regulatory Impact Statement: Smokefree Aotearoa Action Plan, 2021. [Regulatory Impact Statement: Smokefree Aotearoa Action Plan | The Treasury New Zealand](#)

87. Further independent analysis has been carried out and recently published which estimates more detailed financial impacts that the changes would be likely to achieve.<sup>51</sup> The estimates find a potential loss to government, considering health system savings, excise tax, income tax, GST revenue and increased superannuation costs due to people living longer which is approximately \$17 billion to 2050. However, they also quantify significantly greater economic benefits to citizens through increased productivity and disposable income of \$46 billion to 2050. The new estimates find the smoked tobacco measures are likely to result in large economic benefits for the total population. We can provide more detail at your request.
88. Operational costs associated with implementing the Smokefree Act may increase or decrease, depending on Cabinet decisions relating to the proposed changes. Additional funding may also be needed to implement any new tobacco control initiatives (see previous section **High-level advice and options: other tobacco options**). You may wish to signal this at the 18 December 2023 Cabinet meeting and seek in-principal agreement that additional funding be sought through the Budget 2024 process if required. Detailed costings will need to be undertaken following Cabinet decisions.

## Reputational risks

89. There is significant reputational risk with repealing the smokefree amendments, and there is very strong support for the legislation within the health sector. For example, the Royal New Zealand College of General Practitioners, the New Zealand College of Public Health Medicine, Hāpai Te Hauora, Asthma and Respiratory Foundation NZ, Cancer Society NZ, and Royal Australasian College of Physicians have issued media statements asking the Government to reconsider repealing the smokefree changes.
90. A newly published New Zealand study of youth (16-19) and young adults (20-29) shows high support for all 3 policies, even amongst those that smoke. Retail reduction was supported by 78%, 68% supported nicotine reduction, and 79% supported the smokefree generation.<sup>52</sup>
91. Many countries have looked to New Zealand as a leading example in tobacco control. The 2023 Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control highlighted New Zealand's recent legislative changes as a positive case-study. The UK intends to introduce a smokefree generation bill shortly that reflects the smokefree amendments. The United States' Food and Drug Administration (FDA) is also looking at low-nicotine requirements.

## Legal and operational implications

92. Given the current uncertainty over the future of the retail reduction scheme, the process for applying to be an approved smoked tobacco retailer was suspended on 1 December 2023.

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<sup>51</sup> Ait Ouakrim D, Wilson T, Howe S, et al. Economic effects for citizens and the government of a country-level tobacco endgame strategy: a modelling study. Tobacco Control Published Online First: 29 November 2023. doi: 10.1136/tc-2023-058131 <https://tobaccocontrol.bmj.com/content/early/2023/11/29/tc-2023-058131>

<sup>52</sup> Hammond D, Reid JL, Ball J, Edwards R, Hoek JA, Waa A, Stanley J, Burkhalter R. *Support and perceived impact of key smokefree policies in Aotearoa/New Zealand: Findings from the ITC Youth and Young Adult Survey*. December 2023; University of Waterloo. [PowerPoint Presentation \(aspireaotearoa.org.nz\)](https://aspireaotearoa.org.nz)

93.

s 9(2)(g)(i), s 9(2)(h)

94.

95. Assessment of applications received was underway and was expected to be completed by March 2024 with successful retailers to be announced in April 2024. This was intended to allow a 3-month sell down period for unsuccessful retailers.

96. As at midday on 1 December 2023 when the scheme was suspended, 439 applications had been completed and the \$1475 +GST application fee paid (totalling over \$744,000 including GST). A further 334 were completed but not yet paid, and additional applications were in draft. Any repeal therefore needs to be accompanied by specific consideration of treatment of existing applicants, including the potential to refund monies paid.

97. Under the current law these fees would not be refunded if the scheme was reversed as the purpose for the fee has been met. This is true also for any applicants seeking to withdraw their application. This will likely result in significant sector disquiet.

98. If you intend to reverse the approval requirements, you may wish to propose a refund to applicants as part of the legislative recommendations. Reversing these charges will be a significant financial and administrative cost to the Ministry.

