

Briefing

Getting to Smokefree 2025: reform of vaping, smokeless tobacco and consumer nicotine product regulation

Date due to MO: 31 January 2024 **Action required by:** 2 February 2024

Security level: IN CONFIDENCE **Health Report number:** H2024034952

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

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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 Withdrawn | |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:

Getting to Smokefree 2025: reform of vaping, smokeless tobacco and consumer nicotine product regulation

Security level: IN CONFIDENCE

Date: 31 January 2024

To: Hon Casey Costello, Associate Minister of Health

Purpose of report

1. This report provides advice on proposals for vaping and other regulated products, including the 100-Day plan requirements, and seeks your advice on changes to the attached draft Cabinet paper (**Appendix A**).

Summary

2. As part of the Government's 100-Day plan commitments, officials were 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 [CAB-23-MIN-0468 refers].
3. In December 2023, you requested further advice and confirmed your intention to progress a range of vaping and other proposals as part of a broader review of the smokefree policy settings, to better align them with the Government's direction and improve coherence across the Smokefree Environments and Regulated Products Act 1990 (the Act) and its regulations [H2023033982 refers].
4. You are required to report to Cabinet "before 8 March 2024, on further changes needed to... strengthen the regulation of vaping and other nicotine products" [CAB-23-MIN-0500 refers].
5. We propose responding to the 100-Day Plan by seeking Cabinet's agreement to:
 - a. increase penalties for illegal sales of all regulated products to minors
 - b. introduce two new infringement offences: allowing minors to enter an R18 specialist vape retailer (SVR), and publishing a regulated product advertisement
 - c. set all current SVR premise approvals that were made before 21 September 2023 to expire on the anniversary of their approval, requiring them to reapply and meet current appropriate premise requirements (subject to transitional provisions and a decision regarding grandfathering of proximity restrictions)
 - d. set all other and all future SVR premise approvals to have an expiry date no longer than 3 years.
6. The measures above would be an immediate response to concerns about sales of vaping products to minors and increased regulatory oversight. However, we do not consider

them sufficient to address shortfalls in the regulatory regime for vaping and other regulated products (smokeless tobacco, smoked tobacco, and herbal smoking products).

7. We therefore propose you also seek Cabinet's agreement to a wider policy review. This could include initiatives such as banning disposable vaping products (as per the NZ First and National Party Coalition Agreement), restricting visibility of vaping products (as per the National Party Manifesto), **§ 9(2)(f)(iv)**
[REDACTED]
8. Some of the broader proposals suggested [H2023033982 refers] would risk increasing young people's exposure to nicotine products without adding clear benefits for people who smoke or the achievement of the Smokefree 2025 goal. Therefore, we do not recommend progressing:
 - a. legalising the sale of snus and nicotine pouches
 - b. liberalising the promotion of heated tobacco products
 - c. increasing the maximum nicotine concentration for vaping products.
9. There are other proposals we do not recommend progressing due to unclear or likely unintended consequences:
 - a. maximum volume for pre-filled pods
 - b. requiring a liquor license to sell vaping products
 - c. reversing the requirement for removable batteries
 - d. allowing general vape retailers (GVRs) to verbally offer vaping products as an alternative to tobacco
 - e. mandating school reporting to the Vaping Regulatory Authority (VRA).
10. Our advice is provided in three parts:
 - a. Part A: 100-day plan: increase penalties for selling to minors, and increase oversight
 - b. Part B: Longer term response to address problems with the legislation
 - c. Part C: Advice on other proposals we do not recommend progressing.
11. A draft Cabinet paper is attached at **Appendix A** for your consideration and comment.
12. **Appendix B** contains a summary of our recommendations.
13. To meet deadlines associated with the 100-Day Plan, 2 weeks' Ministerial and departmental consultation should commence on 2 February.

Recommendations

We recommend you:

- a) **advise** any changes to the attached Cabinet paper **Yes/No**
- b) **agree** to commence Ministerial and departmental consultation, subject to any changes you may have to the draft Cabinet paper **Yes/No**



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

Date: 30 January 2024

Hon Casey Costello

Associate Minister of Health

Date:



Jane Chambers
Acting Deputy Director-General
Public Health Agency | Te Pou Hauora
Tūmatanui

Date: 29 January 2024

Getting to Smokefree 2025: reform of vaping, smokeless tobacco and consumer nicotine product regulation

Background

1. The 100-Day plan directs 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.”
2. At its meeting on 18 December 2023, Cabinet noted that you would report back “before 8 March 2024 on further changes needed to further strengthen the regulation of vaping and other nicotine products”.
3. The coalition agreements between the National Party and the New Zealand First and Act New Zealand parties respectively refer to:
 - a. “...amending vaping product requirements and taxing smoked products only” and “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.”
 - b. “introduce serious penalties for selling vapes to under 18s, and consider requiring a liquor licence to sell vapes.”
4. In addition, you subsequently indicated that you wish to progress vaping and other proposals as part of a broader review of the smokefree policy settings, to better align them with the Government’s policy direction and improve coherence across the Act and its regulations [H2023033982 refers].

