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21 October 2024

S9(2)(a)

By email: S9(2)(a)
Ref: H2024052270

Tēnā koe S9(2)(a)

Response to your request for official information

Thank you for your request under the Official Information Act 1982 (the Act) to the Ministry of Health – Manatū Hauora (the Ministry) on 24 September 2024 for information regarding nitrous oxide. Please find a response to your request below. You requested:

“All advice and correspondence from Medsafe and the ministry of health and Te Whatu Ora relating to the sale and use of nitrous oxide for recreational purposes.”

On 4 October 2024, you were contacted by the Ministry in accordance with section 18B of the Act and asked to refine your request as the information could not be made available without substantial collation or research. On the same day you agreed to refine your request to:

Formal advice from the Ministry of Health and Medsafe to the Minister of Health, Hon Shane Reti on the sale and use of nitrous oxide for recreational purposes. Advice being briefings, memos and aide-memoires.

The Ministry has identified four documents within scope of your request. All documents are itemised in Appendix 1 and copies of the documents are enclosed. Where information is withheld under section 9 of the Act, I have considered the countervailing public interest in release in making this decision and consider that it does not outweigh the need to withhold at this time.

I trust this information fulfils your request. If you wish to discuss any aspect of your request with us, including this decision, please feel free to contact the OIA Services Team on: oiagr@health.govt.nz.

Under section 28(3) of the Act, you have the right to ask the Ombudsman to review any decisions made under this request. The Ombudsman may be contacted by email at: info@ombudsman.parliament.nz or by calling 0800 802 602.

Please note that this response, with your personal details removed, may be published on the Manatū Hauora website at: www.health.govt.nz/about-ministry/information-releases/responses-official-information-act-requests.

Nāku noa, nā

A handwritten signature in black ink, appearing to read 'Allison Bennett', written in a cursive style.

Allison Bennett
Group Manager, Health System Settings
Strategy Policy and Legislation | Te Pou Rautaki

Appendix 1: List of documents for release

#	Date	Document details	Decision on release
1	8 August 2024	Memorandum: Rapid advice sale of nitrous oxide in vape stores (H2024048489)	Some information withheld under the following sections of the Act: <ul style="list-style-type: none"> • 9(2)(a) – to protect the privacy of natural persons; and • 9(2)(f)(iv) – to maintain the constitutional conventions that protect the confidentiality of advice tendered by Ministers and officials.
2	30 August 2024	Aide Memoire: Recreational use of nitrous oxide in New Zealand (H2024049133)	Some information withheld under section 9(2)(a) of the Act.
3	5 September 2024	Briefing for information: Regulating recreation use of nitrous oxide – approaches in other jurisdictions (H2024050773)	
4	12 September 2024	Briefing for decision: Options to regulate the sale of nitrous oxide for recreational use (H2024050179)	Some information withheld under the following sections of the Act: <ul style="list-style-type: none"> • 6(c) – as its release would likely prejudice the maintenance of the law; and • 9(2)(a)

Memorandum

Rapid advice: sale of nitrous oxide in vape stores

Date due to MO:	8 August 2024	Action required by:	N/A
Security level:	IN CONFIDENCE	Health Report number:	H2024048489
To:	Brian Watson, Private Secretary, Associate Minister of Health		
Consulted:	Health New Zealand: <input type="checkbox"/>		

Contact for telephone discussion

Name	Position	Telephone
Emma Hindson	Acting Manager, Policy and Regulation, Public health Agency	S9(2)(a)
Gill Hall	Manager, Policy and Regulation, Public Health Agency	S9(2)(a)

Action for Private Secretaries

N/A

Date dispatched to MO:

8 August 2024

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Rapid advice: sale of nitrous oxide in vape stores

Purpose

1. This report responds to your recent email request for rapid advice on the sale of nitrous oxide in vape stores. A response to each question is set out below.

Response

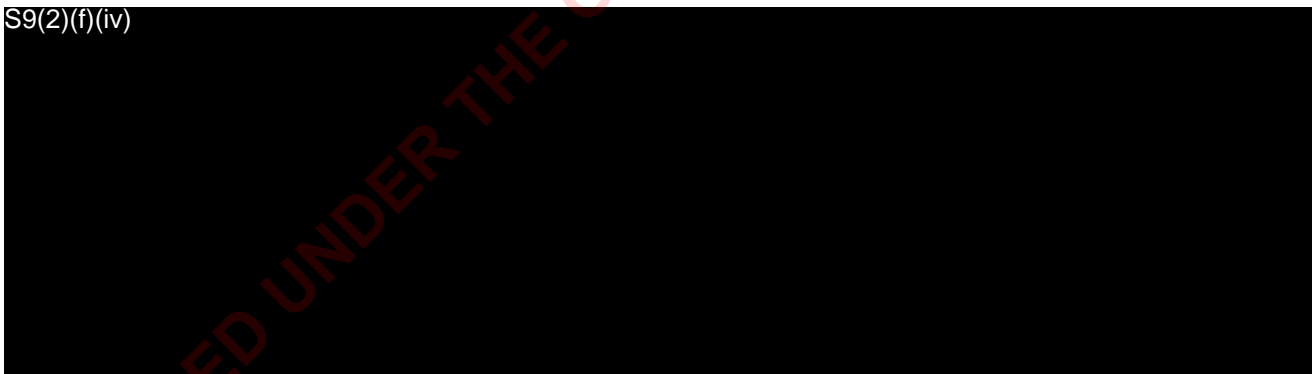
How prevalent is the sale of nos by vape retailers?

2. The Ministry of Health (the Ministry) does not hold this information as there is no requirement for retailers to report it.

What can be done to prevent the sale of these products by vape retailers now within the existing legislation?

3. Nitrous oxide is not regulated by the Smokefree Environments and Regulated Products Act 1991. Smokefree Enforcement Officers (SFEOs) therefore do not undertake enforcement action in relation to the sale of nitrous oxide.
4. Nitrous oxide, when supplied for inhalation, is regulated under the Medicines Act 1981 as a prescription medicine. Any sales without prescription, for the purposes of inhalation, are illegal and the Ministry recommends SFEOs refer any information relating to nitrous oxide sales to Medsafe to follow-up.

S9(2)(f)(iv)



7. As above, the sale of nitrous oxide for recreational purposes is already unlawful.

Next steps

8. Officials can provide further information about this topic at your request.



Dr Andrew Old

Deputy Director-General

Public Health Agency | Te Pou Hauora Tūmatanui

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Aide-Mémoire

Recreational use of nitrous oxide in New Zealand

Date due to MO:	30 August 2024	Action required by:	N/A
Security level:	IN CONFIDENCE	Health Report number:	H2024049133
To:	Hon Dr Shane Reti, Minister of Health		
Copy to:	Hon Matt Doocey, Minister for Mental Health		
Consulted:	Health New Zealand: <input checked="" type="checkbox"/>		

Contact for telephone discussion

Name	Position	Telephone
Maree Roberts	Deputy Director-General, Strategy Policy and Legislation	S9(2)(a)
Suzanne Townsend	Acting Group Manager, Health System Settings, Strategy Policy and Legislation	S9(2)(a)

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Aide-Mémoire

Recreational use of nitrous oxide in New Zealand

Date due: 30 August 2024

To: Hon Dr Shane Reti, Minister of Health

Security level: IN CONFIDENCE **Health Report number:** H2024049133

Purpose of advice:

This aide-mémoire provides information on the recreational use of nitrous oxide and relevant regulatory levers, as requested by your Office on 16 August.

Comment/ Summary:

- This aide-mémoire provides information on:
 - Background to recreational use of nitrous oxide;
 - Evidence and insights into the current state of recreational use of nitrous oxide in New Zealand;
 - Current regulation in place for the recreational use of nitrous oxide in New Zealand; and
 - Where regulatory levers sit.
- Recreational use of nitrous oxide is a substance use and addiction matter that falls under the portfolio of the Minister for Mental Health. However, the regulatory system relating to the sale of nitrous oxide falls under your portfolio as the Minister of Health.
- The issue also relates to Food Safety and Police portfolios.



Maree Roberts

Deputy Director-General

Strategy Policy and Legislation | Te Pou Rautaki

Recreational use of nitrous oxide in New Zealand

Background

Nitrous oxide

- Nitrous oxide is a dissociative anaesthetic gas that is commonly used for sedation and pain relief in dental and medical settings. It also has commercial uses, particularly as a propellant in the manufacture of whipped cream.
- Nitrous oxide is also used as a recreational drug, by inhaling the gas to produce a euphoric effect that lasts for a short period of time, typically up to 2 minutes. When used for this purpose, nitrous oxide is normally inhaled directly from canisters or balloons/plastic bags containing the gas.
- Nitrous oxide cannisters are readily available for sale in stores nationwide, including dairies and vape shops. Several companies also sell nitrous oxide online
- The 2022/23 New Zealand Drug Trends Survey found that 25% of respondents had used nitrous oxide at least once in the last six months, and 56% had used nitrous oxide at some point in their lifetime. These figures are from an anonymous convenience survey, and are not necessarily indicative of the prevalence of use in New Zealand. The most recent prevalence survey was the 2007/08 New Zealand Alcohol and Drug Use Survey, which found that 4.6% of adults had used recreational nitrous oxide, with 0.8% having used the drug in the past year.