**[Legally Privileged]** s 9(2)(h)

99.

s 9(2)(h)

## Indicative timeframes

100. For an amendment bill to come into force by 14 March 2024, it will need to be passed under urgency. Indicative timeframes are set out below. Please note that your office will need to work with the Office of the Clerk to confirm legislative timetabling.

<b>Milestone/Activity</b>	<b>Indicative Timeframe</b>
Cabinet approval of policy decisions	18 December 2024
Issue drafting instructions	20 December 2023
Introduce Amendment Bill	February 2024
Legislation in place	March 2024

## Next steps

101. Following your indication of direction, we will provide you with a draft Cabinet paper for Ministerial and Coalition consultation on Friday 8 December 2023. We will also undertake Departmental consultation at the same time. We will update the paper considering consultation feedback with a view to lodging occurring on Thursday 14 December 2023 for Cabinet's consideration on Monday 18 December 2023.

ENDS.

## Minister's Notes

PROACTIVELY RELEASED

# Briefing

## Cabinet paper cover brief: Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and related regulations

**Date due to MO:** 8 December 2023      **Action required by:** 11 December 2023

**Security level:** IN CONFIDENCE      **Health Report number:** H2023033378

**To:** Hon Casey Costello, Associate Minister of Health

**Copy to:** Hon Dr Shane Reti, Minister of Health

**Consulted:** Health New Zealand:  Māori Health Authority:

### Contact for telephone discussion

Name	Position	Telephone
<b>Dr Andrew Old</b>	Deputy Director-General, Public Health Agency	s 9(2)(a)
<b>Jane Chambers</b>	Group Manager, Public Health Policy and Regulation, Public Health Agency	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:

# Cabinet paper cover brief: Options to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and related regulations

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**Security level:** IN CONFIDENCE                      **Date:** 8 December 2023

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**To:** Hon Casey Costello, Associate Minister of Health

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## Purpose of report

1. This briefing provides you with a draft Cabinet paper for your review, prior to consultation with your Ministerial colleagues.
2. This report discloses all relevant information and implications.

## Summary

3. Cabinet directed [you] to report to Cabinet with options to meet the 100-day plan commitment to repeal amendments to the Smokefree Environments and Regulated Products Act 1990 and regulations [CAB-23-MIN-0468 refers].
4. We provided you with a briefing seeking your decision on several matters to inform the paper you will take to the 18 December 2023 Cabinet meeting [H2023033250 refers]. The draft Cabinet paper reflects these decisions (**attachment 1**).
5. You have also asked that the Cabinet paper include the NZ First Coalition Agreement commitments to amend vaping product requirements and taxing smoked products only. There are significant timing implications of drafting and passing an Amendment Bill within 100-days of taking office **s 9(2)(h)**  
**[REDACTED]** We therefore recommend the Cabinet paper focuses on Government's 100-day commitment to repeal the 3 key changes made to the Smokefree Act (ie to repeal retail reduction, denicotinisation, and the smokefree generation policies). We are advised that should you wish to seek additional policy agreements on these matters through this Cabinet paper you will need to discuss this with the Leader of the House.
6. We have explicitly noted in the Cabinet paper, as per the recent Cabinet directive [CAB-23-MIN-0468 refers] that you will be provided with further advice on increasing penalties for illegal sales of vaping products to those under 18, as well as increasing oversight of the sale of vapes. We suggest that further coalition agreement commitments are considered as part of this advice.



7. You have also asked for a table categorising/summarising the amendments in the Smokefree Amendment Act (**attachment 2**). The table includes reputational, financial and operational implications. We have also provided an abridged table of more substantive amendments the Amendment Act made. The draft Cabinet paper currently recommends that these are retained.
8. As requested, we have also provided further advice on statistical data, excise tax and the illicit market (**attachment 3**). Options for other initiatives are provided for in the Cabinet paper.

