

Departmental Disclosure Statement

Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material
- some of the key quality assurance products and processes used to develop and test the content of the Bill
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Health.

The Ministry of Health certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

June 2022.

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Part One: General Policy Statement

The Government has a goal to reduce daily smoking rates to less than five percent across all population groups by 2025 (the **Smokefree 2025 goal**). While smoking rates have declined overall, Māori, Pacific people, and those living in the most deprived areas of New Zealand continue to have disproportionately higher smoking rates, and experience greater health inequities from smoking.

The Smokefree Aotearoa 2025 Action Plan sets out several measures that focus less on influencing consumer behaviour and more on changing the smoking environment. Legislative change is required to achieve the Smokefree 2025 goal and address the gaps remaining in New Zealand's comprehensive regulation of tobacco products.

This Bill amends the Smokefree Environments and Regulated Products Act 1990 and the Customs and Excise Act 2018 as follows:

- *Reducing retail availability:* New provisions restrict the sale of smoked tobacco products to retailers approved by the Director-General of Health, set out the application process and criteria to be an approved retailer, and provide for the Director-General of Health to set a maximum number of retail premises allowed in a certain area. The intent of these provisions is to significantly limit the number of retailers able to sell smoked tobacco products.
- *Amending the age limits for sale of smoked tobacco products:* New provisions allow for the introduction of a smokefree generation policy by prohibiting the sale of smoked tobacco products to anyone born on or after 1 January 2009. The intent of the smokefree generation policy is to prevent our young people, and successive generations, from ever taking up smoking.
- *Reducing the appeal and addictiveness of smoked tobacco products:* New provisions require that only smoked tobacco products that meet requirements for constituents will be able to be manufactured, imported, or offered for sale or supply, and provide that it will be an offence for any smoked tobacco product to contain constituents exceeding any limits prescribed in, or prohibited by, regulations. A specific provision provides for a regulation-making power to set limits on the quantity of nicotine levels and other constituents of smoked tobacco products. The intent of these provisions is to increase the number of people who successfully stop smoking, and support tamariki/young people to remain smokefree by making smoked tobacco products less appealing and addictive.

These legislative changes are mutually reinforcing, and together are expected to deliver the substantial changes needed to achieve the Smokefree 2025 goal and improve health outcomes for all New Zealanders.

The Bill is an omnibus Bill introduced in accordance with Standing Order 267(1)(a). That Standing Order provides that an omnibus Bill to amend more than 1 Act may be introduced if the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy.

The single broad policy implemented by the amendments in this Bill is to achieve the Smokefree 2025 goal.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
Briefing on achieving the Smokefree 2025 goal for New Zealand [Kaupapa whakamōhio ki te ekenga o te whāinga Auahi Kore 2025 mō Aotearoa]: <u>Report of the Health Committee and the Māori Affairs Committee, December 2018.</u>	
Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Māori: <u>Report of the Māori Affairs Committee, November 2010</u>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	YES
The Bill supports the implementation of the <u>World Health Organization (WHO) Framework Convention on Tobacco Control</u> :	

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	YES
The National Interest Analysis for the WHO Framework Convention on Tobacco Control was prepared by the Ministry of Health and presented to the New Zealand House of Representatives in accordance with Standing Orders 384 and 385 on 7 October 2003.	
The National Interest Analysis was subsequently published as an Appendix to the International Treaty Examination of the World Health Organization Framework Convention on Tobacco Control, 11 December 2003 (<i>as reported by the Foreign Affairs, Defence and Trade Committee</i>). The Analysis can be accessed on the New Zealand Parliament website at the following: http://www.parliament.nz/en-nz/pb/sc/documents/reports/47DBSCH_SCR2638_1/international-treaty-examination-of-the-world-health-organization	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
Regulatory Impact Statement: Smokefree Aotearoa Action Plan (November 2021).	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
The Treasury RIA team agreed that the Regulatory Impact Statement (RIS) could be assessed by the Ministry of Health's Papers and Regulatory committee (PARC). PARC considered that the RIS met the quality assurance standards.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
Information regarding the potential cost and benefits is available in the Regulatory Impact Statement: Smokefree Aotearoa Action Plan (November 2021) .	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The Ministry of Health is responsible for controls related to the sale and supply of smoked tobacco products within New Zealand. Enforcement of these controls is the responsibility of smokefree enforcement officers (SFEOs) appointed by the Director-General of Health under the Smokefree Environments and Regulated Products Act 1990.</p> <p>To ensure policies are given effect by this Bill, SFEO's current capacity and capability will be reviewed, an up-to-date offences and penalties regime will be set up under this Bill, and intelligence sharing and compliance efforts across government will be coordinated, including to prevent the illicit trade of tobacco products.</p> <p>More information can be found under the Focus Area 6 of the Smokefree Aotearoa 2025 Action Plan.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Ministry of Health has worked closely with the Ministry of Foreign Affairs and Trade to consider the implications of trade restrictive policies. World Trade Organisation members, including New Zealand, have the right to implement measures necessary to protect public health. The Smokefree Aotearoa policies are designed to achieve health objectives in a manner consistent with our international trade obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Smokefree Action Plan is intended to bring the Crown's obligations under Te Tiriti o Waitangi to the forefront of the Smokefree Environments and Regulated Products Act 1990 so that the critical disparities in Māori smoking rates and smoking-related illness are addressed.

