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AT THE HEART OF THE MATTER, NZ DRUG FOUNDATION.
Te Tūāpapa Tarukino o Aotearoa

New Zealand Drug Foundation submission on The Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill

Submitted to the Health Committee on 24 August 2022

The Drug Foundation is a charitable trust. We have been at the forefront of major alcohol and other drug debates for over 30 years, promoting healthy approaches to alcohol and other drugs for all New Zealanders.

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Summary

1. We welcome this Bill and the explicit commitment in primary legislation to reducing adult cigarette smoking rates to under 5% for everyone.

2. The three main aspects of the Bill are: to create a smoke free generation whereby no one born after 1 January 2009 is legally able to be sold cigarettes; to reduce the number of cigarette sales outlets; and to dramatically reduce the nicotine content of cigarettes.

3. We note that a 'smokefree generation' has essentially been achieved: only 1.1% of those aged 15-17 years old now smoke daily.[1] This now needs to be sustained. While we support the intention of this policy, we do not think that prohibiting sales to a group of people based on a single fixed date in time is a logical or effective way to do this, and we are concerned about the impacts this may have in potentially creating or growing an illicit market for tobacco.

4. We welcome reducing the number and type of sales outlets, so long as it is done gradually, fairly and does not punish adult cigarette smokers - especially those living in remote areas.

5. We also welcome the initiative to make low-nicotine cigarettes widely available as a choice for people who are keen to reduce their overall tobacco intake. However, based on our expertise in illicit substances, we believe it is essential that regular nicotine cigarettes remain accessible, albeit in a controlled manner, for dependent cigarette smokers who can't, or don't want to quit. If not, we risk creating a situation similar to de-facto prohibition, with all the risks this entails – such as growth of the illicit market, risk of increased health harms, and so on.

6. Alongside development of the Bill, the focus areas of the Smokefree Action Plan that we are particularly keen to support, as evidence-based and effective, include;

    a. Scaling up and funding community-led initiatives to reduce smoking, especially those run by Māori and Pasifika;

    b. Increasing mass media campaigns around smoking harm reduction;

    c. Optimising access to vaping as a harm reduction tool to help people quit smoking. One way to improve this would be to ensure that regulatory approaches to tobacco and vaping are seamlessly coordinated. Another would be to fund the distribution of vaping devices as a smoking cessation tool for people who are addicted to nicotine.

We support the overall aim of this Bill: to reduce harm by strengthening regulations around the sale of smoked tobacco products

7. We very much support the Smokefree 2025 strategy, which aims to see fewer than 5 percent of New Zealanders smoking daily by 2025. We also recognise the need to implement radical

[1] Ministry of Health (2021). *Annual Data Explorer 2020/21: New Zealand Health Survey*. Retrieved from https://minhealthnz.shinyapps.io/nz-health-survey-2020-21-annual-data-explorer/_w_ff71f580/#!/home

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change to meet that goal. Around 4500 people still die each year from tobacco smoking in this country: this is a public health disaster by any measure.

8. We are supportive of taking strong action to reduce the deaths, illness and other harms caused by tobacco in our communities.

Demographics hugely influence smoking rates and must be factored into proposed solutions

9. Tobacco use is heavily impacted by socio-economic status, ethnicity and other demographics:

    a. Māori are more than three times more likely to smoke daily than the rest of the population, whereas those who identify as Asian smoke daily at just a third of the rate of other ethnicities. [2]

    b. Those living in the poorest neighbourhoods are more than seven times more likely to smoke daily than those in the wealthiest, and this effect is greater for women.[3]