*Next steps*

9. We will incorporate any feedback you have on the Cabinet paper, following your review, and send you an updated copy for Ministerial consultation.
10. We have also provided the draft Cabinet paper to departmental agencies, Health New Zealand and the Māori Health Authority for feedback and we will provide your office with a summary of feedback for inclusion in the updated paper (if needed).
11. We will update the draft Cabinet paper on Monday 11 December 2023 to incorporate any changes you may have, as well as feedback from departmental agencies (if needed).
12. You will need to consult with Ministerial colleagues on 12 and 13 December 2023, prior to lodging the paper by 10am on Thursday 14 December 2023. As the timeframe is very tight, you may wish to seek permission from the Cabinet office for late lodging. This would shift the deadline for the paper to be lodged from 10am Thursday 14 December 2023 to midday Friday 15 December 2023.

## Recommendations

We recommend you:

- |   |               |
|---|---------------|
| a) <b>Provide</b> feedback on the draft Cabinet paper   | <b>Yes/No</b> |
| b) <b>Consult</b> with Ministerial colleagues   | <b>Yes/No</b> |
| c) <b>Lodge</b> the Cabinet paper by 10am, 14 December 2023 (or late lodge on 15 December 2023) | <b>Yes/No</b> |



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

Date: 8 December 2023

Hon Casey Costello

**Associate Minister of Health**

Date:

**Attachment 1: draft Cabinet paper**

*Addendum: the final Cabinet paper has been published on the Ministry of Health's website*

PROACTIVELY RELEASED

## Attachment 2: summary table

Table categorising key amendments contained in the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022.

The Amendment Act changed the Smokefree environments and Regulated Products Act 1990 (the Smokefree Act).

Full advice on implications and risks of reversing the legislative changes made to the Smokefree Act were provided in Health Report: *Reversal of legislative changes to the smoked tobacco regulatory regime* (H2023033250 refers).

Key amendments – retail reduction, denicotinisation, smokefree generation								
Area of repeal	Main provisions in Smokefree Act	Comes into force	Implementation progress	New direction for amendment Bill	Reputational implications	Financial implications (not covering excise revenue or estimated health expenditure savings)	Legislative implications	Te Tiriti o Waitangi implications
Significant retail reduction	<p>Part 1B - provides for the regulatory scheme to achieve the significant reduction of retail availability of smoked tobacco products.</p> <p>Includes provision for the Director-General of Health to set the maximum numbers of approved smoked tobacco retailers in defined areas.</p>	<p>1 January 2023</p> <p>Transitional period until 1 July 2024</p>	<p>Applications for approved retailers opened on 21 September 2023 and were due to close on 3 December 2023.</p> <p>The scheme was suspended on 1 December 2023 pending further Government decisions.</p>	<p>Cabinet paper recommends no cap and no licensing of smoked tobacco retailers.</p>	<p>Retail reduction supported by 78% of New Zealand youth (16-19) and young adults (20-29).</p> <p>Very strong support for the legislation within the health sector.</p>	<p>As at midday on 1 December 2023 when the scheme was suspended, 439 applications had been completed and the \$1475 +GST application fee paid (totalling over \$744,000 including GST).</p> <p>A further 334 were completed but not yet paid, and additional applications were in draft.</p>	s 9(2)(g)(i)	s 9(2)(g)(i)
Low nicotine	<p>Part 3A - provides for approval requirements for smoked tobacco products, limits on the constituents of smoked tobacco products (specifically 0.8mg/g nicotine content), and testing requirements for smoked tobacco products.</p>	<p>1 January 2023</p> <p>Transitional period until 1 April 2025.</p>	<p>The Institute of Environmental Science and Research Ltd (ESR) has carried out work on a testing methodology.</p> <p>The Ministry met with the National Retail Group in September 2023. This group has signed an exclusive distribution agreement with 22<sup>nd</sup> Century, a producer of low nicotine tobacco, regarding supply of low nicotine smoked tobacco products, and are looking to introduce low nicotine tobacco in advance of the legislative requirements coming into effect.</p>	<p>No product approval required for smoked tobacco products and no nicotine content requirement.</p>	<p>Nicotine reduction supported by 68% of New Zealand youth (16-19) and young adults (20-29), and 75% of people who smoke or recently quit.</p> <p>Very strong support for the legislation within the health sector.</p> <p>The United States' Food and Drug Administration (FDA) is also looking at low-nicotine requirements.</p>			As above.