The Ministry of Health has worked with the Parliamentary Counsel Office, the interim Māori Health Authority, the Crown Law Office and Te Arawhiti to ensure Te Tiriti o Waitangi (the Treaty of Waitangi) implications were considered in the Bill's development.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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The Ministry of Justice has provided advice to the Attorney-General and this is usually available on the Ministry of Justice's website at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-ofrights/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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The Bill creates new offences and penalties to support the new obligations and controls introduced. These offences relate primarily to the:

- sale, manufacture and import of non-approved smoked tobacco products
- sale of smoked tobacco product by non-approved retailers
- sale, delivery or supply of smoked tobacco products to people under the Smokefree Generation age limit.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted on the proposed changes. Specifically, feedback was sought on the proposed changes to offences and penalties and the guidance provided was reflected in the Bill.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	Yes
<p>The Bill extends the class of persons required to provide information to the database that the Director-General of Health is required to establish. Previously, only importers and manufacturers of notifiable products were required to enter information on the database (this includes limited personal information, namely contact details). The Bill extends the requirement to enter information on the database to general vape retailers and distributors of smoked tobacco products. Regulations will be needed to set out the information required.</p> <p>The Bill makes clear that the Director-General of Health must protect the confidentiality of information entered on the database.</p> <p>The Bill also allows for information sharing with other government agencies, but only to support administration and enforcement of the Smokefree Environments and Regulated Products Act 1990 and the Customs and Excise Act 2018.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	NO

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The Ministry of Health has consulted externally with different agencies at various stages leading up to the draft of this Bill.</p> <p>In 2021, the Ministry of Health publicly consulted on <i>Proposals for a Smokefree Aotearoa 2025 Action Plan</i>, which contained legislative proposals. Over 5,200 people and organisations engaged with the consultation process, either through a written submission or by attending hui (399) or Pacific-focused community meetings (788) organised by Hāpai Te Hauora. Many of these face-to-face meetings included community members who smoked or had been affected by smoking in their whanau. Information regarding the public consultation can be found on the Ministry of Health website at: https://www.health.govt.nz/publication/proposals-smokefree-aotearoa-2025-action-plan</p> <p>The following agencies were consulted on policy decisions and the Bill itself: the Department of Corrections, the interim Māori Health Authority, the Ministry of Business, Innovation and Employment (Commerce and Consumer Affairs), the Ministry of Education, the Ministry for the Environment, the Ministry for Ethnic Communities, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Ministry for Pacific Peoples, the Ministry of Social Development, the New Zealand Customs Service, New Zealand Police, Oranga Tamariki–Ministry for Children, Te Arawhiti, the Crown Law Office, and Te Puni Kōkiri. The Treasury and the Department of the Prime Minister and Cabinet were informed.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
<p>The Bill extends existing provisions that enable fees to be collected for specialist vape retailer applications. Fees will now also be able to be collected for:</p> <ul style="list-style-type: none">• applications to be an approved smoked tobacco retailer• applications for approval or temporary approval of smoked tobacco products• notifications by a general vape retailer that they are selling vape products, and• notifications by a distributor of smoked tobacco products that they are distributing these products. <p>The Bill extends existing provisions that enable levies to be set for notifiable products to also provide that levies can be set for smoked tobacco products. The Bill also extends the classes of sector participants that may be required to pay levies from notifiers and retailers to all regulated product retailers, distributors, importers and manufacturers.</p>	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
<p>The Bill creates new strict liability offences and amends strict liability offences currently in the Smokefree Environments and Regulated Products Act 1990. Strict liability offences will apply to:</p> <ul style="list-style-type: none"> • the sale of smoked tobacco products, other than by approved retailers • the provision of false or misleading information in an application to become an approved smoked tobacco retailer or to have a product approved • a general vape retailer or a distributor of smoked tobacco products who fails to advise the Director-General of Health that they are selling vaping products or distributing smoked tobacco products • manufacturers and importers of smoked tobacco products who fail to conduct the required tests or fail to conduct additional required testing • the failure to keep records in respect of a manufacturer, importer, exporter, distributor, or retailer of regulated products. <p>It is appropriate that these offences are strict liability, as the defendant is either voluntarily involved in the regulated activity, or the element to be proven is within the knowledge of the person concerned and proof of it would not impose an undue burden on the defendant.</p> <p>Furthermore, the majority carry relatively low pecuniary penalties, can be categorised as public welfare regulatory offences and most have a defence of “reasonable excuse”.</p> <p>The strict liability offences in sections 40 and 41 of the Smokefree Environments and Regulated Products Act 1990 regarding sale, delivery and supply of regulated products to people younger than 18 years were amended to exclude the smoked tobacco products which will be covered by new mens rea offences.</p>	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill creates the following regulation making powers to:</p> <ul style="list-style-type: none">• declare a product to be a notifiable product for which product safety requirements can also be prescribed in regulations• set out requirements for the application process for the approval of smoked tobacco retailers• provide for additional criteria or requirements for smoked tobacco retailers, which the Director-General of Health must have regard to before approving a retailer• set contact detail requirements to support the new notification requirements that distributors of smoked tobacco products and general vape retailers must comply with• set requirements for smoked tobacco products including, setting limits on or prohibitions of constituents, testing requirements and standards, and temporary approval criteria and conditions on approval or temporary approval of smoked tobacco products. <p>These regulation-making powers are necessary to give effect to the regulatory regime.</p> <p>The Bill also requires the Director-General of Health to declare a maximum number of smoked tobacco retailers permitted in one or more area of New Zealand by written notice.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO