

Submission

By

**THE
NEW ZEALAND
INITIATIVE**

To the Health Select Committee

on the

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

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1. INTRODUCTION AND SUMMARY

- 1.1 This submission on the Smokefree Environments and Regulated Products Amendment Bill (No 2) is made by The New Zealand Initiative, a think tank supported primarily by chief executives of major New Zealand businesses. The Initiative undertakes research to contribute to the development of sound public policies in New Zealand to help create a competitive, open and dynamic economy and a free, prosperous, fair, and cohesive society.
- 1.2 The Initiative is funded by the subscription fees of its members. The Initiative's membership spans the breadth of the New Zealand economy, from telecommunications and banking to construction, retail, and tertiary education. It also includes two tobacco companies. Its work remains independent; the breadth and diversity of our membership ensures we are not reliant on any one company or sector's continued membership. Its members in the tobacco industry have not been provided an opportunity to provide feedback on this submission.
- 1.3 The Initiative has, over the past several years, undertaken research into tobacco harm reduction policies because of our concern for the inequities caused by the existing tobacco control regime. That research includes *Smoke and Vapour: The changing world of tobacco harm reduction* (2018) and *The Health of the State* (2016). We have maintained a watching brief in this policy area and regularly provide public commentary on policy developments. We submitted on the Smokefree Environments and Regulated Products (Vaping) Amendment Bill in April 2020, on vaping regulations in March 2021, on the Proposals for a Smokefree Aotearoa 2025 Action Plan, and on the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill (2022). We have consistently supported measures enabling access to reduced-harm alternatives to smoked tobacco.
- 1.4 The Bill proposes to reduce youth vaping rates by prohibiting a broad set of vaping products used by both adults and youths, by increasing penalties for sales to minors, by restricting retail visibility of vaping products, and by further restricting areas where vaping retailers are allowed.
- 1.5 The ASH Year 10 survey shows regular vaping prevalence among youths rose sharply from 2015, peaking at just over 20% in 2020. Regular youth vaping rates declined to just over 16% by 2023, the most recent figures available. Daily youth vaping rates have been steady at 10% since 2021. Parliament is right to notice that there has been an increase in youth vaping rates. It should also note that youth vaping rates have stopped increasing and have started decreasing on some measures.¹
- 1.6 If Parliament's intention is to further reduce youth vaping rates, focusing on the ways that youths can be supplied with vapes seems appropriate.
- 1.7 The legislation proposes stepped-up enforcement of prohibitions on and penalties for the sale and supply of vaping products to youths. This measure is appropriately targeted. Social supply to youths in public places is currently prohibited. That prohibition on social supply could be extended to other places, taking the Sale and Supply of Alcohol Act as example framework.
- 1.8 Other measures proposed in the Bill are poorly considered and are best abandoned. Prohibition of vaping products used by adult ex-smokers is particularly likely to cause substantial harm. Concerningly, the Regulatory Impact Statement also repeatedly warns that such measures risk fuelling an illicit market like Australia's.

¹ Action on Smoking and Health. 2023. "[ASH Year 10 Snapshot Survey 2023: Topline – Youth Smoking and Vaping.](#)"