Key amendments – retail reduction, denicotinisation, smokefree generation								
Area of repeal	Main provisions in Smokefree Act	Comes into force	Implementation progress	New direction for amendment Bill	Reputational implications	Financial implications (not covering excise revenue or estimated health expenditure savings)	Legislative implications	Te Tiriti o Waitangi implications
Smokefree Generation	Will provide for the smokefree generation policy (ie, prohibiting the sale and supply in a public place of smoked tobacco products to anyone born on or after 1 January 2009).	1 January 2027.		<p>No smokefree generation, minimum age for sale remains at 18 years.</p> <p>The new fine of \$150,000 will also be removed with these provisions, reverting to a \$10,000 fine for underage sales.</p>	<p>Smokefree generation supported by 79% of New Zealand youth (16-19) and young adults (20-29), and over 75% of people who smoke or recently quit.</p> <p>The UK intends to introduce a smokefree generation bill shortly that reflects the smokefree amendments.</p> <p>Very strong support for the legislation within the health sector.</p>			<p>As above.</p> <p>Also, the smokefree generation policy was expected to be a significant step forward for intergenerational equity – creating a better set of conditions for young people and future generations. The health gains per person were modelled to be five times larger for Māori versus non-Māori, with a particularly significant impact on younger Māori.</p>

Abridged table detailing other amendments - notification requirements, notifiable products, underage sales, data sharing							
Area of repeal	Main provisions in Smokefree Act	Comes into force	Implementation progress	New direction for amendment Bill	Reputational implications	Financial implications (not covering excise revenue or estimated health expenditure savings)	Legislative implications
Broader entry to market scheme: Notification requirements for retailers of notifiable products (ie retailers of vaping, smokeless tobacco, and herbal smoking products) and smoked tobacco distributors	Part 1B – retailers of notifiable products and distributors of smoked tobacco products must notify the Director-General that they are selling or distributing products.	Requirement has been mandatory with offences for non-compliance since 1 October 2023.	The notification scheme opened on 21 September 2023.	Cabinet paper recommends retaining notification requirements.	Retaining a notification requirement aligns with signalled direction of tougher penalties as it enables distributors of smoked tobacco products to be known to the Ministry, supporting compliance and enforcement work.	As at midday on 8 December 2023 2,773 notifications have been completed and the \$80 +GST notification fee paid (totalling over \$255,116 including GST).	If the notification scheme is retained there would be a gap for retailers of smoked tobacco products.
Notifiable products	Definition of <i>notifiable products</i> extended from vaping or smokeless tobacco products to include herbal smoking products or any other regulated products (other than a smoked tobacco product) declared by regulations to be a notifiable product.	Has been in force since 1 January 2023.	In force.  No regulations have been made to declare any other products 'notifiable' products.	Cabinet paper recommends retaining to support compliance and enforcement efforts.	Retaining this extended definition allows for product safety Regulations to be set for these products, and for importers and suppliers of these products to be required to notify the Ministry in relation to the sale of these products.		Smoked tobacco products will be the only regulated product that is not also a notifiable product under the Smokefree Act.
Underage sales	Requirement for sales to minors, that a person cannot rely solely on an oral or written statement of the person's age	Has been in force since 1 January 2023.		Cabinet paper recommends retaining to support compliance and enforcement efforts.	Retaining this supports compliance and enforcement of underage retail sales.		
Data sharing provisions	Part 5, new subpart 6 provides for agreements between the Director-General and the chief executive of a government agency for access to information in a database for the purpose of assisting the chief executive to administer and enforce the principal Act and the Customs and Excise Act 2018.	Has been in force since 1 January 2023.	No data has been shared to date, but work is underway to facilitate data sharing between relevant agencies.	Cabinet paper recommends retaining to support compliance and enforcement efforts.	Retaining this allows for smooth operational efforts between agencies, including integrated compliance and enforcement efforts.		

