

**Public submission**  
**Smokefree Environments and Regulated Products (Vaping) Amendment Bill**  
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I write to provide a brief response to the Committee's call for public submissions for its inquiry into the Smokefree Environments and Regulated Products (Vaping) Amendment Bill. I write as former Director of Action on Smoking and Health in the United Kingdom and as an advocate for the concept of tobacco harm reduction as strategy to address the burden of smoking-related disease. I am a co-author of an 2019 report on nicotine regulation by ASH New Zealand: [A surge strategy for Smokefree Aotearoa 2025: The role and regulation of vaping and other low-risk smoke-free nicotine products](#). I support the analysis provided by ASH Zealand to this Committee inquiry.

These are my personal views and I have no competing interests. I would welcome the opportunity to provide oral evidence to the Committee by video.

In summary, the bill proposes:

- the prohibition of vaping and heated tobacco products in legislated smokefree areas
- to introduce the concept of "regulated products" to allow for a broader range of tobacco, herbal smoking, and vaping products to be regulated under the Act. This is intended to regulate products currently on the market and provide for new products that may need to be regulated in future
- to extend the existing restrictions on the advertising, promotion, sale, and distribution of tobacco products to all regulated products making a distinction between specialist vape retailers and generic retailers, and outlining the different regulations for each type of retailer
- to apply provisions enabling standardised packaging requirements to be set for all regulated products, therefore setting tailored requirements for different product types that acknowledge their different risk profiles

I will discuss each of these briefly.

## **1. The prohibition of vaping and heated tobacco products in legislated smokefree areas**

This measure is excessive and likely to be counterproductive for public health overall. There is no evidential basis that vaping or heated tobacco products pose a material risk to bystanders. However, making the transition from smoking to vaping or heated tobacco products easier and more

appealing could facilitate switching from smoking to vaping and therefore large reductions in risk to those who switch successfully, particularly in disadvantaged populations where smoking predominates. An outright ban would deter smokers from switching and encourage vapers to rejoin smokers and possibly relapsing or remaining as dual users. Once behavioural changes and incentives are considered, it cannot simply be assumed that ‘tough’ measures on use of vapour technologies will have a beneficial effect – they may serve to support continued smoking.

Compared to smoking, bystanders exposed to vaping are exposed to far lower levels of toxicants and for much less time. Three aspects of exposure are very different:

1. *The quantity emitted.* Most of the inhaled vapour is absorbed by the user and only a small fraction is exhaled (15% or less, depending on the constituent). In contrast, about four times as much environmental tobacco smoke comes directly from the burning tip of the cigarette than is exhaled by the smoker. There is no equivalent of this “sidestream smoke” for vaping.
2. *The toxicity of the emissions.* Tobacco smoke contains hundreds of toxic products of combustion that are either not present or present at very low levels in vapour aerosol. This is also the reason why active vaping is much less risky than active smoking.
3. *The time that the emissions remain in the atmosphere.* Environmental tobacco smoke persists for far longer in the environment (about 20-40 minutes per exhalation). Vapour droplets evaporate in less than a minute and the gas phase disperses in less than 2 minutes.

However, we must acknowledge that, for some people, exposure to aerosol may be a nuisance or an unwelcome intrusion and there should be no ‘right to vape’. This suggests that the issue is a matter of protocol and knowing the customer preferences. The appropriate approach is for the *owner or manager* of a premises or public space to determine policy regarding the use of these products rather than address the issue with a single ‘one-size-fits-all’ legal prohibition. This would allow for far greater nuance in how this is addressed. For example, the following policies might apply:

