

In Confidence

Office of the Associate Minister of Health

Chair, Cabinet Business Committee

Smokefree Environments and Regulated Products Act 1990: Public consultation on proposals for regulations

Proposal

1. This paper seeks Cabinet approval to publicly consult on regulatory proposals to bring the new provisions of the Smokefree Environments and Regulated Products Act 1990 (the Act) fully into effect.

Relation to Government priorities

2. The new provisions of the Act are intended to better support smokers to switch to products that are less harmful than smoking, while also protecting children, young people and non-smokers from the risks associated with vaping.
3. The regulation of vaping products contributes to Smokefree Aotearoa 2025 and a number of other Government priorities, including empowering Māori to achieve better health outcomes, improving equity for Māori and Pacific peoples, reducing New Zealanders' risk of developing some cancers, and improving child and youth wellbeing.

Executive Summary

4. The Smokefree Environments and Regulated Products (Vaping) Amendment Act 2020 came into force on 11 November 2020.
5. This means that vaping products, in addition to tobacco products and herbal smoking products are now regulated under the Smokefree Environments and Regulated Products Act 1990 (the Act). The amended Act has a number of regulation-making powers.
6. The attached consultation paper sets out the details of the regulatory proposals and provides an opportunity for the Ministry of Health to seek feedback from the public, industry, healthcare professionals and other interested stakeholders.
7. These regulations need to be made by August 2021, when a number of the Act's transitional periods end. I will report back to Cabinet in April 2021, following consultation, with the final proposals and seek Cabinet approval to

issue instructions to the Parliamentary Counsel Office to draft the vaping product regulations.

Background

8. The amended Act broadens the scope of products regulated under the Smoke-free Environments Act 1990 to include vaping products, in addition to tobacco products and herbal smoking products.
9. This means that many of the existing provisions that apply to tobacco products now extend to vaping products, including the prohibitions on promoting and advertising smoking and tobacco products, and on smoking in indoor workplaces, early childhood centres and schools.
10. The new provisions, however, recognise that vaping is less harmful than smoking and that vaping products may help some people to quit smoking.
11. As a result, the Act exempts vaping products from some of the promotion and advertising restrictions so that people who smoke can better access these products and to allow for the provision of information and advice that may help them switch successfully from smoking to vaping.
12. The Act also requires vaping products to meet safety requirements and manufacturers and importers of these products to notify the Ministry of Health before they are able to be sold by retailers in New Zealand.
13. The regulation of these products will contribute to Smokefree Aotearoa 2025. However, I am of the view that tobacco products should eventually be more heavily regulated and less available than vaping, given their greater health impact. Proposals to achieve this are set out in the Smokefree Aotearoa 2025 Action Plan discussion document, intended for public consultation early next year.

Public consultation

14. I want to be sure that the regulations developed to support the successful implementation of the amended Act will reduce harm, are risk-proportionate and cost effective, and are workable for all stakeholders they affect.
15. The consultation paper sets out draft regulatory proposals to achieve this and seeks feedback from the public, industry, health professionals and other interested stakeholders on requirements for:
 - 15.1 defining an internal area
 - 15.2 specialist vape retailer approvals
 - 15.3 promotion, information and advice
 - 15.4 packaging
 - 15.5 product notification and safety
 - 15.6 annual reporting and returns

15.7 fees.

16. Consultation will be conducted primarily online. The Ministry of Health will email a link to the consultation document to those on its database of stakeholders, including industry (representative bodies, manufacturers, importers, specialist vaper retailers, and small retailers), non-government organisations, district health boards, stop smoking service providers, and Māori and Pacific providers.
17. I have asked officials to take a proactive approach to consulting with Māori and Pacific communities, concurrent with consultation on the Smokefree Action Plan discussion document. Additionally, Hāpai te Hauora, the organisation that holds the national tobacco control advocacy contract with the Ministry of Health, will ensure that Māori and Pacific providers and communities are contacted to engage in the consultation process. Similarly, Tala Pasifika is working with the Ministry of Health to ensure that Pacific communities are engaged. This is important to ensure that individuals who will likely be impacted have a real opportunity to have their voices heard and to participate in the process.
18. The feedback received through consultation will inform the development of the final regulatory proposals to support the regulatory scheme for regulated products under the Act. I intend to bring these proposals back to Cabinet in April 2021.