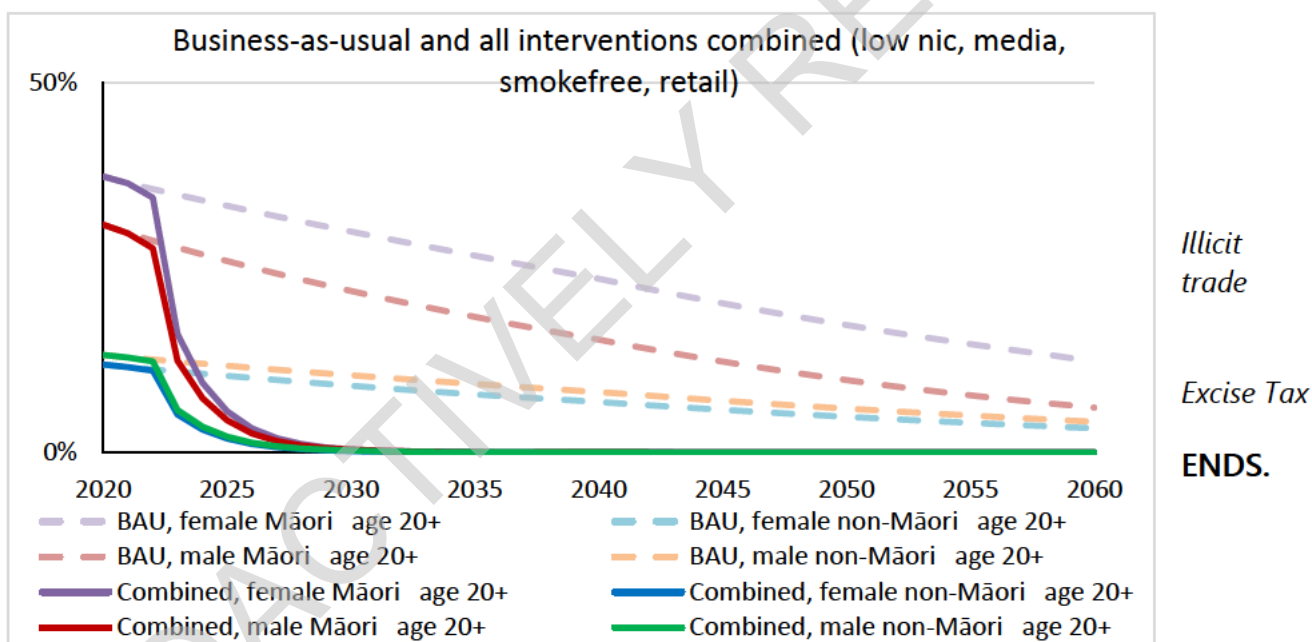
### Attachment 3: additional information