Context

5. On 18 December 2023, Cabinet agreed to amend the Smokefree Environments and Regulated Products Act 1990 (the Act) to remove the changes that would reduce the number of retailers that can sell smoked tobacco, limit nicotine levels in smoked tobacco products and introduce a smokefree generation policy. A Bill to give effect to Cabinet’s decision will be introduced in February 2024, and under urgency could be passed by 8 March 2024.
6. Smoking is a leading cause of preventable death and disease in New Zealand. Although smoking rates continue to decline, there is still a long way to go to achieve the smokefree 2025 goal of less than 5% of all population groups smoking daily (6.8% of adults were daily smokers in 2022/23, down from 8.6% the previous year and 16.4% in 2011/12; significant inequities remain with 17% of Māori smoking daily in 2022/23).
7. The emergence of vaping products has offered an alternative for people who smoke. While vaping is less harmful than combustible tobacco, it is not harmless, and regular use can lead to nicotine dependence, making quitting vaping difficult. Despite restricting

vaping sales to those aged 18 and over, there has been a concerning uptake of vaping by young people who do not smoke, similar to other countries.

8. The 2022/23 ASH survey of Year 10 students (14–15-year-olds) found that youth daily vaping remains at 10%, no increase on last year,¹ and weekly, monthly and regular vaping rates have all decreased. However, there are clear inequities with 26.6% of Māori girls and 18% of Māori boys vaping daily, much higher than the 10% average for that age. Also, the New Zealand Health Survey suggests vaping rates for 15-17-year-olds may still be increasing.

Current legislative and regulatory settings

9. Vaping products were first regulated as consumer products under the Act in 2020. This included restricting sales to those 18+ years of age, banning vaping in workplaces, restaurants, and bars, and setting product safety standards.
10. The Act enables the sale of vaping products via two routes, either as a specialist vape retailer (SVR) or a general vape retailer (GVR).² SVRs must apply to the Director-General of Health (the Director-General) and meet requirements such as operating from an appropriate retail premise and achieving sales thresholds for vaping products.³ SVRs are able to sell a wide variety of vape flavours. By contrast, GVRs must notify the Director-General that they are selling vaping products⁴ and may only sell tobacco, menthol, or mint flavours.
11. New vaping regulations came into force on 21 September 2023 and are progressively taking effect over 6 months. Any new SVRs must now be at least 300 metres from a school or marae, and all single use vaping products must meet new product safety requirements such as reduced nicotine limits, removable batteries, child safety mechanisms and labelling requirements. From 21 March 2024, all vaping products must meet new product safety requirements and use permitted flavour descriptions. The impact of these regulatory changes should start to be reflected in 2023/24 youth vaping rates, due to be reported in November 2024.
12. The settings for smoked tobacco products will change with the pending passing of a Bill to give effect to Cabinet’s decision to reverse the previous Government’s smoked tobacco policies. This advice is provided in the context of that Bill passing.

Government’s strategic approach to achieving Smokefree 2025

13. The Government remains committed to achieving the Smokefree 2025 goal, that is, for a daily smoking rate of under 5% for all population groups.
14. We understand a key strategy for you is to ensure that people who smoke have access to less harmful regulated products (eg, vaping products), which may help them quit smoking. This will be balanced by better protecting young people from accessing vaping products.

¹ The one exception is for low socioeconomic participants who reported a statistically significant increase in daily vaping.

² GVRs are typically dairies, supermarkets or petrol stations, and occasionally ‘dollar’ stores, adult shops, liquor stores etc.

³ At least 70% of total sales from the retail premises are or will be from the sale of vaping products or 60% of total sales from the retail premises are or will be from the sale of vaping products and the Director-General is satisfied that the lower threshold is appropriate in the circumstances.

⁴ The requirement to notify applies to the sale of all notifiable products including smokeless tobacco and herbal smoking products.

15. Many people who smoke have switched to vaping and we can expect this trend to continue. This has been a supporting factor in recent drops in New Zealand's smoking rates. Youth vaping remains at undesirable levels, although rapid increases in youth vaping seem to have largely stopped and, on some measures, may have begun to reverse.
16. Achieving a balance between supporting those who smoke and protecting minors has been difficult. Policies that support people to switch from smoking to vaping often make it easier for minors to vape. We consider it important to now shift the balance of the regulations to better protect minors from access to and use of vaping products.
17. At the same time, we should prioritise policies to achieve equitable outcomes among those who smoke and young people who vape, given differences in smoking and vaping rates between population groups.
18. Our advice is provided in three parts:
 - a. Part A: 100-Day plan: increase penalties for selling to minors and increase oversight
 - b. Part B: Longer term response to address problems with the legislation
 - c. Part C: Advice on other proposals we do not recommend progressing.

Part A: 100-Day plan: increase penalties for selling to minors and increase oversight

Increasing penalties for selling to minors

19. Young people access vaping products through both retail and social supply.⁵ In New Zealand, social supply is the main way Year 10 students access vaping products (at 40.1%). Buying from retailers and online is much less common (20% of daily vapers and 11.5% of ever tried vapers bought from physical stores in 2023).⁶
20. Penalties for unlawful sales to minors are:
 - a. Fines of \$10,000 for a body corporate (including most retailers) and \$5,000 for others on conviction before a court
 - b. Infringement fees (i.e. on the spot fines) of \$1,000 for a manufacturer, importer or distributor, and \$500 for others (eg, sales assistants, and retailers in this instance).
21. Compliance is supported through educational visits and Controlled Purchase Operations. Around 10% of GVRs and 17% of SVRs have been caught selling to minors (compared to around 5% for tobacco). To date, one prosecution of a vape retailer has commenced for sales to minors. It is unlikely, though not tested, that the current level of fine is not a strong deterrent compared to the potential gains from non-compliant activities. The same is likely true of the current level of infringement fees.
22. Given the predominance of youth supply via social sources and current retailer compliance rates, the impact on reducing youth vaping from increasing the fine may be small. However, an increased fine could add weight to public interest reasons for taking a

⁵ i.e. buying from or being given products by friends or others their own age.

