

Submission: Smokefree Environments and Regulated Products Act

April 2021

From Auckland Regional Public Health Service in partnership with Auckland District Health Board, Counties Manukau Health and Waitemata District Health Board ('the Auckland metro DHBs').

Consultation questions

The Ministry of Health is seeking comments on the following.

Regulatory proposal 1: Defining an internal area

1. Which option do you support for the definition of an internal area and why?

ARPHS and the Auckland metro DHBs are supportive of option B for the purpose of this submission.

However we would like note we would support an eventual shift to all hospitality areas being completely smoke free.

Option B provides greater clarity around what is and isn't enclosed. This option would make compliance easier for premises and reduces the burden on Smokefree Enforcement Officers to prove an area is enclosed. Option B would also help to resolve the current challenges where the status quo is ambiguous when tested under the criminal law measure of *beyond reasonable doubt*, when unresolved complaints require legal pathways.

An example of the current open area enforcement challenges is the Longroom case where the judge ruled that in determining whether an area is open or enclosed, it is for the Crown to prove beyond reasonable doubt that the area is substantially enclosed. If there is, at least, a reasonable possibility that it is an open area, then the defendant must be acquitted. This dilutes the standard of what might be regarded as an open or enclosed area. The judge found the current approach to be misguided and suggested that the provision of an acceptable area for smoking be subject to licensing permission. This case alone took approximately 190 hours of Smokefree Enforcement Officer timeⁱ as well as Ministry of Health enforcement time, legal costs and court resources – all of which could be saved with clarity in this legislation.

We would like to see the regulations worded as a rebuttable presumption so that the responsibility sits with the establishment to prove that a space is not significantly enclosed and compliant, rather than the burden being on Smokefree Compliance Officers.

We want to ensure that the new definition does not remove points 2 and 3 in the existing definition in section 5 of the legislation, which holds that an area must have walls, sides, screens or other similar surfaces and be enclosed by those surfaces.

ARPHS and the Auckland metro DHBs would recommend ensuring clarity in the wording of the definition of a roof structure to include coverings, whether closed or open at the time of inspection including plastic roll-out gazebo type roofs or an area covered by retractable sun umbrellas.

ARPHS and the Auckland metro DHBs are supportive of the removal of the word 'substantially' enclosed; as this is subjective and has historically been problematic for enforcement. Requirements for substantial or complete enclosure could possibly contradict the intent of the regulation if they were not removed.

There is also a need to define “an area” as in the past people have tried to demarcate “smoking and non-smoking areas” within the same space, which frequently causes smoke drift into internal areas or work places.

2. If you support option c, or if option c were to proceed, would you support a 50 percent coverage threshold? If not, what threshold would you suggest and why?

ARPHS and the Auckland metro DHBs do not support option C - this unnecessarily leaves too many possibilities for establishments to follow the letter of the law while ignoring its intent as we saw with the Diamond Lounge.ⁱⁱ In this case Sky City specifically designed a space that had four walls and a roof, but technically met the requirements of the regulations due to creative design. This effectively became an indoor venue where smoking was legal and commonplace. We wish to avoid any such future scenarios.

Regulatory proposal 2: Specialist vape retailer approvals

3. Do you agree that being in a rural location should be a factor in determining whether to approve an application to be a specialist vape retailer with the lower threshold of 60 percent of sales from vaping products?

Yes - we are supportive of a lower threshold of vaping product sales to be considered a factor for specialist retailers in remote locations.

4. Are there any other criteria that should be considered when determining whether to approve an application to be a specialist vape retailer with the lower threshold of 60 percent of sales from vaping products?

Yes - if a lower threshold was to be granted ARPHS and the Auckland metro DHBs would request that there be a very low maximum tobacco sales threshold in order to support the harm minimisation intent of vaping. For example a store selling 60% vaping products and 40% conventional tobacco would go against the intent of the regulations to help support smokers to switch to vaping to facilitate quitting.

If a lower threshold were to be granted, we would want to ensure that retailers had the necessary skills and knowledge to support the vaping to quit approach for example having mandatory specialist vape retailer training. Although we present these caveats to a lower threshold, our preference is to not lower the threshold.

5. Do you agree that regulations are not necessary at this stage? If not, what do you propose should be put in regulations?

Yes – ARPHS and the Auckland metro DHBs agrees regulations surrounding a lower threshold for rural specialist vape retailers are not necessary at this stage. The range of products will be available online to those living rurally. We do however feel that the regulations generally should be kept under review.

We would recommend the requirement for SVR status includes their entire business sales rather than only sales in a businesses physical store. We have concerns that the lack of consideration of the entire businesses revenue leaves the opportunity to maintain SVR status whilst selling an unregulated amount of tobacco products online.

ARPHS and the Auckland Metro DHBs recommends a license period of no more than one year initially and then every three years thereafter dependant on compliance. This would bring the licensing standard in line with alcohol standards.

Lastly, we would want to see some clarity in the regulations surrounding what monitoring and enforcement will exist to ensure compliance with these requirements and who will be delegated to do this.

Regulatory proposal 3: Promotion, information and advice

3.1 Display of vaping products in retail settings

6. Do you agree that the display of vaping products should not be regulated at this stage? If you do not agree, what controls do you think should be put in place and why?

No - ARPHS and the Auckland metro DHBs disagrees and wants the display of vaping products to be regulated.

If vaping products are displayed in specialist vape stores they should be inwards facing, have sufficient health warnings and R18 signage.

External and window displays are a form of advertising and an avenue for youth exposure. These can also negatively impact those who do not smoke and those trying to quit vaping. If there are external facing displays they should not be visible from the street within 1km of schools, community recreation facilities or universities (where under-18s often study) to avoid marketing to children.

It is also important any displays are not designed to be bright, colourful and attractive to children. In this sense we would be supportive of plain packaging requirements for vaping products being brought in line with tobacco products.

There needs to be clarity to support compliance about what products these display regulations apply to – for example are shisha hookah pipes or heat-not-burn equipment considered vaping devices and therefore included?

3.2 Price lists given to retailers for tobacco only

7. Do you support the proposal to restrict the information allowed on manufacturers' price lists for tobacco products?

Yes

8. Is there any other information that you consider should be allowed on manufacturers' price lists for tobacco products? If so, what do you propose?

Yes - an inclusion of the products' nicotine levels so that lower nicotine cigarettes are easily identified.

3.3 Public health messages

9. Do you consider that other information, beyond the information that Vaping Facts already outlines, should be designated as a public health message issued by the Director-General of Health for public services and any publicly funded individuals or organisations to use? If so, what do you propose?

Yes - We have identified that there is an information gap on the Vaping Facts website surrounding dual use of cigarettes and vapes, considering NZ based research suggests over 60% of vapers are currently also smoking.

Already anecdotal reports of perceptions of vaping as risk-free are becoming more common, particularly among youth. We have some concerns surrounding the ability to select statements to create biased or unbalanced public messaging and we wish to ensure an accurate balance of facts being presented to the public, particularly to potential young users. However we would hope that publically funded services would take individual responsibility for ensuring this. The Auckland metro DHBs recommend that this process is reviewed in 12-18 months' time to ensure it is achieving its intended purpose and not being misused.

Stop Smoking Practitioners that would also recommend messages about vaping to be available in a wide range of languages.

3.4 Vaping product information in retail settings

10. Do you support limiting information about vaping products in retail premises and on retailers' websites to written authorised statements (other than permitted oral communications)? If not, what do you propose?

Yes

11. Do you support the proposed statements? If not, what do you propose?

Yes - ARPHS and the Auckland metro DHBs are supportive of the statements, but would like to see the development of two additional statements one deterring non-smokers from vaping and the other warning the product contains nicotine which is an addictive substance.

12. Do you support limiting the format of these notices so that they are consistent with tobacco product notices? If not, what do you propose?

Yes - provided that in-line with the format for tobacco product notices there is also a requirement to display a pictorial health warning along with text highlighting potential harms in both English and Te Reo.

3.5 Product availability notices in retail premises

13. Do you support the proposal to align availability notices for vaping products with those for tobacco products? If not, what do you propose?

Yes - as standardisation is efficient and supports retailer compliance.

3.6 Point-of-sale information on purchase age

14. Do you agree there should be a requirement for retailers to display purchase age (R18) notices at each point-of-sale? If not, why not?

Yes - ARPHS and the Auckland Metro DHBs agree that there should be R18 notices at each point of sale to make the age restrictions clear.

15. Do you support the proposed wording and presentation requirements? If not, what do you propose?

Yes - as the message is clear, accurate and factual.

3.7 Suitably qualified health workers

16. Do you agree that no additional category of person should be added to the definition of 'suitably qualified health worker'? If you do not agree, which category do you think should be added and why?

We agree that supporting individuals or groups to successfully quit smoking, including switching from smoking to vaping, requires specialised knowledge, skills, and competencies. Smoking cessation, including use of vaping products to quit, is more likely to be successful, when people have wrap-around support from a quit coach or stop smoking service. Such support may include behavioural support, use of other stop smoking medications, referral to other services if required, and support for stressors in life such as financial issuesⁱⁱⁱ.

While we are supportive of limiting the scope of those who can provide stop-smoking support to those who possess these necessary skills, ARPHS and the Auckland metro DHBs ask that this be extended to include social workers and addiction counsellors when supporting clients to quit in mental health and addiction services.

Also, we would like the following additional points to be considered:

- 'Registered health practitioners' should be those who have a current certificate to practice.