#### **Hypothetical examples of options for vaping policy**

1. A bar wants to have a vape night every Thursday
2. A bar wants to dedicate one room where vaping is permitted
3. In a town with three bars, one decides it will cater for vapers, two decide they will be not allow vaping
4. A bar manager decides on balance that his vaping customers prefer it and his other clientele are not that bothered – he’d do better allowing it
5. A hotel wants to allow in its bar and meeting spaces, but not in its restaurant or rooms
6. An office workplace decides to allow vaping breaks near the coffee machine to save on wasted smoking break time and encourage smokers to quit by switching
7. A care home wants to allow an indoor vaping area to encourage its smoking elderly residents to switch during the coming winter
8. A vape shop is trying to help people switch from smoking and wants to demo products in the shop
9. Public transport operators do not allow vaping in buses or trains but have vaping areas at stations
10. A supermarket bans vaping completely

This approach allows for thousands of ‘micro-decisions’ to be made to suit the owners and clientele preference in particular situation. It also allows indoor vaping policy to evolve over time and is more likely to work through consent and co-operation.

The appropriate role for the state is to provide information to inform owners and managers of the issues and to help them make clear policies.

## **2. To introduce the concept of “regulated products” to allow for a broader range of tobacco, herbal smoking, and vaping products to be regulated under the Act.**

The Bill is intended to regulate products currently on the market and provide for new products that may need to be regulated in future. Overall this makes sense and is an area where New Zealand could lead the world if such regulation is done well. *But what matters is the underlying regulatory philosophy.* This should have four main characteristics, and these are linked:

1. **Regulation should be ‘risk proportionate’** – this a broader regulatory concept but it is particularly important in this field where the risks vary by 20-100 times between combustible products like cigarettes and non-combustible products.
2. **Regulators should focus on unintended consequences** – the danger that well-intentioned but excessive regulation of the lower risk products will have the effect of increasing the use of the higher risk products. A regulation designed to address a small risk in a low risk product can trigger much greater risks by increasing the use of high risks products. This is at the heart of the challenge of regulating vaping and heated tobacco products and it should dominate the analysis of regulators
3. **Smokers are the primary at risk group.** Measures should be focussed on achieving the 2025 goal of reducing *smoking* to minimal levels in all population groups or at least narrowing the extent to which it is missed. This includes reducing smoking among adolescents who smoke or who are likely to smoke.
4. **Protection of young people should focus on marketing and access.** The protection of young people should not be done in a way that renders the fundamentals of the products unacceptable to adults, but measures that can be made specific to youth should be used – that leads to focus on access and marketing.

The form of a ‘risk proportionate’ regulatory regime would look as follows:

- Allow all forms of non-combustible consumer nicotine product to be available in any market, appropriately taxed and regulated, where cigarettes are freely available. There is no case for banning particular categories such as smokeless tobacco or snus or the new oral nicotine products that contain nicotine but no tobacco as envisaged in the Bill. These products will be useful to different people quitting smoking at different time of day, in different settings, and at different points in their journey away from smoking.

- Apply relatively high taxes on cigarettes, but low or no taxes on much safer products including e-cigarettes and heated tobacco products;
- Impose bans on cigarette advertising, but controls on content and placement of vaping product advertising to prevent marketing to teens;
- Impose bans on smoking in public places, but indoor vaping policy should be a decision for the owners or managers of buildings;
- Limit or ban flavoured smoking products and control additives that increase appeal in cigarettes but allow flavours in vaping products to create an attractive route out of tobacco use for smokers. Control flavour *descriptors* to prevent child-appealing branding and imagery.
- Require large graphic health warnings on cigarettes, but messages encouraging switching to vaping products;
- Impose standardised packaging for cigarettes, but not vaping products;
- Regulate product formulation of cigarettes and vaping products in a way that makes switching to vaping relatively more attractive than continuing to smoke;
- Regulate to address electrical, chemical, thermal and mechanical product risks where these benefit consumers;
- Require containers to be child-resistant;
- Impose differential age restrictions for retailers, for example, age 21 for cigarettes, but 18 for e-cigarettes;
- Ban internet sales of cigarettes, but allow internet sales of vaping products to provide diversity and choice to people in sparsely populated areas incapable of sustaining a specialist vape shop;
- Develop vaping-friendly stop-smoking services;
- Campaigns to discourage smoking, but to encourage switching.