2. YOUTH ACCESS TO VAPING PRODUCTS

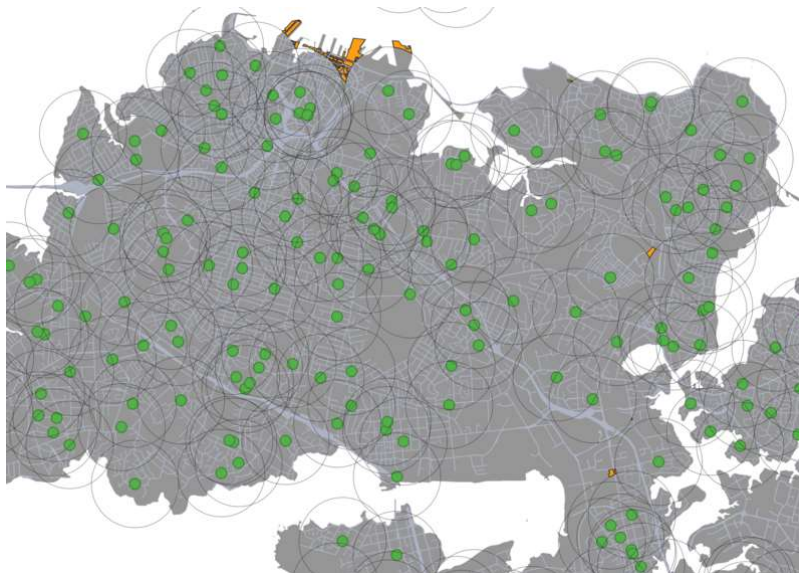
- 2.1 In the 2023 ASH Year 10 snapshot survey, as cited in the Ministry of Health’s Regulatory Impact Statement, 40% of daily-vaping youths were supplied with vapes by friends, 18.5% were supplied by family, and 15% purchased vapes from retail outlets.²
- 2.2 The Bill proposes to step up retail enforcement with increased monitoring and heftier penalties. These measures are appropriately targeted if Parliament’s goal is to reduce youth vaping, but only address a relatively minor fraction of overall youth supply.
- 2.3 Supply by family is more common than purchasing from retail outlets. That form of supply can be desirable: a parent may wish to supply their child with vapes if the child would otherwise be smoking as vaping is far less harmful than smoking. However, supply by an older sibling or cousin would also be counted in this category, and that supply may be without parental knowledge or consent.
- 2.4 The Sale and Supply of Alcohol Act (2012) provides a useful framework for social supply. Section 241 of the Act prohibits the supply of alcohol to minors, with fine on conviction of not more than \$2000. However, section 3 of the Act provides a defence for alcohol supplied by or with the express consent of the parent or guardian.
- 2.5 The 2012 legislation requiring parental permission for alcohol supply to minors was accompanied by a public awareness campaign by the Health Promotion Agency. In November 2012, 40% of surveyed adults knew that parental permission would soon be required before providing alcohol to a minor; by January 2014, awareness rose to 75%.³
- 2.6 Hazardous drinking patterns among those aged 15-17 halved from 2011/12 to 2022/23. We cannot directly tie the change to the updated rules in the Sale and Supply of Alcohol Act, as youth alcohol consumption was declining prior to the 2012 Act. However, the reduction in hazardous drinking among youths was larger than the reduction in hazardous drinking among adults over the same period. Tightening the rules on social supply has reasonable potential to reduce youth vaping without adverse unintended consequences for adult vapers.
- 2.7 Supplying vapes to minors in public places is prohibited by the Act at Section 41. However, supply by friends, cousins, and older siblings can happen in private homes. Mirroring the restrictions in place in the Sale and Supply of Alcohol Act would help in setting expectations of parental consent being necessary for supply of vaping products to minors. However, the parts of Section 241 relating to host responsibility in alcohol supply (describing responsible supply, and all of Part 4), would be inappropriate in this context.
- 2.8 Updating Section 41 to more closely mirror restrictions in the Sale and Supply of Alcohol Act would strike “in a public place” from Section 1 and add to Section 3 a defence of being a parent or guardian or having the permission of a parent or guardian (following 241(3)(a) and 241(3)(d) of the Sale and Supply of Alcohol Act).
- 2.9 Strengthening enforcement on retail supply is well-targeted. But where only about 15% of vaping youths acquire vapes from retailers, addressing social supply is also warranted.

² Ministry of Health. 2024. “[Supplementary Regulatory Impact Statement: Banning disposable vaping products and increasing penalties for sales to minors](#).” Finalised 12 August; released September.

³ Dunne, Hon. Peter. 2014. “Message from the Minister.” *AlcoholNZ* 4:1 (May).
https://www.hpa.org.nz/sites/default/files/documents/Alcohol%20NZ_May_online_FA.pdf

3. RETAIL OUTLET RESTRICTIONS

- 3.1 The legislation proposes adding additional restrictions on the location of vaping retailers to prohibit retail outlets near early childhood learning centres.
- 3.2 To the best of our knowledge, no toddler attending ECE has successfully convinced a vape shop clerk to supply the toddler with vaping products. It is difficult to imagine that even the most obtuse shop clerk could be fooled by a fake ID in such cases. If it ever did happen, it would be strong grounds for sharply penalising the outlet providing a toddler with vaping products. The higher end of the range of proposed penalties could be appropriate.
- 3.3 We wish to open with a general note on prohibiting things near other things.
- 3.4 It is easy to build an emotional case for banning retail outlets selling things that people don't like near places where children are, regardless of whether there is any plausible causal link between the retail outlet and any particular harm.
- 3.5 Cities are places where things are close to other things. That is what makes cities useful. If everything were far apart from other things, then it would be a rural area. And doing anything like setting up a vape shop would then be prohibited because of the National Policy Statement on Highly Productive Land rather than because of nearby schools.
- 3.6 Pseudonymous urban planning guru "Steve", for whom I can vouch for in this context, illustrated the point well in response to calls for banning retail vape outlets within a kilometre of schools.⁴ When a lot of people are close to each other, there will be a lot of schools close to each other. In Steve's illustration below, each green dot is a school. Each circle represents a 1-km-radius circle around each dot. And the areas in orange are sites zoned for retail that are not within 1 km of a school. Banning things within a kilometre of a school is close to a total city-wide ban.