- We think the Stop Smoking Practitioners Programme is very important and we think this workforce should be expanded, with priority given to Māori and Pacific practitioners.

- Specialist vape retailers should be encouraged to refer people to Stop Smoking Services for wrap-around stop smoking support.

Regulatory proposal 4: Packaging

17. Do you support the proposed wording of the health warning for vaping products? If not, what do you propose?

Yes

18. Do you agree with the proposed requirements for the health warning panel for vaping products? If not, what do you propose?

Yes – ARPHS and the Auckland metro DHBs agree with the proposed requirements for health warnings on vaping products, but would like to see the development of two additional statements one deterring non-smokers from vaping and the other warning the product contains nicotine which is an addictive substance. We would also like to see the inclusion of a contact number for consumers to report any adverse reactions to consuming the product.

19. Do you support the proposed wording of the health warning for smokeless tobacco products? If not, what do you propose?

Yes - ARPHS and the Auckland metro DHBs are supportive of the proposed wording. We would also like to see the inclusion of a contact number for consumers to report any adverse reactions to consumption of the product. We would request this is also required for all tobacco products.

20. Do you agree with the proposed requirements for the health warning panel for smokeless tobacco products? If not, what do you propose?

Yes

21. Do you agree with the proposals for product presentation for vaping products? If not, what do you propose?

No - ARPHS and the Auckland metro DHBs would like to see plain packaging requirement for vaping products brought in line with tobacco products to reduce marketing opportunity and support ease of compliance. Plain packaging reduces youth uptake, supports smokers to quit while still allowing product identification including brands and flavours.

22. Do you agree with the safety messaging statements? If not, what changes to them do you suggest?

Yes - ARPHS and the Auckland metro DHBs are supportive of the safety messages which are in-line with EU and UK regulations.

23. Do you agree with the proposals for product presentation for smokeless tobacco products? If not, what do you propose?

Yes

24. How much time do you think smokeless tobacco product manufacturers should have before they need to comply with new packaging requirements? Please give reasons.

Three months for manufacturers to change the packaging, then a further 3-6 months for retailers to sell or remove any non-compliant products from their stores. This proposal allows a transition period of 9 months, any longer detracts from the intent of the regulations to protect consumers.

25. Do you agree with the proposed instructions on and in the packaging? If not, what changes to them do you suggest?

Yes

26. Do you agree with allowing track and trace markings? If not, why not?

Yes – ARPHS and the Auckland metro DHBs are supportive of these markings on the condition that this is made a standardised requirement for all imported tobacco in NZ. If this is not made a standard requirement then allowing track and trace products into the market as well as the current products would result in an increase of tobacco in the country. Without standardising this requirement across all products there would be no benefits in helping to counter-act black market tobacco supply.

27. Do you support the proposal to restrict the quantity of smokeless tobacco sticks in a package to 20 or 25? If not, what do you propose?

Yes - as smaller quantities, including single sales, makes products more accessible to youth and non-smokers and could encourage transition from casual use to dependency or regular use.

28. How much time do you think manufacturers of vaping products and smokeless tobacco products should have before they need to comply with new packaging requirements? Please give reasons.

Three months for manufacturers to change the packaging, then a further 3-6 months for retailers to sell or remove any non-compliant products from their stores. This proposal allows a transition period of 9 months, any longer detracts from the intent of the regulations to protect consumers.

Regulatory proposal 5: Product notification and safety

5.1 Product notification requirements

29. Do you agree that these are the right details for the Ministry of Health to collect for each notifier? If not, what changes would you make to the details collected?

Yes

30. Do you agree that the notifier should declare that they meet the current requirements of the Act? If not, what approach to enforcing the provisions of the Act do you suggest?

Yes - and this should be a rebuttable presumption with the responsibility falling on the retailer to prove they are meeting the requirements of the Act.

31. Do you agree that these are the right details for the Ministry of Health to collect for each notifiable product? If not, what changes would you make to the details collected?

Yes - this covers all the details required to have a complete record of manufacturers and ingredients of products being imported or distributed into New Zealand.

32. Do you agree that the notifier should declare that each product meets the current requirements of the Act? If not, what approach to enforcing the provisions of the Act do you suggest?

Yes - but this needs to be supported by a system to test these products.

5.2 Product safety requirements

33. Do you agree with our approach of basing product safety requirements on the EU and UK legislation and guidance? If not, what approach to our product safety requirements do you suggest we use?

Yes – basing safety requirements on sensible tried and tested guidelines is appropriate.

34. Do you agree with the product controls we are proposing to include in the product safety requirements? If not, what changes to the areas that the product safety requirements cover do you suggest?