Risks from recreational use

- There are risks associated with inhaling nitrous oxide, but according to the 2023 New Zealand drug harms ranking study, the overall harm arising from its use is low. In the overall population rankings, nitrous oxide had the lowest harm score of all psychoactive drugs. Substances such as kava and nicotine e-cigarettes/vapes were ranked as more harmful.
- One of the most immediate risks of nitrous oxide use is physical injury due to fainting or falling. People also get frostbite injuries from opening or inhaling directly from a cannister.
- Inhaling large amounts of nitrous oxide can cause oxygen deprivation, leading to loss of consciousness, seizures, and heart problems, especially when inhaled in poorly ventilated areas. Mixing nitrous oxide with other drugs can have unpredictable effects and increase the risk of harm.
- Long-term use of large amounts of nitrous oxide can lead to vitamin B12 deficiency, which can cause nerve damage and neurological issues.
- Nitrous oxide was considered by the Expert Advisory Committee on Drugs (the EACD) in 2005. Based on the risk of harm nitrous oxide poses to individuals or society by its misuse, the EACD did not recommend classifying it under the Misuse of Drugs Act 1975.

Trends in use and harms

- It is difficult to monitor the incidence of harm related to nitrous oxide abuse, as most incidents are not reported. However, there is some indication that both the rate of use and incidence of harm are increasing.
- Data from the National Poisons Centre (the NPC) indicates an increase in nitrous oxide use and abuse. They note a marked increase in reports regarding recreational nitrous oxide exposure in 2023 (11 reports) and thus far in 2024 (10), compared to the number of similar calls in prior years (3–5 per year between 2019 and 2022). The majority of reports show a “heavy” use pattern (i.e., acute heavy and/or chronic daily use) and associated neurological symptoms. Contacting the NPC is voluntary so data will likely show only a portion of overall prevalence and mainly cases that have resulted in healthcare referral.
- The National Drug Intelligence Bureau (the NDIB) has also received reports of increased harm and use of nitrous oxide from Police and health care professionals during the past year.
 - Police in Waikato and the Bay of Plenty districts report an increase in incidents involving nitrous oxide. These include several car accidents where witnesses or the occupants have admitted to using nitrous oxide while driving.
 - Auckland- and Christchurch-based clinicians have reported a perceived increase in patients experiencing severe harm from consuming large quantities of nitrous oxide in a short space of time. The harm reported ranges from severe spinal injury to psychosis.
- The reported increase in harm is correlated with an increase in the availability of larger-sized nitrous oxide cannisters (up to 3.3 litres). The NDIB notes that the availability of large cannisters appears to be the main difference between recent trends and relatively fewer harm events from nitrous oxide use in the past. There are media reports that these large cannisters are being sold in vape shops.

Current regulation and levers

Legislation

- There are two pieces of legislation that regulate nitrous oxide as a psychoactive substance: the Medicines Act 1981 and the Psychoactive Substances Act 2013.

Medicines Act 1981

- Nitrous oxide is a prescription medicine when intended for inhalation for a therapeutic purpose. Penalties apply for selling a prescription medicine by retail other than from a licensed pharmacy on prescription of an authorised prescriber.
- Offences under the Medicines Act are only applicable if the product is deemed to be for a therapeutic purpose. Nitrous oxide in the form sold for recreational purposes is not considered to be a medicine, so the Medicines Act does not apply.
- Medsafe does not inspect the suppliers of nitrous oxide unless the product is intended for a therapeutic purpose and is being supplied under a licence pursuant to the Medicines Act.