⁶ The majority in both groups bought from SVRs rather than a supermarket, dairy, petrol station, convenience store or other shop.

prosecution against an offending retailer.⁷ For individual sales assistants, who may be on minimum wage, we do not recommend a significant increase in fines. Responsibility for meeting legislative requirements should largely fall to the retailer.

23. It is recommended that fines for individuals (such as sales assistants) are increased from \$5,000 to \$10,000, and that fines for body corporates are increased from \$10,000 to \$100,000.⁸ Differing fines, up to a maximum of \$100,000, better accounts for the range in potential offenders, from sales assistants to large corporates such as supermarkets.
24. It seems unlikely that increasing penalties for sales to minors would significantly reduce youth vaping on its own. A wider policy review is required, but in the meantime, there are additional changes to penalties that may help improve compliance:
 - a. The fine levels for sale to minors could be increased for *all regulated products* (for consistency, so that the fine for selling tobacco is not less than for selling vaping products).
 - b. Existing infringement fees for sales to minors could be increased, and the higher fee class extended to retailers:
 - i. for any person (i.e. sales assistants) from \$500 to \$1,000
 - ii. a higher amount, such as \$2,000, could be considered for manufacturers, importers and distributors, and this class extended to include retailers,⁹ to reflect the seriousness of selling to minors and the responsibility that should be taken when stocking and selling these products. The Ministry of Justice's guidelines recommend infringement fees should not normally exceed \$3,000 at most, or 10% of the total fine, whichever is lower.
 - c. New infringements could be developed in relation to specific existing offences that relate to sales and appeal to youth, to enable timely enforcement action on these matters. These are offences for:
 - i. allowing a minor to enter an SVR (section 14(2))¹⁰ (suggested infringement of \$2,000 for the retailer only)
 - ii. publishing a regulated product advertisement (section 23) (suggested infringement of \$2,000 for the retailer (and any other business) and \$500 for anyone else).
25. We are consulting the Ministry of Justice on these proposals.

26. s 9(2)(h)

⁷ It is not the rule that all offences for which there are sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest. Just as history of recurring conduct, and harm to children and young people may weigh in favour of prosecution, the likely imposition of a very small penalty can be a reason against pursuing prosecution.

⁸ Fines are generally (and in this case) set as a maximum, giving discretion to the court to charge a lower amount.

⁹ Retailers are currently only subject to a \$500 infringement for sales to minors, while importers and manufacturers have a \$1,000 infringement for this offence.

¹⁰ The existing offence is in relation to taking "all practicable steps" to prevent a minor from entering an SVR. The infringement would need to be worded slightly differently to the existing offence for practicality.

Cabinet proposals

27. Subject to Ministry of Justice feedback, we propose you seek Cabinet's approval to:

- a. increase the maximum fine for illegal sales of regulated products to minors [levels to be confirmed with Ministry of Justice] **Yes / No**
- b. increase related infringement fees to [levels to be confirmed with Ministry of Justice] **Yes / No**
- c. implement new infringements for two offences:
 - i. allowing minors to enter an R18 SVR **Yes / No**
 - ii. publishing a regulated product advertisement. **Yes / No**

Increasing oversight

28. Currently, SVRs must meet only the requirements that were in place at the time of their approval. This means, for example, that only newly approved SVRs are required to be at least 300m from a school or marae, or to be in an 'appropriate premise'. An option for increasing oversight is to set all current approvals to expire,¹¹ and then require them to reapply under current requirements. This would ensure all SVRs meet up-to-date standards and would improve oversight in that all stores would be monitored against the same set of regulations. It would also be more straightforward to suspend or cancel SVRs that are non-compliant.
29. This would align better with community expectations, however, a sampling of existing SVRs suggests that approximately half (around 600) would fail the requirement to not be within 300m of a school or marae. It is not possible to establish how many would not currently meet the requirements for an appropriate premise. Many are likely to be able to meet the appropriate premise requirements with modifications to their store, but some may not be able to modify their store layout sufficiently to qualify.
30. It is unclear what impact removing half of existing SVRs would mean for access to vaping products for the purposes of smoking cessation. While some geographic areas would retain some SVRs, others might lose all of them. These areas would then need to rely on GVRs and online stores for access to vaping products. This would also have a significant financial impact on those businesses that have, for example, taken on multi-year leases.
31. To avoid this, we recommend applying the appropriate premise requirement to all re-approval applications but grandfathering¹² the proximity requirement for existing owners (so that only new applications are required to meet this aspect). Alternatively, if you prefer to move toward consistency across retailers and apply the proximity requirement to all SVR approvals, we recommend consulting publicly first, due to the significant implications. We are limited in our ability to assess the impact of this policy without going to public consultation.

¹¹ Approvals would expire on the anniversary of their approval (or after 12 months, for those approved in the last year) so as to not create a situation where a large number of premises are reapplying at the same time.

¹² Exempt existing retailers from any new proximity restrictions.

Cabinet proposals

32. We propose you seek Cabinet's approval to:

EITHER

- | | | |
|----|---|-----------------|
| a. | after a transitional period (of, for example, 12 months) set all SVR approvals that were made before 21 September 2023 to expire on the anniversary of their approval | Yes / No |
| b. | set all other and all future SVR approvals to have an expiry date no longer than 3 years | Yes / No |
| c. | apply the proximity requirement to <i>new</i> approvals only (i.e. grandfather this requirement) | Yes / No |

OR

- | | | |
|----|--|-----------------|
| d. | seek further advice on the impact of applying the proximity requirement to <i>existing</i> approvals, with a view to publicly consulting as part of any broader review of the Act, prior to making a decision. | Yes / No |
|----|--|-----------------|

Part B: Longer-term response to address problems with the legislation

33. The changes proposed above signal the Government's intention to address concerns about illegal sales of vaping products to minors. However, we consider a broader review of the legislative settings and regulatory regime for all regulated products is necessary. The Act does not provide for sufficient compliance tools and, in many cases, penalties are insufficient or completely lacking.

34. This section provides advice on the following:

- a. Additional oversight of sales of vaping and other regulated products
 - i. Requiring a license to sell regulated products
 - ii. Improving the coherence of product regulation
 - iii. Strengthening overall compliance and enforcement
- b. Banning disposable vaping products
- c. Restricting promotion of vaping products
 - i. Reviewing the exemptions for vaping products
 - ii. Reducing the visibility of vaping products
- d. Introducing excise tax on vaping products.

Additional oversight of sales of vaping and other regulated products

35. The regulatory system for vaping products was designed to be a light touch, high trust model for both products and retailers. The levels of compliance observed, as well as evidence of product development and marketing that circumvent the intent of the Act and regulations, make it difficult to deliver on community expectations for the control of vaping products.

36. In addition, the Act and regulations have been progressively updated and are difficult to interpret and use. They would benefit from redrafting, and clarification in several areas, such as the process for market entry, for example, as a retailer, or to notify a product. Much of this is currently inferred from only one section of the Act.
37. There may be additional obligations or decision-making criteria that could be added, such as a requirement to always have a suitably trained staff member present in an SVR.

Requiring a license to sell regulated products

38. Introducing licensing for all retailers selling regulated products would allow the Ministry to know who is selling products. Licensing is also an effective way to set minimum requirements for retailers (eg, so that they must demonstrate competence and ability to sell products) and support enforcement (eg, by requiring that all license holders are fit and proper, effectively vetting applicants to ensure there is low risk of breaking the law). A license, having been granted, can also be revoked or suspended if a breach of the law occurs, adding to the range of compliance tools.
39. You asked for advice on requiring a liquor license to sell vaping products (refer to Part C for more detail). Although we do not recommend this, there are aspects of liquor licensing that could be used to improve the regulation of vaping and other regulated products such as tobacco, for example:
 - a. significantly strengthened requirements for operator competence, including duty managers who are trained and present at all times, and suitability of the applicant requirements
 - b. 1-year probationary periods for new operators
 - c. Licenses (for all types of retailer) that expire and must be proactively reapplied for
 - d. improving the effectiveness of suspensions and cancellations of licenses as an enforcement mechanism, eg, by extending to all types of retailer and including stand down periods
 - e. strengthened decision-making processes, and opportunity for input from communities or relevant experts.
40. The Ministry's oversight of sales of vaping and other regulated products (eg, smoked tobacco) would benefit from reform. With the removal of the smoked tobacco retail scheme, the Ministry will not have complete information on who is selling products, hampering compliance. Options include introducing a licence to sell all regulated products and extending the existing requirements to notify the Director-General of selling notifiable products, to all regulated products.

Improving the coherence of product regulation

41. A key part of the regulatory regime relates to the products for sale, and the way that these are regulated, including product safety and packaging requirements.
42. For vaping products, smokeless tobacco, and herbal smoking products (but not smoked tobacco) there is a notification regime, where importers or manufacturers submit certain product information to the Ministry and declare that the products meet product safety requirements.

43. There may be public expectation that the regulator reviews product safety and compliance of each product. This is not the case, as the regulations do not support the assessment of regulated products, consistent with a high trust model.
44. There is evidence that a number of issues exist, with vaping products being notified that are non-compliant, eg, because the labels on the packet don't accurately explain what is in a vaping substance, or in some cases are contaminated.¹³
45. A balance needs to be struck in relation to the level of administrative burden that is appropriate for both notifiers and the regulator and ensures public safety. It may be that the current arrangement would benefit from strengthening, by including:
 - a. an assessment or approval by the regulator as part of the notification process. For example, to ensure that the notification is of a product that is compliant with product safety requirements, and that it appears accurate and complete, and a true representation of the product in question.
 - b. a requirement for manufacturers to demonstrate or declare that they have good manufacturing practices, for example, that they manufacture products in a clean environment, and have processes to ensure that what is in the vaping substance bottle is not contaminated and is the same as what is stated on the label.¹⁴
 - c. a requirement for additional information to allow for assessment of notifications, for example, provision of test reports, or images.

Strengthening overall compliance and enforcement

46. Now that the regulatory system established by the 2020 Amendment to the Act has bedded in, it is apparent that we do not have sufficient compliance tools at our disposal, and in many cases, penalties are insufficient or completely lacking. Some examples include:
 - a. Missing and insufficient offences and penalties. For example, operating as an SVR without approval. This is a serious breach of the Act for which there is no directly related penalty.
 - b. Infringements (on the spot fines) are relatively low, not available for many common retailer offences and could be better targeted towards businesses rather than, or as well as individual shop assistants. For example, vaping retail stores and online stores frequently breach existing requirements preventing advertising and promotion of regulated products, however, individual instances may not meet the threshold for prosecution. A broader range of new infringements (on the spot fines) than those proposed in paragraph 24 could be considered.
 - c. Enforcement powers are not in line with best practice. For example, there is no power to seize evidential samples of suspected non-compliant products and/or direct a retailer to remove non-compliant products or materials from sale. The

¹³ Preliminary analysis of products tested by ESR in March 2023 found that 33 out of the 55 (60%) products had a nicotine concentration over the legal limit at that time, and that some products have up to 80% more nicotine in tests compared to labelled, or up to 44% less. A summary of earlier research is available from <https://www.esr.cri.nz/our-research/our-science-in-action/up-in/>

¹⁴ This could be modelled after existing international requirements, such as from the UK or EU.

ability to require basic details such as name and address is limited to offences related to under-age sales.

- d. There are some industry participants for whom fines may not be effective due to the level of sales they are making from vaping products.¹⁵ This could be mitigated using pecuniary penalties, where there is a commercial imperative for non-compliance. These could focus on non-compliance that has resulted in significant commercial gain.

Cabinet approvals

47. We propose you seek Cabinet's agreement to a broader review of the Smokefree Environments and Regulated Products Acts 1990 to better support:
 - a. oversight of the market for regulated products (ie, vaping, smokeless tobacco, smoked tobacco and herbal smoking products), and **Yes / No**
 - b. effective compliance and enforcement. **Yes / No**

Process for any review of policy settings

48. We propose targeted engagement with a range of communities most impacted by vaping, including rangatahi Māori, Pasifika youth, whānau who have used vaping to quit smoking, and Māori and Pasifika smoking cessation providers. Research would be carried out with these groups to ensure their lived experience with smoking and vaping informs policy recommendations.
49. If agreed that a broader review should be undertaken, we will provide you with a proposed scope and timeline by the end of March 2024 for consideration.

Mitigating legal risks associated with regulatory change

50. Regulating tobacco and vaping products is an area where legal challenge, both domestic and international, is likely. The processes we follow, such as undertaking public consultation, are an important aspect to mitigating potential legal risks. Legal advice will be an essential component of all our advice. An additional challenge is keeping pace with the speed of innovation from industry.

Banning disposable vaping products

51. Disposables, or single use vaping products have quickly become the most popular vaping product used by young people here and around the world. In 2023, disposables were used by 58.1% of Year 10 Students who had ever tried vaping, and 68.1% of those who vaped daily (rapid increases from 12.2% and 9% respectively in 2021). The highest rate of disposable use in New Zealand is among Pacific and Māori students.
52. Two recent UK studies found the appeal of disposables was perceived to be related to high visibility in stores, small size, and lack of long-lasting odour (and therefore

¹⁵ For example, one vaping market participant had approximately \$93million in online sales in 2022.

convenience and discretion in terms of concealment from parents and within schools), simplicity of use, and in one of the studies, also low price (i.e. pocket money prices). Some young people would likely switch to reusables if disposables were unavailable, but these are more expensive, which could be a deterrent.

53. A ban on disposables might make some adults who smoke less likely to switch, as disposables are viewed as cheap, convenient, and easy to use, and we should consider mitigations for this risk (eg, subsidising vaping products via our stop smoking services). However, reusables are likely to be more cost effective in the long run. One United Kingdom study found most participants using disposables were concerned at the high ongoing cost and were planning to switch to reusable devices.
54. Should a ban on disposable vaping products be supported, we will work with Health New Zealand – Te Whatu Ora to develop options to provide better support for people who smoke, to switch to vaping (eg, in the UK, a vape starter kit is available so that cost is not a barrier to quitting.)
55. Banning disposable vaping products would also have clear environmental benefits. Disposable vaping products are made of plastic and contain copper and lithium. They are commonly littered. Unless disposed of safely, disposable vaping products can last in landfill for years. Both batteries and nicotine are considered hazardous waste.
56. Other jurisdictions have seen increases in youth vaping similar to New Zealand. Many have or are taking steps to restrict the sale of disposable products, for example, France (for health and environmental reasons), Germany (for environmental reasons) and Ireland (under waste management legislation). Scotland is considering a ban for primarily environmental reasons. England is considering restricting the sale of disposable products using powers under environmental legislation but recognises their importance to adults who smoke (31% of adult vapers there now use disposables). Belgium awaits European Union (EU) approval to implement its own ban, and Germany plans to push for an EU-wide ban. Australia banned importation of disposables from 1 January 2024.
57. **s 9(2)(h)**
[REDACTED]
58. Previous experience shows industry will respond very rapidly to circumvent a ban on disposable vaping products with new products that comply but are cheap and attractive to youth. We are already seeing the emergence of new products that fit this description. We suggest progressing work to ban disposable products; however, it should not be relied on in isolation, but combined with other policies (eg, tightening the ability to promote products, including visibility to the public, and potentially increasing price through excise tax).

Cabinet proposals

59. We propose you seek Cabinet’s agreement to:
 - a. working towards banning disposable vaping products as part of any broader review of the Act. **Yes / No**

Restricting promotion of vaping products

60. How we regulate promotion is important to ensure people who smoke know about and consider less harmful alternatives, as well as protecting young people from access to addictive substances.

Reducing exemptions for vaping products

61. There is a comprehensive ban on promotion of tobacco products, but many exemptions to this for vaping products and heated tobacco devices. These include:
- stores may display products in a way that is visible to the public, both within and from outside the store
 - SVRs may promote vaping products in-store and to existing customers and offer discounts and free giveaways.
62. Some of these exemptions have been problematic, particularly from a compliance perspective. For example, SVRs may communicate with 'existing customers' however, this exemption is being exploited to widely promote vaping products on social media, reaching a broad audience, including minors.
63. In addition, the way these exemptions are set out in the Act is difficult to follow and would benefit from review.

Visibility of vaping products

64. Proliferation of vaping retailers combined with colourful and highly visible in-store and window displays contributes to the normalisation of vaping, instead of an intended harm reduction tool for people who smoke. People are exposed to window displays that function as product advertisements. 'Power walls' within general retailers expose young people to vaping products alongside regular grocery items. Two recent UK studies found the main appeal of vaping product packaging was the colours, especially for disposables, which contribute to the attractiveness of the bright displays in-store and in shop windows.
65. Given that SVRs are intended to be 18+ only spaces, reducing visibility of vaping products from the street would mean SVRs are not reaching out into public spaces, exposing young people to what is effectively advertising. Canada has achieved this with vaping product retailers, by requiring frosted windows.
66. Another option is that GVRs be required to follow tobacco rules, eg, to have all stock in closed cupboards. Signs in-store could still be used to alert adult customers to availability and price, so access for smoking cessation would not be reduced.
67. Approximately a third of vaping product sales are made online from about 200 online retailers. Any consideration of a product display ban should therefore also consider these retailers. A reduction in visibility should also include consideration of any other advertising and display material both in-store and via other mechanisms, that might circumvent the purpose of a display ban. While youth online purchasing is consistently very low (1.5% of ever tried vapers, 2.3% of daily vapers in 2023), this may change, particularly in response to any other vaping changes.
68. **s 9(2)(h)**
[REDACTED]

Cabinet proposals

69. We propose you seek Cabinet's agreement to:

- a. working towards restricting the promotion of vaping products, including visibility, in any broader review of the Act.

Yes / No

s 9(2)(f)(iv)

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Part C: Advice on other proposals we do not recommend progressing

77. We have considered a range of other potential proposals that we do not recommend you progress. The following proposals are discussed below:
- a. Expanding the range of available consumer nicotine products
 - b. Requiring a liquor licence to sell vaping products
 - c. Liberalising the regulation of heated tobacco products
 - d. Increasing maximum nicotine concentration
 - e. Reversing the regulation requiring removable batteries
 - f. Setting a maximum volume for prefilled prods
 - g. GVRs verbally offering vaping products as an alternative to tobacco
 - h. Mandating school reporting to Vaping Regulatory Authority (VRA).

Expanding the range of available consumer nicotine products

78. You have asked for advice on expanding the availability of potentially less harmful oral tobacco and nicotine products such as snus and nicotine pouches.
79. Some smokeless tobacco products are unlawful in New Zealand, including chewing tobacco, snus and dissolvables. Chewing tobacco, which is associated with mouth cancer, should remain unlawful. However, if there are products with a similar risk profile to vaping, then there may be an argument for making them available as options for smokers, however this needs to be weighed against the likelihood that minors could also begin to use these products. This is a problem that Scandinavian countries have had to respond to in recent years by tightening up regulations, eg, Norway has mandated plain packaging for snus.
80. Swedish-type snus is a tobacco product for oral use that is made from pasteurised finely ground tobacco leaves and food grade additives, including flavourings. It is significantly less harmful than smoking, similar to vaping. Its relevance to the New Zealand population is unknown, but it may appeal to a minority of smokers. There is weak evidence of effectiveness of snus as a tool for smoking cessation and weak evidence of an association between using snus and taking up smoking. The risk of feeling addicted may be higher for snus than for smoked tobacco. Use of snus may increase the risk of certain cancers.
81. Nicotine pouches are small pouches for oral use. They do not contain tobacco leaf. They contain nicotinic salts, microcrystalline cellulose, various other salts (including sodium bicarbonate), citric acid and other flavours. They are relatively new to the international market. There is not good evidence to date to support their possible use as a reduced harm alternative to smoking and there is currently no evidence of their effectiveness for smoking cessation. There is evidence of them being marketed to children in other countries, and they are associated with nicotine dependence and addiction. Children, adolescents and non-smokers are considered at high risk of dependence.
82. On balance, we do not recommend extending the range of nicotine products available for sale in New Zealand. Vaping and heated tobacco products are already available, with vaping a popular reduced-harm option. Additional products will likely compound existing concerns about young peoples' addiction to nicotine for little benefit.

83. We can provide you with an evidence brief on snus and nicotine pouches if you wish.

Requiring a liquor licence to sell vaping products

84. You asked for advice on requiring a liquor license to sell vaping products. We understand the intention is to improve compliance with restrictions against selling to minors by making use of an existing regulatory regime. This policy is likely to be extraordinarily complex, costly, and result in significant unintended consequences both practical and legal. We do not recommend a liquor license for the sale of vaping products. Additional detail about liquor licencing is provided in **Appendix C**.
85. We have consulted with the Ministry of Justice on this proposal. They advise they are in agreement with this advice.

Liberalising the regulation of heated tobacco products

86. You have asked for advice on re-classifying heated tobacco sticks (HTPs) as vaping products, which would mean the vaping exemptions would apply, eg, to allow them to be displayed in shops.
87. HTPs make up a very small part of the New Zealand market now.¹⁶ New Zealand regulates HTPs in a hybrid way. HTPs are smokeless tobacco products because unlike vaping products they contain tobacco. However, the HTP device is regulated as a vaping device and the use of the product is defined as vaping (i.e. vaping includes inhaling an HTP). The tobacco component of HTPs is a tobacco product for excise tax purposes.
88. The classification of the device as a vaping product means that HTPs are not subject to the full range of tobacco product controls (eg, the devices may be on display in stores because they are part of the vaping exemptions).
89. Theoretically, HTPs should be less harmful than cigarettes, (though are likely to be more harmful than vaping) however, there is little independent evidence to support their use as an appropriate reduced-harm alternative to smoking. There is no evidence to support their use as a quit smoking tool. HTPs are, however, able to be legally purchased in New Zealand so are available to those who want to try them.
90. We do not recommend liberalising the way HTPs are promoted. This would likely compound existing concerns about youth uptake and addiction to nicotine products.
91. We can provide you with further information and evidence related to heated tobacco products at your request.

Increasing maximum nicotine concentration

92. You have proposed increasing the maximum nicotine concentration in vaping substances to 30mg/mL to better support people who smoke to switch. This would be an increase

¹⁶ Unpublished data from ITC survey, Janine Nip et al. Among people who smoke, current nicotine vaping product (NVP) use was 45.1%, with 26.5% using NVPs daily; current heated tobacco (HTP) use was 6.0%, with 2.1% using HTPs daily. Among people who had recently stopped smoking, current NVP use was 53.8%, with 46.5% using NVPs daily; current and daily HTP use was <1%. Among people who had attempted to stop smoking in the past 2 years, 59.2% used NVPs and 8.6% used HTPs in their most recent quit attempt. Among people who had stopped smoking in the last 2 years, 65.4% used NVPs and 1.9% used HTPs during their last (successful) quit attempt.

from 28.5mg/mL for vaping substances containing nicotine in salt form and intended for use in a reusable device, and an increase from 20mg/mL for all other vaping substances.

93. s 9(2)(h)

94. s 9(2)(h)

Reversing the regulation requiring removable batteries

95. You have proposed repealing the previous Government’s requirement for vaping products to have removable batteries. This was intended to reduce the risk that sealed batteries pose by allowing batteries to be inspected (i.e. for damage and any signs of wear or deterioration), and safely disposed of.

96. All vaping devices contain batteries. With many devices, the battery is built into the device in a way that does not make it easy for the battery to be viewed or removed. This poses two distinct risks.¹⁷

a. The first is where batteries cause a fire or explosion due to a fault in the battery. This has occurred (around the world) variously during charging, while being carried by a user, or most seriously, during use. While not common, the consequences could be, and at times have been, severe – including resulting in deaths. In New Zealand, ACC has recorded an eight-fold increase in injuries linked to devices. The yearly number of injuries rose from 9 in 2016 to 72 in the first 11 months of 2021. Accepted claims for injuries resulting from burns, which ACC says is generally caused by devices exploding or catching fire, increased steadily each year from fewer than 4 in 2016 to 12 in 2021.¹⁸

b. The second is the risk of fire or explosion once vaping devices have been disposed of. Vaping devices, with batteries inside, can cause fires when crushed. Several recent instances of this have occurred within recycling bins and trucks in New Zealand.¹⁹

97. These trends have also been observed internationally, and evidence, for example from the United States Food and Drug Administration, can be provided on request. The EU has

¹⁷ Compliance Policy for Limited Modifications to Certain Marketed Tobacco Products, Guidance for Industry, U.S. Department of Health and Human Services Food and Drug Administration Center for Tobacco Products November 2019, <https://www.fda.gov/media/133009/download> (accessed 2 August 2023).

¹⁸ [Injuries caused by vapes rise steadily - ACC figures | RNZ News](https://www.rnz.co.nz/news/national/459403/injuries-caused-by-vapes-rise-steadily-acc-figures), 12 January 2022 <https://www.rnz.co.nz/news/national/459403/injuries-caused-by-vapes-rise-steadily-acc-figures> (accessed 9 August 2023).

¹⁹ [Vape batteries set recycling trucks alight | RNZ News](https://www.rnz.co.nz/news/national/484810/vape-batteries-set-recycling-trucks-alight), 24 February 2023 <https://www.rnz.co.nz/news/national/484810/vape-batteries-set-recycling-trucks-alight> (accessed 9 August 2023).

ratified proposals to require all batteries in portable appliances to be removable and replaceable by the end-user, and once that requirement comes into force, all vaping products sold in the EU will need to have removable batteries.²⁰ This move by the EU indicates that battery and product manufacturers will need to transition towards removable batteries, which aligns with the New Zealand product safety requirements.

98. Vaping devices with removable batteries are already available on the market globally and in New Zealand, including reusable and single use vaping products.²¹
99. We do not recommend repealing this safety requirement.

Setting a maximum volume for prefilled prods

100. You have proposed setting a maximum volume of 2ml for vaping substances in prefilled pods.
101. Whilst this does align with requirements in some overseas markets,²² it could also provide a commercial advantage to overseas suppliers, which would likely present legal challenges. It would also contribute to increased plastic waste due to needing to replace pods more often. It is unclear what the health benefit from this change would be. We do not recommend progressing with this.

GVRs verbally offering vaping products as an alternative to tobacco

102. You asked for advice on enabling dairies, supermarkets, and service stations to verbally offer vaping products when a customer requests to purchase tobacco.
103. If this were to proceed, we propose further obligations should also be placed on retailers, for example, training of staff. A mechanism for this would need to be developed. We do not recommend progressing with this at this stage without better understanding the impact this would have on businesses and having assurance around the quality of the training and advice given.

Mandating school reporting to Vaping Regulatory Authority (VRA)

104. You have proposed that schools be required to report to the VRA on the number and brands of confiscated vapes.
105. This proposal would appear to result in increased administrative impacts on both schools and the Regulator. You may wish to raise this with the Minister of Education, given the potential for impacts on the education sector, should this be progressed. As a link to health benefits from this proposal is unclear, officials do not recommend proceeding with this proposal.

²⁰ See Article 11, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020PC0798> (accessed 2 August 2023). Article 11 requires that manufacturers shall design appliances, in which portable batteries are incorporated, in such a way that waste batteries can be readily removed and replaced by the end-user or by independent operators.

²¹ For example reusable - <https://www.vapresso.com/vape-kits/gen-s> (accessed 9 August 2023). For example single use - <https://www.shosha.co.nz/twist-bar-disposable-vape-with-removable-battery> (accessed 9 August 2023).

²² For example requirements in the United Kingdom [E-cigarettes: regulations for consumer products - GOV.UK](https://www.gov.uk/government/news/e-cigarettes-regulations-for-consumer-products) (www.gov.uk)

Equity

106. Vaping product use is disproportionate across society, with higher usage amongst Māori and Pacific peoples. Pacific adults (15+) are one and a half times more likely to vape than non-Pacific. Māori adults (15+) are more than twice as likely to vape daily as non-Māori. Regulating them in a way that reduces access for those wishing to use a less harmful product than smoked tobacco would have a disproportionately negative effect on those populations (which also have higher smoking rates).
107. While not intended for use by non-smokers, New Zealand has seen a rapid increase in youth vaping in recent years, including among young people who smoke. There are clear inequities in youth vaping. Reducing access to, visibility of, and addictiveness and appeal of vape products for young people is likely to have a disproportionately positive effect on those populations of young people who currently have higher rates of use.

Next steps for Cabinet paper

108. Following your feedback, we will make any changes to the draft Cabinet paper. The process and timeframe, to get to Cabinet before 8 March 2024, follows:

Minister's office to initiate 2 weeks' Ministerial consultation	2 February
Ministry to initiate departmental consultation	2 February
Ministerial and departmental consultation complete	16 February
Revised Cabinet paper to Minister for consideration	20 February
Cabinet paper finalised by Minister	21 February
Lodge paper with Cabinet Office	22 February
Cabinet Committee	28 February
Cabinet	4 March

ENDS.

Minister's Notes

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Appendix C: More information about Liquor Licensing

1. The alcohol system is set up to focus on alcohol – to ensure the sale, supply and consumption of alcohol is undertaken safely and responsibly - and is not designed with an additional product like vaping in mind. Extending the system to vaping would require a significant shift in the way the system operates, and the criteria for issuing licenses would need to change. While the legislation is administered by the Ministry of Justice, the licensing system is operationalised locally by the 67 territorial authorities with the support of the Ministry of Health and New Zealand Police. Development of Local Alcohol Policies by territorial authorities mean there is variation in how alcohol is licensed across the country, which may not be suitable for the retail of vaping products.
2. Under current legislative settings, requiring a liquor licence (or alcohol licence, as per the legislation) would mean that:
 - a. all petrol stations, dairies and convenience stores would be ineligible to sell vaping products as they are excluded from obtaining a liquor license (this was a feature of alcohol selling specifically removed from legislation in 2012)
 - b. all existing SVRs would be eliminated from the market as there is a conflict with sales requirements. In order to obtain an off-license, a retailer must expect to earn at least 85% of its revenue from alcohol, whereas SVRs are required to have at least 70% of sales from vaping products.
3. If amendments were made to the Sale and Supply of Alcohol Act (SSAA) and the Smokefree Environments and Regulated Products Act to remove the above restrictions, consequences may still include:
 - a. The number and density of off-licenses may increase significantly, which is associated with higher rates of hazardous drinking, interpersonal violence and other crimes, emergency department admissions and other consequences of alcohol consumption. Allowing alcohol sales in petrol stations would be particularly undesirable for drink driving-related reasons.
 - b. Given the high number of existing vaping product retailers who would be likely to apply for off-licenses, the system would likely be overwhelmed. NZ Police and Medical Officers of Health can submit opposition reports on applications but must do so within 15 days (with no allocated funding). They would not be able to complete timely reports in the event of significant numbers of applications. This would also likely lead to a backlog for Inspectors (who must always file a report) and District Licensing Committees, which would interfere with the normal functioning of the licensing system.
4. There would be significant costs for the National Public Health Service and NZ Police. These could not be covered by licensing fees, which can only cover the expenses of inspectors, District Licensing Committees and the Alcohol Regulatory and Licensing Authority. There would also be additional costs for councils.
5. Domestic and international legal or trade challenges may arise if we are seen to be controlling who can and cannot sell vaping products, particularly if decisions are based on meeting alcohol policy requirements.

6. Based on previous consultation responses, there is likely to be significant community objection to the co-location of these two potentially harmful substances.
7. However, we consider that there are aspects of liquor licensing that could be used to improve the regulation of vaping. For example:
 - a. significantly strengthened requirements for operator competence, including duty managers who are trained and present at all times, and suitability of the applicant requirements
 - b. 1-year probationary periods for new operators
 - c. Licenses (for all types of retailers) that expire and must be proactively reapplied for
 - d. improving the effectiveness of suspensions and cancellations of licenses as an enforcement mechanism, eg, by extending to all types of retailers and including stand down periods
 - e. strengthened decision-making processes, and opportunity for input from communities or relevant experts.

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