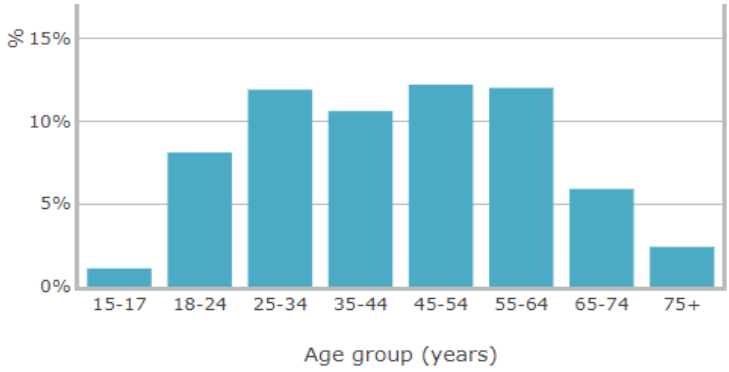
    c. People living in Tairāwhiti are 2.5 times more likely to be a current smoker than those living in Capital and Coast.[4]

    d. Adults living with a disability are significantly more likely to smoke daily than non-disabled people (adjusted ratio of 1.88).[5]

    e. Those aged 15-17 are significantly less likely to smoke daily, and those in the age bracket 45-54 are most likely to smoke daily.[6] In 2020/21, only 1.1% of young people aged 15-17 smoked daily, down from 6.6% ten years ago.

    f. While women and men smoke daily at similar rates, Māori women are more than three times more likely than non-Māori women to smoke.

Age distribution, daily smokers aged 15+



[2] Ministry of Health (2021). *Annual Data Explorer 2020/21: New Zealand Health Survey*.
[3] Ministry of Health (2021). *Annual Data Explorer 2020/21. New Zealand Health Survey*
[4] Mercier, K and Jarrett, H (2022). *State of the Nation 2022. A stocktake of how New Zealand is dealing with drug use and drug harm*. NZ Drug Foundation, Wellington.
[5] Ministry of Health (2021). *Annual Data Explorer 2020/21. New Zealand Health Survey*
[6] Ibid

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Source – Ministry of Health – Annual Data Explorer 2020/21

10. These statistics reaffirm the need to take an approach to reducing harm that is targeted to work for people who are already under-served by our current health settings, such as Māori (particularly Māori women), and those who live outside the main centres.

11. Our focus should be on helping to reduce or quit smoking for those who are already established smokers - particularly those over 45, as the highest-using age cohort. We also need to ensure that the current low rates of smoking in younger age groups can be sustained.

We are generally very supportive of attempts to better regulate the market

12. The evidence is extremely clear that we can reduce the harmful effects of substances such as tobacco and alcohol by ensuring that products are well regulated. This includes putting controls around:

    a. Who can sell products, when and where.

    b. Product ingredients, and how these are shared with the consumer.

    c. Evidence-based harm reduction messaging and reduced branding on packaging.

    d. Limiting advertising.

13. As such, we are supportive of the following clauses in the Bill:

    a. **Clause 31** – which requires smoked tobacco products to be approved by the Director-General, limits constituents of smoked tobacco products and sets out requirements for testing products.

    b. **Clause 35** – which requires manufacturers to test the constituents of notifiable products.

    c. **Clause 40** – which gives the Director-General wider regulation-making power to prescribe safety standards and determine requirements for testing. Clause 40 also requires the Director General to consider whether such regulations will reduce use of the product, and what the impact will be for Māori, which we support.

We support licensing retailers

14. Clause 13 of the Bill creates a new Part 1B in the Act, and prohibits the sale of smoked tobacco products other than by approved retailers. We very much support the proposal to license tobacco retailers. We also support the requirement in subsection 20N to consult with Māori on how this should be done.

15. Licensed businesses are more likely to comply with tobacco regulations, and introducing a licensing system is also likely to reduce the number of outlets wanting to sell tobacco.

16. We request that the regulations developed under this Bill should:

    a. Require retailers and employees to be trained to be able to give brief advice on vaping devices and how to access smoking cessation services, if requested.

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b. Require retailers to be required to offer written (government-supplied) information to all purchasers on harm reduction, and how to access smoking cessation services.

c. Take into account the existing licensing system for vaping products and devices. There should ideally be at least as much (or more) cost, training and effort required for a retail outlet to sell tobacco as there is to sell vaping devices. Vaping is significantly less harmful than tobacco use, and it's clear that it has huge potential as a tool to assist with smoking cessation.

The Bill may lead to an increased illicit market for tobacco

Some of the key approaches in the Bill may lead to an increase in the illicit market

17. There are three proposed approaches in the Bill that may potentially lead to an increase in the illicit market for tobacco products:

    a. Reducing retail outlets, if this is done too quickly, or too radically.

    b. Entirely replacing regular-strength tobacco with very low-nicotine products.

    c. The smokefree generation proposal.

18. We explain how this may happen for each of these policy proposals in the sections below. But we should first explain why increasing the illicit market could be so dangerous.

The dangers of an increased illicit market for tobacco

19. We know from our experience with illicit drugs, and alcohol during prohibition, that taking a product out of legal supply leads to the following:

    a. Some people continue to take the harmful substance, whether we want them to or not.

    b. The illicit market steps in to supply these substances because they are not legally available.

    c. The illicit market is not interested in harm reduction, but is driven primarily by profit. Products in the illicit market become stronger, more dangerous, and harmful to people who use them (a phenomenon known as the 'iron law of prohibition').[7]

20. In an illicit market, drug producers and importers are incentivised to increase the potency of products to maximise their profit margins, making drug use ever more dangerous. As an example, during alcohol prohibition, consumption patterns moved from beer to the much more harmful moonshine. In the same way, opium use has been supplanted in many countries by

[7] NZ Drug Foundation (2018). *Global leaders call to regulate drugs*. https://www.drugfoundation.org.nz/matters-of-substance/archive/november-2018/global-leaders-call-to-regulate-drugs/#:~:text=The%20%E2%80%9CIron%20Law%20of%20Prohibition,potency%20of%20prohibited%20substances%20increases.%E2%80%9D.

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heroin use, followed by synthetic opioids such as fentanyl, and then the even stronger carfentanil and others. This process is visible in our own country where early-wave synthetic cannabinoids have been replaced by much more dangerous compounds that have led to dozens of deaths since 2017.

21. Should we see an increase in the size of the illicit market for tobacco, some of the risks are:

    a. Organised crime groups may focus more on tobacco. Dealers may push it onto clients who have approached them for different drugs. We have seen this phenomenon in New Zealand, where some people purchasing cannabis report being steered towards methamphetamine, which has a bigger profit margin.[8]

    b. In a strong illicit market, there are fewer ways to reduce use by young people. Products are readily available, but the illicit market does not check IDs. Young people may increase their use, especially if tobacco becomes 'cool' again due to its illegal status. Young people may also be encouraged to sell tobacco in schools to make an easy profit.

    c. With a bigger illicit market to serve, the prices for illicit full-strength tobacco may fall significantly, encouraging people to consume more.

    d. Potentially, cigarettes may become stronger than they are currently, or products may even become contaminated with other substances, including synthetic opioids such as fentanyl. This may seem like an unlikely scenario in the current market, but in an illicit market, there is no way to control the quality, potency or purity of products.

22. Any of these impacts would be likely felt most intensely by Māori, who have the highest use rates of any group.

23. The biggest problem with an illicit market is that harm reduction tactics such as price controls, quality controls, packaging and labelling requirements that are available for legal products do not apply. While we can license retailers of legal products, train them in harm reduction, and require them to offer vaping options where tobacco is sold, we cannot do the same in an illicit market.

24. If the illicit market for tobacco increases, we can expect some of the public health gains made through the Bill to be lost. We would expect to see consumption and associated harms go up over time for some people.

25. We therefore need to ensure that any policy proposals adopted by this Bill do not lead to an increase in the size of the illicit market, and that safety nets are put in place to ensure this does not happen.

[8] Walton D and Martin S. (2021). *The Evaluation of Te Ara Oranga: The Path to Wellbeing. A Methamphetamine Harm Reduction Programme in Northland*. Wellington: Ministry of Health.

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Reducing the number of retailers – we support this, but urge caution

26. We strongly support reducing the availability of tobacco as a general principle, though would caution that this should happen in a measured way, tracking any potential impact on the illicit market for tobacco products.

27. It is clear from research on alcohol (and now also on cannabis) that availability is a key factor in consumption levels. Where availability is restricted, consumption decreases. Restrictions may include reduction in the hours and days of sale as well as limits on the number of outlets.[9] Restrictions on advertising, shop signage and inability to see the product from the street or inside stores also impact the perception of availability.[10]

28. Making tobacco less convenient to buy may reduce the number of people who start smoking, and may reduce the number of people who move from casual to regular use. It may also have a positive impact on those who smoke tobacco regularly, by encouraging them to quit smoking due to the added inconvenience caused. It may also help those who have already quit smoking not to relapse.

29. Last but not least, reducing the number of retailers based on population size and density is likely to help reduce disparities in smoking in Aotearoa, as tobacco retailers are currently disproportionately concentrated in disadvantaged areas. As such we strongly support the initiative to reduce the number of retailers and establish some rules around the density of outlets.

We need to be cautious though

30. If we attempt to reduce the retail outlets too dramatically, or too quickly, those who are addicted to tobacco and have no intention of giving up will struggle to access it legally. For them, the situation will look very much like prohibition, because they may be unable to access legal products as they have in the past. In response, they may turn to the illicit market.

31. We acknowledge that there are key differences between what is proposed here, and full prohibition, the biggest being:

    e. Other forms of nicotine, the addictive component in tobacco, will still be available (via vaping or nicotine replacement therapy, such as patches for example).

    a. Low-nicotine cigarettes will still be available.

    b. Use of cigarettes will not be criminalised.

32. However, it is essential we avoid a situation where legal regulated tobacco is no longer practically available for some populations. While cigarettes should not be for sale on every

[9] Alcohol and Public Policy Group (2010). *Alcohol: No Ordinary Commodity – a summary of the second edition*. Addiction / Volume 105, issue 5, pp769-779.
[10] Transform Drug Policy Foundation (2022). *How to regulate cannabis, 3rd ed*, Transform Drug Policy Foundation, London.

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street corner, or advertised to people in public places, it would not fit with the goals of a harm minimisation strategy to make it very difficult, or impossible, for adults to purchase tobacco.

33. For reasons of equity, we are particularly concerned that it should remain possible to find legal sources of tobacco in rural and low population areas, and in low social decile areas.

34. The only way to ensure a burgeoning illicit market does not grow up around tobacco is to keep legal supply in place. It must be as strictly regulated as possible, to minimise harm, and it must be accompanied by the best possible interventions that money can buy to discourage new users.

35. **We therefore recommend** reducing retail outlets in a staged way, monitoring and evaluating the impact on the illicit market as we go along. We should pay particular attention to the impact on people living outside urban centres.

Low nicotine products – this looks a lot like de facto prohibition of smoked tobacco products

36. We have mixed views on the proposal to restrict sales of tobacco to low nicotine products. It is a creative proposal that has the potential to save many thousands of lives every year because people will no longer find cigarettes as satisfying. As such, the proposal has significant appeal.

37. On the other hand, it is experimental. Although small-scale pilot projects of this approach appear to have been successful, this hasn't been tried elsewhere at a country level. It is worth noting that during previous trials, full strength cigarettes continued to be available to research participants who wished to purchase them, and there was evidence of substantial non-compliance (i.e. many people left the research trials and reverted to full-strength cigarette use).[11]

38. In the same way that reducing the retail availability of cigarettes too drastically may feel like prohibition to consumers in its effect, this proposal is likely to do the same.

39. Our fear is that those who do not wish to quit cigarettes (there will always be some), will seek to purchase full-strength cigarettes from wherever they can find them, and the illicit market will increase as a result.

40. As one example, preliminary analyses of participants in the TAKe study, a cohort study of Māori people who smoke, found over half said they would quit smoking (40%) or switch to e-cigarettes (14%) if very low nicotine cigarettes were the only available smoked tobacco product.[12] This is a

[11] Edwards, R., Hoek, J., Wilson, N., Bullen, C. (2021). *Reducing nicotine in smoked tobacco products: A pivotal feature of the proposals for achieving Smokefree Aotearoa 2025*. Public Health Expert. https://blogs.otago.ac.nz/pubhealthexpert/reducing-nicotine-in-smoked-tobacco-products-a-pivotal-feature-of-the-proposals-for-achieving-smokefree-aotearoa-2025/

[12] Edwards, R., Hoek, J., Wilson, N., Bullen, C. (2021). *Reducing nicotine in smoked tobacco products: A pivotal feature of the proposals for achieving Smokefree Aotearoa 2025*.

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promising finding, but it begs the question - what will the other half do? Will they be forced to turn to the illicit market?

41. The opportunity to save lives is compelling. As many as three out of four of those who smoke currently would like to give up, and this proposal may help them do so. However, there are big risks with this approach.

42. Given the risks, we would prefer to see this policy implemented as a pilot, with close monitoring around impacts on the illicit market.

43. Alternatively, if this policy proceeds, we would like to see retailers allowed to legally continue to sell regular potency cigarettes alongside lower potency options. There are ways to make these less appealing, for example by pricing products based on potency, so that higher potency products are more expensive. Alternatively, policy makers could look at gradually reducing nicotine levels in the higher-potency products, rather than all at once.

44. If you do implement this proposal, please ensure that effects on the illicit market are monitored extremely carefully, with a built-in review period. If the illicit market starts to grow quickly, we would like to see the ability built into the law for the policy to be ramped back quickly.

While we support the intent, we do not support the smokefree generation policy

45. The Bill creates primary legislation that prohibits anyone born after 1 January 2009 legally being sold smoked tobacco (the smokefree generation). We do not support this policy.

46. While we support the intention behind the policy banning the purchase of tobacco to people born after a specific date, we don't believe it will have the desired impact. We also note that youth smoking in New Zealand is already at extremely low levels and unlikely to increase.

47. This proposal does not solve any existing policy problems. The youngest groups have seen the most significant declines in smoking in recent years; ASH data and the New Zealand Health Survey suggest that youth are already more than 98% smoke-free whilst their parent's generation continue to have the highest smoking rates, and the greatest risk of dying early. Of the 2,000 underage smokers in New Zealand, most do not buy tobacco from shops.[13]

48. We also struggle with the logic of this proposal from a human rights perspective, and are concerned that it does not appear to be based on any clear evidence about how it may work. Under this proposal for example, two children born one hour apart before and after the cut-off date will have a different policy applied to them for their entire lives - one would be able to buy smoked tobacco products, and one wouldn't.

[13] Health Promotion Agency (2020). *Smoking and vaping behaviours among 14 and 15-year-olds Results from the 2018 Youth Insights Survey https://www.hpa.org.nz/sites/default/files/Smoking%20and%20vaping%20behaviours%20among%2014%20and%2015-year-olds%20report2.pdf*

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As time goes by, retailers would be required to check IDs and turn down purchases to adults of 30, 50 or 70 years old. Will adults really accept this arbitrary rule? Besides anything else, we struggle to see how this might work in practise, and whether it will be enforceable.

Prohibition is not a responsible long-term solution to drug regulation

49. Even more so than in the examples above (reducing retail outlets, and restricting products to low-nicotine levels) this policy proposal resembles prohibition. It will simply not be possible for some people to buy cigarettes, ever. While this policy is pitched at young people, those people will eventually become adults who are unable to buy what is currently a legal regulated substance.

50. However much we would like people not to use tobacco - or any drug - some will always continue to do so. This is a certainty. Tobacco is already in our society - it exists, and people derive pleasure from it.

51. Our job is to nudge that group to be as small as possible, and to reduce the harms caused to that group as much as possible, whilst not allowing an illicit market to become financially worthwhile.

52. Based on decades of lessons learned from the prohibition of illicit drugs, we will fail in our task to reduce the harm caused by smoking if we attempt to stop people using cigarettes by making their sale illegal for a whole cohort of adults.

53. On one level it feels counter-intuitive to caution against phasing out legal sales of such a harmful substance that causes thousands of deaths each year. However, we are concerned that the long-term impacts of such a policy may mean that harms may actually increase for some groups.

54. **If this policy is implemented, we recommend** regular and careful monitoring of the illicit market, including the types of products that are sold and how many people access them.

Instead, consider other more targeted options to reduce use by young people

55. It would be useful to have a more nuanced understanding about why different clusters or groupings of youth cohorts (also known as 'peer crowds') take up smoking, and what messaging, support or interventions works for each of them to help prevent uptake. For example, some young people will take up smoking because a family member uses, and smoking is just what everyone does, or it helps them fit in.

56. Understanding these different audiences, and targeting support accordingly should help make progress in a more targeted way with preventing new uptake. As an example of this in action, the Drug Foundation works together with other organisations and agencies to engage peer crowds and identify approaches that improve their wellbeing around alcohol use.

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Revising the penalties for selling vaping and smoking products illegally

Don't convict people for 'social supply'

57. We are concerned that high financial penalties for supplying tobacco products may penalise people for 'social supply' to young people. Social supply would include the situation where a person gives cigarettes to a friend who is underage. The person sharing their cigarettes may also be underage. As the law is currently drafted, that person would be equally culpable as an adult giving cigarettes to children, or a commercial dealer.

58. We would like an exception to be made in the law to ensure that convictions or high penalties do not fall to the very people we are trying to help with this law (i.e. young people).

59. The Law Commission covered the issue of social supply in its review of our illicit drug law in 2011. They noted:

> *"We remain of the view that social dealing is less culpable than commercial dealing, and that this distinction should be reflected in the law if possible. The absence of any significant commerciality makes the criminality of social dealing more analogous to possession. In addition, the circumstances of the offending tend to justify a more lenient sentencing response..."*

Create different penalties for lower harm substances such as vaping products

60. Secondly, we would like to propose that the penalties for breaking the law around smoked tobacco supply be proportionally higher than those for selling reduced-harm alternates, such as vaping products. This would send a clear message that smoked tobacco products are far more dangerous.

Ensure that manufactures and importers carry the bulk of the cost

61. And finally, we would like to propose that levy schemes and penalties be substantially increased for tobacco manufacturers and importers. These companies carry almost all the culpability for tobacco related harms, and their products are responsible for the most preventable cause of health inequities in Aotearoa. They carry a cost to the health system extending into billions of dollars. The bulk of this cost should surely be borne by them.

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The importance of promoting vaping to smokers

62. Finally, alongside this new law we would like to see substantial investment put into nudging existing smokers towards vaping to stop smoking. Vaping is a helpful tool for smokers to cut down or stop their use, and is estimated to be 95% less harmful than smoking.[14]

63. As one example, vaping devices and advice could be offered free to all those who are currently addicted to cigarettes, whether through the GP, pharmacies, community initiatives or elsewhere.

64. As another example, all tobacco retailers could be required to stock vaping products, and to let purchases of tobacco products know that these are available.

65. Any initiatives to promote vaping as a smoking cessation tool should of course take place in a way that does not encourage non-smokers - especially young people - to take up vaping. We must also ensure that vaping continues to be regulated in such a way that it reduces, rather than exacerbates harm. This needs to be kept under constant review. We would like to see more investment into researching the impact of vaping in New Zealand.

Thank you for your time

[14] Public Health England (2015). *E-cigarettes: an evidence update*. https://www.gov.uk/government/publications/e-cigarettes-an-evidence-update