The regulatory proposals

Defining an internal area

19. The Act enables regulations to be made to define an 'internal area' where smoking and vaping are prohibited. This is because there have been ongoing concerns regarding a lack of clarity for business owners and enforcement officers when trying to determine whether a space is an 'open area' (where smoking and vaping are allowed) or an 'internal area' (where smoking and vaping are prohibited).
20. The consultation document seeks feedback on a range of options, including the status quo.

Specialist vape retailer approvals

21. The Act sets out specific requirements for the Director-General of Health to give approval for a person to be a specialist vape retailer if they meet a 70 percent sales threshold (that is, 70 percent of total sales from the retail premises are or will be from the sale of vaping products). The Director-General of Health can also approve applications to become a specialist vape retailer with a lower sales threshold (60 percent) under certain circumstances (for example, taking into account where a retail premise is geographically located).
22. The consultation document seeks feedback on whether additional information is required to determine whether an approval can be given at the lower sales threshold.

Promotion, information and advice

Price lists

23. The Act exempts manufacturers' price lists from advertising restrictions and allows regulations to be made that specify the information that can be included on these lists.
24. The consultation document proposes restrictions on the content and form of information that can be included on tobacco product price lists, but not price lists for vaping products at this stage.

Public health messages

25. The Act allows a public health message to be issued by the Director-General of Health for use by public services and any publicly-funded individuals or organisations to support the intent and purposes of the Act.
26. The consultation document notes that the existing Ministry of Health resource Vaping Facts is designated for this purpose and seeks input on whether any further messaging is needed.

Provision of information in retail settings

27. The Act exempts the provision of information relating to vaping products in retail settings from advertising restrictions and allows regulations to be made that specify the information that vaping retailers can provide in their premises or on their website.
28. The consultation document proposes restrictions on the content and form of the information that retailers can provide to consumers.

Product availability notices in retail settings

29. The Act allows product availability notices for vaping products in retail premises or on websites and allows regulations to be made that specify the content and form of these notices.
30. The consultation document proposes that regulations are made that align with those for tobacco products with some amendments where necessary.

Point-of-sale purchase age information

31. The Act allows regulations to be made that require retailers to display R18 notices at each point-of-sale at their place of business or internet site. There are no mandatory requirements for R18 notices at point-of-sale for tobacco products.
32. The consultation document proposes a mandatory requirement for retailers to display R18 notices at each point-of-sale for vaping products. This is because,

unlike tobacco products, vaping products may be on display and accessible to children and young people under the age of 18.

Suitably qualified health workers

33. The Act enables health workers to provide advice to people wishing to transition from smoking to vaping, providing they are suitably qualified. The Act defines a 'suitably qualified health worker' and allows additional categories to be added to the definition by notice in the Gazette.
34. The consultation document proposes adding no further categories to the definition at this stage.

Packaging

35. The Act requires the packaging of regulated products to comply with requirements set out in regulations. Standardised packaging requirements for tobacco products, which include pictorial health warnings, have been in place since 2017.
36. The consultation document proposes tailored requirements for vaping products and smokeless tobacco products that reflect their lower risk compared with tobacco products.

Product notification and safety

37. The Act requires manufacturers and importers to notify the Ministry of Health of their intention to sell vaping products and smokeless tobacco products before the products can be sold by a retailer.
38. As part of the notification requirement, these products must also meet safety requirements. The Act enables these requirements to be set out in regulations.
39. The consultation document proposes requirements for product notification and safety based on United Kingdom and European Union legislation and guidance.

Annual reporting and returns

40. The Act requires manufacturers and importers of vaping products and specialist vape retailers to provide annual sales-related information to the Ministry of Health.
41. The consultation document proposes adapting existing tobacco product reporting requirements for vaping products.

Fees

42. The Act enables the regulatory scheme to be fully cost-recovered through fees and that these are specified in regulations.
43. The consultation document proposes the structure and level of fees under the regulatory scheme.

Next steps

44. The consultation paper will be released in late-January 2021 for six weeks. Following consultation and analysis of feedback, I will report back to Cabinet in April 2021 with final regulatory proposals. I will also be seeking agreement to instruct the Parliamentary Counsel Office to draft the regulations.

Financial Implications

45. In line with previous Cabinet decisions [CAB-18-MIN-0569 refers], the regulatory scheme will be fully cost-recovered, including establishment and operational costs.

Legislative Implications

46. Regulations will be needed to fully implement the scheme.

Impact Analysis

47. The Ministry of Health's Quality Assurance panel has reviewed the Impact Statement titled "*Regulations for the Smokefree Environments and Regulated Products (Vaping) Amendment Act*", produced by the Ministry of Health and dated 7 October 2020.
48. The panel considers that the Impact Statement **meets** the quality assurance criteria.
49. The Impact Statement is clear and concise. The analysis addresses the decisions sought from Cabinet, is balanced in its presentation of the information and the major impacts are identified and assessed.

Population Implications

50. Māori, Pacific peoples and those living in New Zealand's most deprived areas have higher smoking rates than other groups of New Zealanders. They are, therefore, among those most likely to be impacted by these proposals. The intent of the Act, and its supporting regulations, is to better support smokers to switch to a significantly less harmful alternative.

Human Rights

51. The proposals are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

International Trade Obligations

52. 



Consultation

53. The New Zealand Customs Service, the Ministry of Justice, New Zealand Police, the Ministry of Business, Innovation and Employment (Commerce and Consumer Affairs), Te Puni Kōkiri, the Ministry for Pacific Peoples, Oranga Tamariki–Ministry for Children, The Treasury, and the Department of the Prime Minister and Cabinet have been consulted.
54. The Ministry for Pacific Peoples has noted that online consultation may not be an effective means of engaging with Māori and Pacific populations as they are among the most digitally excluded and therefore, may need additional support to overcome barriers to participate in the consultation. Ministry of Health officials will continue to work with relevant agencies to maximise engagement reach, which can mitigate these barriers and support a successful consultation process. Additionally, I have directed officials to work with Hāpai Te Hauora and Tala Pasifika on the best methods to ensure effective engagement in our current environment. This may include community-facilitated engagement through existing Māori and Pacific peoples' networks.

Communications

55. The public consultation will be run primarily online. Officials will also work with government agencies and Hāpai Te Hauora to engage with Māori and Pacific communities through relevant networks.

Proactive Release

I intend to proactively release this paper, following Cabinet approval.

Recommendations

I recommend that the Committee:

1. **note** that vaping products are now regulated under the Smokefree Environments and Regulated Products Act 1990 and that the amended Act has a number of regulation-making powers
2. **note** that the Ministry of Health intends to publicly consult on regulatory proposals to bring the new provisions of the Smokefree Environments and Regulated Products Act 1990 fully into effect
3. **note** that the consultation document seeks feedback on the proposed requirements including:
 - 3.1 defining an internal area
 - 3.2 specialist vape retailer approvals
 - 3.3 promotion, information and advice

- 3.4 packaging
 - 3.5 product notification and safety
 - 3.6 annual reporting and returns
 - 3.7 fees
4. **agree** to the public release of the consultation document in late-January 2021
 5. **agree** that the Associate Minister of Health can approve minor technical and editorial amendments to the consultation document prior to its public release
 6. **note** that following assessment of the consultation feedback, I will report back to Cabinet in April 2021 with final recommendations for requirements of the regulatory proposals in April 2021 and seek approval for the Parliamentary Counsel Office to draft regulations
 7. **note** that the regulations must be made by August 2021.

Authorised for lodgement

Hon Dr Ayesha Verrall

Associate Minister of Health