⁴ Steve. 2022. "In cities, things are close". 27 April. [City Beautiful](#). Steve provides an important disclaimer that the map is from the Ministry of Education and that "It's not necessarily complete or perfect, but it'll do to illustrate the point." Current rules prohibit new specialist vape retailers within 300 metres of schools; the map above was in response to calls from the Asthma Foundation to set a 1km radius.

- 3.7 Very few places in Auckland are not within a kilometre of a school. Most sites are covered by several overlapping circles. The circles would need to have a very narrow radius to not amount to a total ban on outlets in urban areas. Calls for banning things near schools are best understood as prohibitionist demands for general bans on those things because schools are everywhere and everything in cities will be close to them. Cities are places where things are close to other things, including schools.
- 3.8 As “Steve” puts it: “Think about it from first principles. The Ministry of Education generally tries to make sure that everyone in the city has a school within walking distance, and the city council tries to plan shopping areas so that there’s a local shopping centre within an easy walk of everyone’s home. These are both good things! But obviously, if you can easily walk to the one, you can walk to the other. Making vape shops inaccessible to children makes them inaccessible to everyone. We live in a city because of how easily we can get to things - to work, to school, to the shops, to the park, to everything else we do regularly.”
- 3.9 New Zealand has over 4500 Early Childhood Learning Centres. Prohibiting vaping retailers within 100 metres of each of them prohibits vaping retailers across over 141 million square metres, or over 14,100 hectares, if no ECE centre is within 100m of another ECE centre. Or the equivalent of about 33 Auckland CBD areas.
- 3.10 Since many ECE centres will be within existing prohibition areas, the addition to the area where retail vape outlets are prohibited will be less than 14,100 hectares. But it is useful context. “Let’s just ban it within 100m of ECE centres” sounds like a minimal restriction but is identical to calling for a ban on new retail outlets over some 141,371,670 square metres, or about four hundred thousand commercial lots each measuring 350 square metres, less the space covered by roadways.
- 3.11 The Cabinet Paper correctly notes that, in combination with existing limits near primary and secondary schools and marae, “there would be very few remaining areas where a new specialist vape store could be set up. Generally, the only options would be rural areas or the fringes of some suburban areas.”
- 3.12 To put it more bluntly, the legislation effectively proposes a complete prohibition on new vaping retailers, and a de facto sinking lid on outlets as outlets close for one reason or another and new outlets are forbidden from taking their place.
- 3.13 Imagine if the existing set of specialist vape retailers coordinated to prohibit new entrants, with a tontine arrangement where the last remaining vape shop would have a national monopoly. The Commerce Commission would rightly view that activity as cartel-like behaviour that would need attention. It might even trigger thresholds for criminal cartel prosecution.
- 3.14 The Cabinet Paper does not mention the term competition even once. There is no analysis of effects on competition or potential competition. If existing shops know that no new entrant will ever be allowed to emerge and that the existing set of competitors is all they have to worry about, it is easier for tacit collusion to emerge. The government might wish to ask the Commerce Commission about the long-term consequences of these policies for competition, if it still has any interest in ensuring competitive retail markets.
- 3.15 If the government wants to licence vape retailers and to set a sinking lid on numbers, it should propose a regulatory regime designed to that end while trying to minimise the harm caused to adult vapers and current smokers who would like to quit smoking. The set of geographic restrictions is very poor policy.

- 3.16 The government should also consider reverse sensitivity issues. Owners of commercial properties near proposed ECE centres would have reason to object to those proposed ECE centres when proximity to ECE constrains allowed retail activities.
- 3.17 We encourage the government to not proceed with the ban on retail outlets near ECE centres and to reconsider existing geographic restrictions in favour of a more fit-for-purpose regime.
- 3.18 On visibility restrictions more generally, the Select Committee should consider that vaping products that are visible to passers-by are not just visible to youths who are forbidden from entering specialist vaping retail shops. They are also visible to smokers who are legally allowed and encouraged to enter the shop for assistance in stopping smoking.
- 3.19 In her speech introducing the legislation, Minister Costello said, “The government’s approach is to ensure vapes are not publicly displayed in a manner that appears to be targeting youth.” But it is illegal to sell vapes to youths. Advertising products to customers who are not allowed to purchase the product seems a very poor marketing strategy – and particularly when enforcement and fines are increasing. Is it more likely that shops are open and inviting not to attract youths, who are forbidden from even entering the shop? Or that the shops are open and inviting to attract adults including smokers who wish to quit smoking? Measures that make products and stores less attractive will also affect adults who wish to quit smoking.

4. PRODUCT BANS

- 4.1 The General Policy Statement on the Bill says the Bill would ban disposable vapes.
- 4.2 Disposable vaping products are defined in Section 4 of the Bill as encompassing vaping devices that are either non-refillable, or non-rechargeable, or both, as well as containers that are pre-filled and that are not designed to be refilled by the user.
- 4.3 The term “disposable” then not only encompasses single-use all-in-one devices but also the pod-based devices commonly used by adult ex-smokers.
- 4.4 To take a simple analogy, a disposable vape is a bit like a bottle of pre-mixed coffee drink. A pod-based vaping device is more like a Nespresso coffee machine, where single-use pods are put into the machine to deliver a coffee. And refillable pod- or tank-based devices are akin to complicated espresso machines that are great for aficionados, but not ideal for others.
- 4.5 The legislation is described as banning the kinds of coffee drinks that you can find in the cooler section of your local supermarket. But it also bans Nespresso machines, leaving only complicated espresso machines for those wanting their morning brew.
- 4.6 The Regulatory Impact Statement notes that recent regulatory changes prohibiting vapes that do not have removable batteries will remove most all-in-one disposable vapes from the market.
- 4.7 The RIS also suggests that, in the period prior to the regulatory changes prohibiting vapes without removable batteries, about 60% of vaping youths used disposable vaping devices while about 25% of adult vapers used disposable devices.
- 4.8 Bans on types of devices are a poor way of targeting youth vaping. Devices are used by vapers of all ages. Disposable devices can be important for adult vapers with low income, or who do not have the manual dexterity to handle more complex devices, or who have left their refillable or pod-based system at home while travelling. But a ban that affected only all-in-one

disposable products would be more directly targeted at the products that vaping youths use while having more limited effect on adults who rely on vaping to avoid smoking.

- 4.9 Vaping is far safer than smoking. There can be risk caused by user error when dealing with refillable systems. Pod-based and disposable devices are essentially foolproof. They come pre-filled with a vaping fluid whose ingredients have been notified to the Ministry of Health and that cannot be adjusted. They are designed to shut down when the vape fluid runs out, avoiding problems that can be caused by hot dry coils otherwise. And there is far less risk that users or others are accidentally exposed to vaping fluids. The government proposes to ban the vaping devices that pose the lowest risk while only allowing the sale of devices that introduce higher risks of user-error and consequent issues.
- 4.10 Like a complicated espresso machine, refillable vaping rigs are more difficult to use for those with reduced manual dexterity. Pod-based devices are simpler. Banning pod-based devices as well as all-in-one disposables will make it harder for older current smokers to shift to a less-harmful alternative.
- 4.11 A ban on disposables also has substantial implications for retail access. Only Specialist Vape Retailers are allowed to demonstrate vapes in-store. Dairies and petrol stations are not specialist vape retailers unless they subdivide the shop. Some dairies have done so; petrol stations are unlikely to. A person shifting from disposable or pod-based vapes to refillable vapes under the government's proposed ban may well require assistance in using the new system. If they typically purchase vapes at the local dairy or petrol station, that outlet will be prohibited from showing them how to use the only vapes that are legal. But it will be able to sell them cigarettes. Cigarettes are very easy to use. What does the Select Committee hope will happen in that situation?
- 4.12 The RIS warns that the government's proposed more comprehensive ban risks fuelling an illicit market. We urge the government to take this risk seriously.
- 4.12.1 At paragraph 66, the RIS warns: "There is also the potential risk that a more comprehensive ban incentivises an illicit market. Whilst not directly comparable, tighter regulation in Australia has seen the rise of a significant illicit market with 87% of Australians who vape reporting sourcing vapes illegally."
- 4.12.2 At paragraph 82, the RIS warns: "Regulation can also lead to increases in an illicit market. An example is tight regulation in Australia (prescription only access), which has led to significant illicit supply (87% of vapers report obtaining vapes without a prescription.)³⁶ While the changes being proposed in New Zealand go nowhere near as far, we have already seen retailers selling products that are no longer legal for discounted prices, as they try to offload old stock after regulations take effect.³⁷ This can have the unintended consequences of making vapes more affordable and thereby accessible"
- 4.12.3 At paragraph 92, the RIS warns: "Any changes to regulation can incentivise increases in the illicit vape market. Auckland University will help us to establish a baseline for the illicit vape market and then monitor any changes over time."
- 4.13 It is impossible to tell what proportion of adult ex-smoking vapers, faced with a ban on the vaping devices they prefer, would shift to the types of vaping devices that are not banned, the proportion that would shift back to smoking, and the proportion that would shift to illicit