No – the current proposal allows Nicotine Salts to contain up to 50mg/ml which is notably higher than the most commonly recommended maximum strengths of 18-24mg/ml for vaping devices. ARPHS and the Auckland metro DHBs suggest reducing the maximum nicotine threshold for nicotine salts to 20mg/ml and would also be supportive of making this product only available through pharmacies and stop-smoking services. Nicotine salts are designed to support heavy smokers to quit by providing a greater hit of nicotine to simulate heavier smoking; however these smokers would benefit from cessation support which seeking a prescription would provide the opportunity for. In America highly potent nicotine salts used in JUUL devices became the most commonly used product among youth; this provision could prevent the same happening in Aotearoa. In the UK, the nicotine strength of the popular JUUL product was restricted to less than 20mg/ml and consequently had considerably lower youth uptake, we suggest applying this same standard in NZ.

35. After reviewing our full proposal in Appendix A, do you agree with our proposed product safety requirements? If not, what changes to them do you suggest?

Yes - ARPHS and the Auckland metro DHBs are largely supportive of the proposed safety requirements. We support prohibiting oil and fat-based ingredients from vaping to reduce the risk of lipid pneumonia as well as the prohibition of additives and flavourings that have been associated with respiratory harm. We are also supportive of the provision allowing the list of prohibited substances to be extended as more are identified. These safety requirements are robust, informed by research

and are based off and extend beyond some of the strongest product safety precedents that exist globally.

Regulatory proposal 6: Annual reporting and returns

36. Do you support the proposals for manufacturers' and importers' annual sales reports? If not, what do you propose?

Yes - at present little information exists about tobacco sales and retailer numbers, this would help us to better understand the tobacco environment.

37. Do you support the proposals for specialist vape retailers' annual sales reports? If not, what do you propose?

Yes - we would also like to see a requirement for non-specialist retailers to report for a complete national sales data picture.

Regulatory proposal 7: Fees

38. Do you agree the Ministry of Health should charge for the activities identified? If not, what activities do you suggest we charge for?

Yes - We would also like to see a licensing regime and fee implemented for tobacco products as the more harmful products.

39. Do you agree with the way the fees are structured? If not, how should they be structured?

Yes – ARPHS and the Auckland metro DHBs are broadly supportive of the fees structure; however we would want to ensure that there is consideration towards the financial advantages and disadvantages to businesses of different sizes.

40. Do you agree with the level of each of the fees? If not, how much do you suggest the Ministry of Health should charge?

Yes

41. Do you agree with our assumptions on annual volumes of work? If not, what assumptions do you suggest we use?

We have no position on this currently.

42. How many products do you anticipate notifying yourself?

None, as health agencies ARPHS and the Auckland metro DHBs will not be importing or selling these products for commercial profit, so will not be required to notify.

43. Are there additional issues relating to fees and charges that you would like us to consider?

Yes – ARPHS and the Auckland metro DHBs would like to also see it applied to tobacco, as without fees or a licensing regime, tobacco retail could become more enticing. Tobacco licencing has been successful in many areas within Australia and the United States.

44. Do you agree that we should reduce fees for very low-volume products? If not, how would you suggest the Ministry of Health handles very low-volume products?

No - ARPHS and the Auckland metro DHBs propose that no reduction in fees be given for a low volume selling product. We feel the products available should be dictated by the market itself, and effectively subsidising less popular products could lead to a greater range of flavours which may increase youth appeal. We would propose that pharmacies and stop smoking services are the only services where fees are waived for products and devices if they are operating as organisations with no commercial interests in the sale of vaping products.

If a reduction in fees is considered for a very low volume product, the threshold should still be set at a point where reasonable consideration is required for product retail decision making.

We also recommend that the sales threshold should be a percentage of total sales, rather than a raw number. This will help to ensure that smaller retailers are fairly contributing whilst not disproportionately affected by the licensing costs.

45. How would you suggest we define very low-volume products?

We don't have an opinion on this currently.

46. Do you have suggestions for the design of any provisions, including suggestions for: (a) limits on the number of products that any notifier can have fee exemptions for (b) administrative efficiency (c) any other issues that might be associated with low-volume products?

Yes - while ARPHS and the Auckland metro DHBs do not support fee exemptions for standard or specialist vape retailers, if one were to be put in place, we would like to see this limited to no more than ten products.

For administrative efficiency, we propose that a national database is created for retailers to both notify their products and record their sales numbers. This database would help to support decision making for exemption applications by providing sales data for consideration. We do, however, have concerns that reporting is reliant on retailer's honesty and there is potential to adjust their sales figures to ensure

qualification for 'low sales threshold exemptions'. Auditing product reports would be resource intensive, if at all possible and could justify abandoning the proposal.

ⁱ Ministry of Health v Drewmond Hard Hospitality Ltd (The Longroom) (2019) NZDC 3991

ⁱⁱ The Cancer Society of New Zealand Incorporated v The Ministry of Health (2013) NZHC 2538

ⁱⁱⁱ Vapingfacts.health.nz accessed 01/03/2021