



PARLIAMENTARY SERVICE
Te Ratonga Whare Pāremata

Smokefree Environments and Regulated Products (Vaping) Amendment Bill 222-1

Bills Digest 2613

Policy objectives

The [Smokefree Environments and Regulated Products \(Vaping\) Amendment Bill 2020](#) amends the [Smoke-free Environments Act 1990](#) (the principal Act / SFEA). The bill updates the Act, provides flexibility for future “reduced-harm” products that may come along, and introduces a new term, “regulated product”.¹

The intent of the bill is to balance the benefits of vaping and smokeless tobacco products (as compared to smoking) with concerns about children’s and young people’s access to these products. The bill also seeks to address safety concerns associated with vaping.²

Background

Alternative products explained

A [Regulatory Impact Statement](#) (page 9) prepared by the Ministry of Health provides an explanation of products that are available as alternatives to smoking:

Vaping products are electrical devices that produce a vapour, rather than smoke, by heating a solution (vaping liquid) which the user inhales. Vaping liquids are available with or without nicotine and are usually flavoured. The liquids and devices can be sold separately. A wide range of smokeless tobacco products are used internationally as alternatives to smoked tobacco, for example:

- *heated tobacco products (devices that heat, rather than burn, manufactured tobacco sticks)*
- *snus (tobacco, often in small sachets, that is placed in the cheek or under the lip), chewing tobacco and dissolvables.*

The Regulatory Impact Statement also notes that the use of vaping in New Zealand has increased quickly and that there is “scientific consensus” that vaping is much less harmful than smoking.

¹ Smokefree Environments and Regulated Products (Vaping) Amendment Bill 2020, Explanatory note, General policy statement, p. 1.

² Ibid p. 1-2.

Current regulatory framework³

Prior to the litigation in *Philip Morris (NZ) Ltd v Ministry of Health* [2018] NZDC4478 (*Philip Morris v MoH*) the Ministry of Health considered that it was illegal to sell:

- vaping products manufactured from tobacco; and
- smokeless tobacco products.

This was based on the prohibition in section 29(2) of the principal Act against importing for sale tobacco products for “chewing, or for any other oral use (other than smoking)”.

The Court in that case found against the Ministry of Health’s interpretation of section 29(2): Philip Morris’ tobacco stick, which produced an aerosol instead of smoke, was able to be lawfully imported for sale.

As explained at page 13 of the Regulatory Impact Statement, the Ministry considers the implications of the *Philip Morris v MoH* ruling to mean sales of oral tobacco products (except those that are chewed or ‘parked’ in the mouth), are lawful and those products are therefore subject to the requirements of the principal Act. For example, vaping products that are manufactured from tobacco are not allowed to be sold to minors.

Difficulties with current framework

The difficulties with having an Act governing products that were not in contemplation at the time the law was enacted have been identified in a November 2018 [Cabinet paper](#) (pages 4-5):

- *there is a lack of clarity in the SFEA about which products can and cannot be lawfully sold*
- *there have been significant practical barriers to enforcing the SFEA for vaping products, due to evidential difficulties proving that the nicotine in the product is manufactured from tobacco*
- *the SFEA does not apply to vaping liquids that are not manufactured from tobacco or devices, meaning they can, for example, be sold to minors*
- *the SFEA does not prohibit vaping or the use of similar devices in legislated smokefree areas, such as indoor workplaces and schools*
- *the SFEA does not specify minimum product safety requirements, or expressly provide an ability to do so.*

Smokefree 2025

Finally, by way of background, the bill represents an opportunity to support the Government’s [Smokefree 2025](#) goal which was adopted in March 2011 in response to the recommendations of a Parliamentary inquiry by the Māori Affairs select committee. This aligns with the bill’s objective of encouraging current smokers to shift to a reduced-harm product.

³ This background summary has focused on the principal Act, however, other legislation can apply. For more information, see the Regulatory Impact Statement at page 13.

Main provisions of the bill

As mentioned above, the bill appears to have four main objectives:

- making it easier to include future harm-reduced products into the regulatory regime
- protecting children and young people
- encouraging smokers to shift to a less harmful product
- providing safety requirements.

The following aligns some of the provisions of the bill against these objectives as examples of how the bill aims to achieve these objectives.

Flexibility for potential future harm-reduced products

The explanatory note to the bill states at page 4:

"This bill amends the Smoke-free Environments Act 1990 to enable the Act to regulate vaping products in the same manner (to the extent applicable) as tobacco products..."

The bill provides:

- clause 4: the bill changes the title of the principal Act to the "Smokefree Environments and Regulated Products Act 1990"
- clause 5: introduces a new definition of "regulated product" which means: a tobacco product, vaping product, or herbal smoking product.

The term "regulated product" replaces many of the references to simply "tobacco products" that currently appear in the principal Act. Any future harm-reducing products not currently contemplated by the bill that Parliament decides to regulate could be tacked on to the definition of "regulated product" with fewer amendments needed to the rest of the principal Act.

Protecting children and young people

The Regulatory Impact Statement notes (page 25):

...policies should minimise the risk of initiation of nicotine use by non-smokers (particularly children and young people)...

The bill:

- extends the current prohibition on smoking to include vaping in the following places:
 - clause 10 (amending section 5): workplaces
 - clause 13 (amending section 7A): schools and early childhood education and care centres
- clause 21: a specialist vape retailer must take all practicable steps to prevent a person under the age of 18 from entering the retailer's approved vaping premises
- clause 26:
 - imposes restrictions on advertising and promotion of regulated products
 - prohibits the sale and supply of regulated products to people under 18

- distinguishes between the obligations of retailers (e.g. a supermarket) and specialist vape retailers, for example, retailers must not sell a vaping product that contains a flavor other than tobacco, menthol, or mint (new section 63(2)).

Encouraging smokers to shift

The [Cabinet paper](#) [page 3] stated:

“While many people want to quit smoking, it can be very hard to do so, particularly for those who face complex challenges in their lives. Some people feel that smoking is their only pleasure, even if they want to quit, and need support beyond ‘quit smoking’ interventions.

The bill provides for specialist vape retailers that can:

- sell within the retailer’s approved vaping premises a vaping product that contains any flavor except a prohibited flavor (clause 63(3))
- give advice and recommendations about vaping products to customers who are inside the retailer’s approved vaping premises (clause 26 inserting a new section 24)
- allow customers to vape in approved vaping premises of a specialist vape retailer (clause 21 inserting new section 14(1)).
- clause 26 (inserting a new section 36): allows a vaping product that is for sale to be visible from outside the person’s place of business and in an area inside the business which members of the public have access. This applies to both specialist vape retailers and retailers.

Providing safety requirements

“Vaping products can benefit smokers who are able to switch, however, they are not risk-free. In particular, the long-term health impacts are inadequately understood. Appropriate regulation is, therefore, important: products need to comply with safety requirements...”

The bill provides at clause 26:

- the Director-General of Health can require a manufacturer or an importer of a regulated product to conduct tests of the product (section 56)
- provides for a notification process (Part 4) designed to regulate the safety of vaping products and smokeless tobacco products by requiring the manufacturer or importer to declare that the product complies with product safety requirements and to describe the product’s ingredients (in accordance with regulations).

Other matters – regulations

Finally, a [Cabinet paper](#) presented to the Cabinet Social Wellbeing Committee noted at pages 6 – 7 that there are a number of regulations needed. These are expected to be in effect within six months of commencement of the Act. Some examples of the regulations identified as necessary in the Cabinet paper include:

- prescribing safety requirements for vaping products
- point of sale health information or warning signs
- approval of and rules applying to specialist vape stores.

Other material

Departmental disclosure statement

<http://disclosure.legislation.govt.nz/bill/government/2020/222>

Regulatory impact statement

<https://www.health.govt.nz/system/files/documents/information-release/ris-support-smokers-to-switch-to-alternatives-jan-2019.pdf>

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