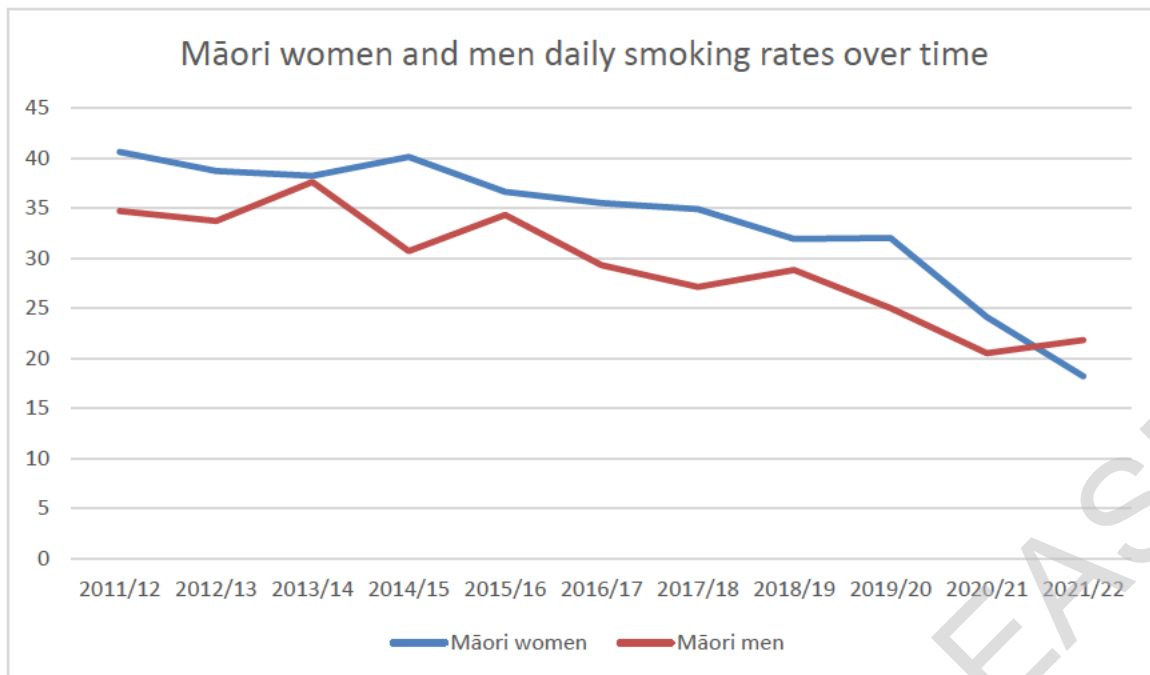
#### Statistical data

The measures were all modelled with a theoretical implementation date of 2023 (which differs to the implementation dates since set in the legislation). The modelling was based on actual smoking rates up to 2019/20, and did not include the 2020/21 data, which showed a larger than usual drop in smoking rates. There was not a statistically significant decrease in total Māori smoking rates the following year. A recently discovered denomination error means last year’s smoking rates are in the process of being revised. The data for 2021/22 will be corrected on 14 December 2023 at the same time as the 2022/23 publication.

This first graph below compares predicted smoking rates out to 2060 under BAU compared to under the combined package of regulatory measures. The second graph shows actual daily smoking rates for Māori up to 2021/22 – demonstrating a sharper drop for 2020/21, but otherwise following a similar trend as modelled.

#### Projections of age 20+ smoking prevalence (for daily smoking) for Māori and non-Māori to 2060, comparing business-as-usual to combined package of regulatory measures + media (health promotion)





As the modelling has not been repeated with more recent smoking rates, we do not have a revised date that Māori would be expected to reach the smokefree goal. However, some of the recent declines would be offset out by the fact that none of the measures were implemented in 2023, as modelled.

#### *Illicit trade*

The independent research on the illicit market in New Zealand by the University of Auckland acknowledged the increases in seizures for 2020. It states, "The volume of illicit tobacco intercepted by Customs has grown in recent years, and our analyses suggest better detection is occurring at the border over recent years." This may be due to their recent increase in resources. NZ Customs received Budget 2022 funding to address tobacco smuggling and there have been recent changes to prohibit importation of tobacco products by air cargo and international mail.

In addition to the independent research, earlier this year KPMG carried out research on behalf of Imperial Tobacco New Zealand. They estimated that illicit consumption of tobacco in Aotearoa New Zealand decreased by 10.1% from 2019 to 2022.<sup>1</sup>

#### *Excise Tax*

Excise tax is collected on tobacco products, and the amount is adjusted annually.<sup>12</sup> Between 2010 and 2020 New Zealand implemented a series of annual 10% excise increases on tobacco. Evaluation of the impacts from these increases found they were effective at helping some segments of the

<sup>1</sup> KPMG, Illicit Tobacco in New Zealand, 2022 Full Year Report, 31 May 2023.

<sup>2</sup> Excise tax rates are increased every January, in line with the consumer price index.

population to stop smoking, however further increases could have negative impacts on low-income New Zealanders.<sup>3</sup>

Despite the 10% excise increases, overall revenue from excise has gradually decreased as smoking rates have declined. In the 2022/23 financial year, \$1,666 million excise was collected, down from \$1,980 million in 2018/19.

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<sup>3</sup> The Ministry commissioned consultants EY to review tobacco excise tax policy in 2018, and the report is published here. <https://www.health.govt.nz/system/files/documents/pages/evaluation-tobacco-excise-increases-final-27-nov2018.pdf>



## Minister's Notes

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