markets. The RIS sensibly recommends ongoing monitoring of smoking and vaping rates, along with monitoring of the illicit market.

- 4.14 Currently, the Ministry of Health runs a product notification regime. The flavourings in vapes must be notified to the Ministry, who can then watch for product safety issues and remove any combinations that prove unsafe from the market. Nicotine content is regulated and must be listed.
- 4.15 Illicit vapes will not be subject to that notification regime or product labelling requirements. If a product causes adverse reactions, there will be no way of removing the product from the market. The Ministry instead will be limited to the kinds of notifications it can provide when adulterated illicit drugs are found to cause harm: issue general warnings about the characteristics of the products that seem potentially to have been the cause of the problem.
- 4.16 Vapes are broadly prohibited in Australia. New South Wales prohibits the sale of vapes that contain nicotine without prescription. A University of Wollongong study tested 428 vapes seized from retailers and 322 taken from children at schools. Despite most of those vapes not listing nicotine as an active ingredient, about 98% contained nicotine. Many other chemicals not listed among the product's ingredients were also found. Substances banned for use in legal nicotine products in NSW were found in 4% of tested samples,⁵ including ethylene glycol in concentrations more than 10 times higher than the trace amounts allowed under New Zealand regulation.
- 4.17 The New South Wales research also found that youths had tampered with illicit disposable devices to make them refillable or rechargeable, extending the lifespan of illicitly-acquired disposable vapes. It is an undesirable outcome where components used in disposable vapes are not designed to for that extended lifespan.⁶ Youths may be more able to circumvent bans than Parliament expects.
- 4.18 To briefly summarise then: the government's proposed extensive ban on vaping devices will increase safety risks around the use of legal vapes. It will make it harder for adult smokers to shift to less-harmful alternatives and may encourage some ex-smoking vapers to shift back to cigarettes. It incentivises an illicit market that brings risk of contaminated vapes. And an illicit market will make it much harder to remove potentially hazardous products from the market if and when particular ingredients are discovered to be harmful.

5. Conclusion

- 5.1 The government is not wrong to notice high rates of youth vaping and to wish to reduce youth access to vapes.
- 5.2 Strengthening the Bill's provisions around the supply of vapes to youths would help to address the most common ways that youths acquire vapes: from friends and family. We support this aspect of the Bill and encourage consideration of the social supply framework in the Sale and Supply of Alcohol Act to further strengthen existing restrictions on informal social supply of vapes to youths without their parents' permission.

⁵ NSW Ministry of Health. 2023. "[NSW E-Cigarette Analysis Project: Summary Report](#)".

⁶ See discussion in Sloan, Caitlin. 2023. "[Fears for teens' health as UOW researchers find banned substances in vapes.](#)" *The Illawarra Flame*. 12 October.

- 5.3 Proximity-based restrictions on new vape outlets amount to a poorly-designed prohibition on all new retail outlets in most urban areas, with consequent effects on market competition and eventually on access to vapes for ex-smokers and would-be-ex-smokers in affected places.
- 5.4 Bans on types of devices are not a good way of addressing youth vaping. The extended ban that includes pod-based devices is likely to be particularly harmful. We most strongly urge the government to reconsider this part of the legislation.