Psychoactive Substances Act 2013

- When nitrous oxide is supplied for recreational use, it falls within the scope of the Psychoactive Substances Act. This Act is used to approve and regulate substances that do not reach the threshold for classification under the Misuse of Drugs Act. No nitrous oxide products have been approved for sale under the Act, so currently it is illegal to import, manufacture, sell, supply, or possess it for the primary purpose of inducing a psychoactive effect in an individual who uses it.
- The enforcement powers under this Act sit with Police if the product is unapproved. The Psychoactive Substances Regulatory Authority (based in the Ministry of Health) has powers in relation to approved products and licensed activities.
- For selling, offering to sell, or possessing for sale an unapproved psychoactive substance, the penalty on conviction is a term of imprisonment not exceeding two years for an individual or a fine not exceeding \$500,000 for a company.
- When an individual is found to have an unapproved psychoactive substance in their possession, the penalty on conviction is a fine not exceeding \$500. Personal possession is also an infringement offence.

Other relevant legislation

- Nitrous oxide cannisters are subject to safety controls under the Hazardous Substances and New Organisms Act 1996, and food grade nitrous oxide is subject to the Food Act 2014.
- Classification under the Misuse of Drugs Act is based on the risk of harm of the substance, and therefore is not suitable for regulating psychoactive substances that have a low overall risk profile, nor does the Act have levers to regulate psychoactive substances that have legitimate uses other than medicinal ones.
- There are no powers under the Smokefree Environments and Regulated Products Act 1990 in relation to nitrous oxide.

Enforcement

- Over the years, Medsafe and Police have sought to take enforcement action using the Medicines Act, but this has proven difficult.
- Medsafe has usually dealt with issues regarding nitrous oxide by providing warnings to suppliers. The Ministry of Health has commenced prosecutions in the past (between 2007 and 2010), to which most pleaded guilty. Medsafe has also worked with Police, who have provided warnings based on Medsafe's advice.
- It is difficult to obtain evidence that the nitrous oxide product is not being used for one of the legitimate purposes – the evidence required could be seen as entrapment.
- So far, the only enforcement actions taken under the Psychoactive Substances Act have been in the form of cautionary letters from Police. There has not yet been a prosecution.

New enforcement approaches are underway

- Recently, the Ministry of Health has been assessing how nitrous oxide could be controlled under the Psychoactive Substances Act. We will come back to you with advice on this matter.
- Medsafe is preparing guidance for retailers, media, Police, and others. It will also be used to communicate with those believed to be in breach of the Psychoactive Substances Act.

- Medsafe will shortly publish guidance on its website.

Harm reduction strategies

- There is a continuum of services available to the public with a harm reduction focus, including health promotion and prevention, early intervention and primary care, and specialist services. Health New Zealand is responsible for commissioning and delivering treatment support services.
- The New Zealand Drug Foundation has information resources available regarding risks associated with nitrous oxide and other inhalant use, and steps individuals can take to reduce their risk of harm while using nitrous oxide.
- There are no addiction treatment services specifically dedicated to treating nitrous oxide addiction, or addiction associated with inhalation of volatile substances.
- We do not collect data on how many people seek treatment for nitrous oxide use. Anecdotally, it is understood that many people who present for treatment with nitrous oxide or other inhalant substance use concerns are also engaging with use of other illicit substances.

Next steps

- Indications are that the nitrous oxide market is evolving and leading to increasing harms. There is potential to improve the regulatory system with the aim of reducing availability and reducing harms. Our next briefing will examine the options, including enforcement strategies and any legislative change if necessary.

Briefing for information

Regulating recreation use of nitrous oxide: approaches in other jurisdictions

Date due to MO:	5 September 2024	Action required by:	N/A
Security level:	IN CONFIDENCE	Reference:	H2024050773
To:	Hon Dr Shane Reti, Minister of Health		
Consulted:	Health New Zealand: <input type="checkbox"/>		
Proactive release:	This briefing is proposed by the Ministry of Health for proactive release: <input type="checkbox"/>		

Contact for telephone discussion

Name	Position	Telephone
Maree Roberts	Deputy Director-General, Strategy Policy and Legislation	S9(2)(a)
Suzanne Townsend	Acting Group Manager, Health System Settings, Strategy Policy and Legislation	S9(2)(a)

Minister's office to complete:

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

Comment:

Briefing for information

Regulating recreation use of nitrous oxide: approaches in other jurisdictions

Security level: IN CONFIDENCE **Date:** 5 September 2024

To: Hon Dr Shane Reti, Minister of Health

Purpose of report

1. This briefing provides information on how other countries regulate the recreational use of nitrous oxide, as requested.

Context and scope

2. The following information has been gathered on the approaches taken by other countries to regulate the recreational use of nitrous oxide.
3. This information has been gathered by desk-based research on the legislation in other jurisdictions. This does not speak to enforcement, or any operational issues. Further analysis on the approaches would be required to determine their suitability to New Zealand's context.
4. In New Zealand, recreational use of nitrous oxide is already controlled for under the Psychoactive Substances Act 2013. Under this Act, it is illegal to import, manufacture, or sell without licence, or possess nitrous oxide that is intended for a psychoactive effect.

Regulatory approaches in other countries

5. The recreational use of nitrous oxide is generally a growing concern in the below jurisdictions, triggering recent regulatory changes in the UK and certain Australian states. It is difficult to compare the recreational use of nitrous oxide in other jurisdictions to the situation in New Zealand, due to a lack of data.

United Kingdom

6. Prior to 2023, nitrous oxide was controlled under the UK Psychoactive Substances Act 2016 which meant production, sale or importation was illegal if the intent was to use it for its psychoactive effects.
7. In 2023, nitrous oxide was classified as a Class C drug under the UK Misuse of Drugs Act 1971, making possession illegal.
8. For criminal offences, there are broad exemptions that apply unless a person "intends to wrongly inhale it" or "knows, or is reckless as to whether it is likely to be wrongfully inhaled by some other person". Individuals are required to demonstrate their possession of the substance is lawful, and they do not intend to use it for psychoactive effects. Legitimate purposes are not defined in the legislation.

9. In summary, it is illegal to possess, produce, supply, import or export nitrous oxide that is intended to be used for psychoactive effect.
10. Classifying nitrous oxide under the Misuse of Drugs Act 1971 was contrary to advice from the UK Advisory Council on Misuse of Drugs. In New Zealand, our Misuse of Drugs Act 1977 would not allow for exemptions for legitimate use as per the UK.

Ireland

11. In Ireland, nitrous oxide is not a controlled substance under the Misuse of Drugs Act 1977. It can be legally sold for catering and industrial purposes. The Criminal Justice (Psychoactive Substances) Act 2010 prohibits the sale, importation or exportation of psychoactive substances; under this legislation, it is illegal to sell nitrous oxide for its psychoactive properties.

Australia

12. Under Australian Consumer Law, the sale of nitrous oxide for legitimate purposes, such as whipping cream, is legal.
13. Nitrous oxide for non-therapeutic use is scheduled in the national Poisons Standard as a Schedule 6 poison, which means that product labels must contain warnings and safety directions, and retailers must take measures to prevent access by children.
14. Each state and territory has its own regulations to control supply for recreational use:
 - a. Western Australia is currently amending the Medicines and Poisons Regulations 2016 to limit access to nitrous oxide. Under the new regulations, nitrous oxide for food and beverage use will only be accessible for purchase by registered food businesses, select businesses with a liquor licence, and other persons approved by the Department of Health. Suppliers will need to obtain evidence from each purchaser that they are a registered food business, or otherwise authorised to purchase nitrous oxide. Sale and supply of large cannisters will be prohibited. We are in contact with Western Australian officials around the process they used to develop their regulations.
 - b. In South Australia, the sale of nitrous oxide is regulated under the Controlled Substances Act 1984. It is an offence to sell or supply nitrous oxide to people under 18, to sell it between 10pm and 5am, and to make it visible or accessible to the public in retail stores.
 - c. New South Wales recently consulted on proposed reforms, including supply controls as in Western and South Australia.
 - d. In Victoria, the sale of nitrous oxide is illegal if the person selling it knows or has reasonable cause to believe that someone intends to inhale it (under the Victorian Drugs, Poisons and Controlled Substances Act 1981).

Netherlands

15. In January 2023, the Netherlands banned the import, export, sale, or stocking of nitrous oxide. It is now included on list II of the Opium Act. However, professional use of nitrous oxide for medical and technical purposes is still allowed. Cream chargers are still allowed, but they cannot be resold to anyone.

Next steps

16. We will provide a briefing containing more detail on the regulatory options available in the New Zealand context by 12 September.



Maree Roberts
Deputy Director-General
Strategy Policy and Legislation
Date: 5 September 2024

ENDS

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Briefing for decision

Options to regulate the sale of nitrous oxide for recreational use

Date due to MO:	12 September 2024	Action required by:	N/A
Security level:	IN CONFIDENCE	Reference:	H2024050179
To:	Hon Dr Shane Reti, Minister of Health		
Copy to:	Hon Matt Doocoy, Minister for Mental Health		
	Hon David Seymour, Associate Minister of Health (Pharmac)		
Consulted:	Health New Zealand: <input type="checkbox"/>		
Proactive release:	This briefing is proposed by the Ministry of Health for proactive release: <input type="checkbox"/>		

Contact for telephone discussion

Name	Position	Telephone
Maree Roberts	Deputy Director-General, Strategy Policy and Legislation	S9(2)(a)
Allison Bennett	Group Manager, Health System Settings, Strategy Policy and Legislation	S9(2)(a)

Minister's office to complete:

- Approved
 Decline
 Overtaken by events
-
- Needs change
 Seen
- See Minister's Notes
 Withdrawn

Comment:

Briefing for decision

Options to regulate the sale of nitrous oxide for recreational use

Security level: IN CONFIDENCE **Date:** 12 September 2024

To: Hon Dr Shane Reti, Minister of Health

Purpose of report

1. This briefing contains information on options to regulate the recreational use of nitrous oxide as requested, with a focus on its sale. It is copied to the Minister of Mental Health as it raises addiction issues, and copied to the Hon David Seymour, Associate Minister of Health (Pharmac) because of his Medsafe delegation.

Summary

2. Recreational use of nitrous oxide appears to be leading to an increased level of harms in New Zealand, as indicated by anecdotal reports from Police and healthcare professionals.
3. Recreational use of nitrous oxide, and supply for recreational use, is currently prohibited under the Psychoactive Substances Act 2013. Under this Act, Police are the key enforcement agency.
4. S6(c) [REDACTED]
5. Medsafe are about to release new advice to clarify the law on nitrous oxide, S6(c) [REDACTED]. We recommend that the impact of the new enforcement approach be evaluated over a 6-month period, to determine whether additional legislative change is necessary.
6. We will support this with an advisory letter to vape stores informing them of the law and its implications. We will also work with the Drug Foundation to update harm reduction material.
7. If the review of enforcement shows regulatory change is required, we will consider the option to regulate nitrous oxide under the Hazardous Substances and New Organisms Act 1996. This would mean enforcement officers in Public Health Units (Health New Zealand) and in local councils have a role in compliance monitoring and enforcement.
8. We will also consider an option to amend the Psychoactive Substances Act 2013 to introduce targeted regulatory tools for nitrous oxide, such as limiting purchasers to registered food businesses or prohibiting larger cannisters. This option would require further analysis.

Recommendations

We recommend you:

- a) **Note** that the Psychoactive Substances Act 2013 provides enforcement powers for Police where the sale of nitrous oxide is for recreational use; **Noted**
- b) **Note** that the Psychoactive Substances Act 2013 does not provide powers for use to ban the sale of particular nitrous oxide products; **Noted**
- c) **Note** that the Ministry of Health (the Ministry) will shortly be publishing new advice to inform retailers and others that supplying nitrous oxide for recreational use is illegal under the Psychoactive Substances Act 2013; **Noted**
- d) **Note** that this will be supported by an advisory letter to vape stores and updated harm reduction information; **Noted**
- d) **Agree** that the Ministry reports back to you in 6 months on the results of the enforcement activities following release of the new advice; **Yes/No**
- f) **Agree** to consider regulatory change after the 6 months evaluation and depending on the success of the new enforcement approach. **Yes/No**
- e) **Note** we have identified two options to consider if further regulatory change is required:
- Option A: regulation under the Hazardous Substances and New Organisms Act 1996; and / or
- Option B: amendments to the Psychoactive Substances Act 2013. **Noted**



Maree Roberts
Deputy Director-General
Strategy Policy and Legislation
Date: 13 September 2024

Hon Dr Shane Reti
Minister of Health
Date:

Options to regulate the sale of nitrous oxide for recreational use

Background

Recreational use of nitrous oxide

9. Background on the issue of recreational use of nitrous oxide in New Zealand was provided in the previous aide-mémoire [H2024049133 refers]. In summary, recreational use of nitrous oxide does appear to be leading to an increased level of harms in New Zealand, as indicated by anecdotal reports from Police and healthcare professionals. This is a trend that has emerged in other jurisdictions, including Australia and several European countries, particularly the United Kingdom.
10. Recreational use of nitrous oxide is a complex matter which spans Health, Mental Health, Police, Food Safety, and Environment portfolios. In developing this advice, we have engaged with Health New Zealand (Health NZ), the National Poisons Centre, Police, the National Drugs Intelligence Bureau, the Ministry for Primary Industries, and the Environmental Protection Authority.

Where can nitrous oxide for recreational use be obtained?

11. Evidence on availability is generally anecdotal from the news media, however many report that nitrous oxide is widely available to buy in both online and physical shops, including dairies and vape shops.
12. Products include the small cream chargers which hold around 8 grams of gas, and larger cannisters (up to 2kg of gas) which are relatively new to the New Zealand market. These products are distinct from therapeutic nitrous oxide products that are contained in larger gas cylinders.
13. Smokefree Enforcement Officers have reported seeing nitrous oxide products for sale in vape stores. We know this is widespread in Northland and Auckland, however we do not yet have a nation wide picture.
14. Online shops generally market cream chargers and cannisters containing nitrous oxide for baking purposes. Many stores offer large bundles and same-day shipping.

Recent policy changes

15. Until recently, it was deemed that recreational use of nitrous oxide should be controlled under the Medicines Act 1981. This was because nitrous oxide is an approved medicine, and its misuse was viewed as an offence under the Medicines Act. This included where it was being sold for non-medical purposes.
16. The Ministry has reviewed the law and is now of the view that cream chargers and cannisters containing nitrous oxide are psychoactive substances when used for a psychoactive effect and would be captured under the Psychoactive Substances Act 2013. Under this Act, it is illegal to sell or supply without a licence, or possess nitrous oxide if it is intended for a psychoactive effect. Police are the key enforcement agency.

Current regulation and enforcement challenges

- 17. S6(c)
- 18.
- 19.
- 20.

Recent developments may improve enforcement

21. Police, Medsafe, and the PSRA are currently updating and aligning their regulatory approach in relation to the supply and use of nitrous oxide for recreational purposes under the Psychoactive Substances Act. Medsafe and the PRSA are publishing advice on their website to clarify enforcement on Monday 16 September 2024. Police are updating cautionary letters to communicate this with importers, distributors, and retailers. We will arrange for letters to be sent vape stores to advise them of the legal position.

22. S6(c)

23. Penalties under the Psychoactive Substances Act are also higher than under the Medicine Act for similar offences, which may be a greater deterrent.

New enforcement approach under the Psychoactive Substances Act 2013

24. As we currently have a regulatory regime to control the sale of nitrous oxide for recreational use, we will continue to assess the impact of recent developments.

25. As noted above, the new approach is expected to be clearer for enforcers, as well as those who are suppliers and users of nitrous oxide.

26. S9(2)(c)

27.

S6(c)

28. We recommend that the impact of the new enforcement approach be evaluated over a 6-month period, to determine whether additional legislative change is necessary. S6(c)
29. We will discuss this timeframe and the approach for monitoring impacts with Police.
30. During this time, we will engage with industry to identify the legitimate supply chain and uses of nitrous oxide products, as this should help inform enforcement. It could potentially lead to a voluntary register of legitimate suppliers and purchasers, particularly in relation to the large cannisters.
31. In addition, we will talk with partner organisations (such as Health NZ and the NZ Drug Foundation) about updating the harm reduction advice on nitrous oxide available to the public.

Regulatory change options

32. If the new enforcement approach does not adequately address the sale of nitrous oxide for recreational use, we have identified two potential options for regulatory change that could provide targeted tools for more efficient and effective enforcement: regulation under the Hazardous Substances and New Organisms Act 1996 or changes to the Psychoactive Substances Act 2013.

Option A: regulation under the Hazardous Substances and New Organisms Act 1996

33. Nitrous oxide is classified as a hazardous substance under the Hazardous Substances and New Organisms Act 1996 (HSNO Act) and is subject to some import and manufacturing requirements including labelling, a requirement to have a safety data sheet, and disposal.
34. In addition, controls exist under the Health and Safety at Work (Hazardous Substances) Regulations 2017 in relation to workplaces.
35. The Environmental Protection Authority (EPA) has a range of mechanisms at its disposal to place controls on hazardous substances, as well as placing a broad range of conditions on import, manufacture, and supply. Controls can be set for a specific hazardous substance through a reassessment, or the EPA can issue notices, which are secondary legislation to cover a wide range of hazardous substances.
36. An option to investigate is whether to make legitimate supply of nitrous oxide "to workplaces only". Importers, manufacturers, and suppliers therefore can only distribute their product to legitimate businesses. If they are non-compliant, enforcement officers can take action.
37. The EPA has a small compliance team. Certain health-related substances under the HSNO Act can be enforced by enforcement officers in Public Health Units (Health NZ) and in local councils.
38. The EPA could reassess nitrous oxide if there is evidence of increased harm to human health (e.g. increased hospitalisations). They have a set process for reassessments which

takes a minimum of 100 days but often takes at least a year. Any regulatory decisions are made by a decision-making committee acting under delegation from the EPA.

39. If the option to regulate under the HSNO Act is to be pursued, the Ministry can request grounds (the first step in the reassessment process) if the data showing increased hospitalisation due to nitrous oxide is available. Once grounds are granted an application can be made to the EPA to reassess nitrous oxide. This application will need to contain more information on the problem, including researching the range of products and affected industries.
40. There are provisions under s140 for Orders in Council in the HSNO Act, which could be a useful mechanism in these circumstances. These powers are fairly broad reaching. We would need more time to explore this option.

Option B: Amendments to the Psychoactive Substances Act 2013

41. The Psychoactive Substances Act 2013 was designed as a licensing regime to approve certain substances as being able to be imported, manufactured, or sold. It is predicated on the basis that the substance is only being used for the approved purpose. Nitrous oxide not an approved product, however it is manufactured and sold for legitimate uses.
42. The Act prevents the sale by an unlicensed retailer where the product is being sold for psychoactive effect. The Act does not allow the setting of conditions to enable the supply of psychoactive substances for legitimate purposes.
43. To do this would require amendments to the Act with nitrous oxide in mind. Legislative change could support enforcement efforts by providing targeted tools, resulting in more efficient and effective enforcement.
44. Targeted requirements could be introduced to reduce harmful supply of nitrous oxide while retaining access for legitimate users of nitrous oxide as a food additive. This is the approach being taken in Western Australia. Examples of the types of policies that could be enabled this way include:
 - a. Setting criteria for identifying legitimate suppliers and purchasers of the whipping cream cannisters to discourage illegitimate suppliers and provide an evidential basis for enforcement actions.¹
 - b. Restricting the size or type of nitrous oxide containers which may have no legitimate use and are more likely to lead to harms.
 - c. Limiting trading hours, to make nitrous oxide less easily available.
 - d. Set age restrictions for purchasing nitrous oxide, to prevent sale to minors.
 - e. Requiring advisory labels on products or in stores, with harm reduction advice for purchasers.

¹ Under new regulations in Western Australia (coming into force in later 2024), nitrous oxide for food and beverage use will only be accessible for purchase by registered food businesses, select businesses with a liquor licence, and other persons approved by the Department of Health. Suppliers will need to obtain evidence from each purchaser that they are an approved type of business. This approach may be feasible in the New Zealand context however would create a regulatory burden on legitimate users of nitrous oxide.

45. A policy development project with legislative change as one of the options would involve several months of policy work and consultation before producing a policy decision paper prior to bill drafting.
46. The process in Western Australia involved an interagency working group, public consultation, and extensive consultation with industry. If the Ministry were tasked with leading this project, prioritisation against other work would need to be considered.
47. Implementation of a legislative option is likely to require additional resources for the new administrative and enforcement activities generated by the new legislation.

Impacts on work programmes

48. Both the options above will require reprioritisation of the Ministry work programmes. If either option is desired, we can provide advice on timeframes, resourcing, and prioritisation.

Scheduling nitrous oxide under the Misuse of Drugs Act 1975 is not recommended

49. Scheduling nitrous oxide under the Misuse of Drugs Act 1975 is not recommended as it would prohibit legitimate uses of nitrous oxide.
50. On the surface it appears that a similar approach has been taken in the UK, where nitrous oxide was recently scheduled as a Class C Drug. However, there are broad exemptions for its legitimate non-therapeutic uses. In New Zealand, our Misuse of Drugs Act 1975 would not allow for exemptions for legitimate use as per the UK.

Equity

51. Generally the harms of recreational drug use, as well as the harms of a criminal justice approach to drug laws, fall disproportionately on deprived communities. In relation to nitrous oxide, we do not have information to assess the impacts on equity at this time. We will consider this aspect further in future advice.

Next steps

52. To action and evaluate the new enforcement approach, officials will liaison with Police and other agencies. We will arrange for advisory letters to be sent to vape stores, updated on-line harm reduction information for the public, and engage with industry.

ENDS.