**Flavours.** It does not make sense to impose a ban on flavours in vaping or heated tobacco products. These are *integral* to the appeal of the product to adults and an important part of an adult smoker's journey away from tobacco use. Data from the United States suggest that 'curiosity' not flavours is the primary driver of uptake in adolescents. I have discussed the issue of flavours in some depth on my blog: [The US vaping flavour ban: twenty things you should know](#) (19 November 2019).

A flavour can be defined legally in (at least) three ways: a chemical recipe; a taste sensation; or a descriptor. The descriptor can bear no real relation to the actual chemical or taste sensation ("Unicorn Vomit"). I recommend that regulation of flavours focusses on chemical safety and inappropriate flavour descriptors or trademark violations.

### **3. To extend the existing restrictions on the advertising, promotion, sale, and distribution of tobacco products to all regulated products making a distinction between specialist vape retailers and generic retailers, and outlining the different regulations for each type of retailer**

This measure is excessive and likely to be counterproductive for public health and does not apply the concept of ‘risk proportionality’. Commercial advertising for vaping products functions as *anti-smoking advertising* – promoting a smoking cessation pathway, and at no expense to the taxpayer.

Advertising allows the new ‘entrant’ products to gain the attention of smokers and to compete with cigarettes, the dominant ‘incumbent’. Advertising and promotion are central to the disruption of the cigarette oligopoly. This works by informing consumers, developing confidence in brands, and creating a buzz around an alternative “value proposition” to smoking. To ban the advertising of low-risk alternatives has the effect of protecting the incumbent cigarette trade and implicitly promoting smoking.

The appropriate risk-proportionate approach to advertising is to control content and themes (they should be responsible and adult orientated) and to limit placement (physical location, medium, time for broadcast media) so that it reaches predominantly adult audiences. This approach is practiced in the UK for e-cigarette advertising not covered by the EU Tobacco Products Directive and practiced in many countries for age-restricted goods and services such as for alcohol and gambling.

Though it is impossible to isolate adolescents entirely from marketing aimed at adults, it is important to recall that the risks to adult and adolescent smokers present the by far the more serious public health challenge compared to possible uptake of vaping by people who would never otherwise have used nicotine. All societies have young people who engage in risk behaviours (smoking, illicit drugs, heavy drinking, underage sex, reckless driving, violence etc). It is unavoidable that young people going through transition to adulthood will try products used by adults. But among the adolescent risk behaviours, vaping is one of the least troublesome and may help some young people divert away from becoming lifelong smokers. While it is important to protect young people, that should not be done by taking measures that will have the effect of harming adults to a far greater extent.

### **4. To apply provisions enabling standardised packaging requirements to be set for all regulated products, therefore setting tailored requirements for different product types that acknowledge their different risk profiles**

A decision to have a differentiated approach to packaging regulation is wise and conforms to the concept of risk-proportionate regulation.

The use of plain standardised packaging has the effect of reducing ‘brand equity’ – the value that users perceive associated with the product above and beyond the product itself. Economically, this can have various effects: it can trigger trading down to cheaper brands; it can cause producers to lower prices on their premium products; it could favour counterfeit or bootleg branded products; it

can reduce the total sales and consumption. The effects of plain packaging have not so far been sufficiently well characterised to know which of these predominate in any given circumstances.

The decision to make cigarette packages look unattractive, to deny branding space, and to impose graphic warnings commands considerable support world-wide. But its ultimate justification rests on the harms done by smoke and the very high risk to health imposed by smoking. No such justification applies to non-combustible nicotine products and it would not stand up to scrutiny in a risk-proportionate regulatory system.

Along with a differentiated approach to advertising, differential use of standardised packaging could help vaping products drive out smoking products. I recommend that standardised packaging is not imposed on any non-combustible product at this time but that branding and consumer friendly messaging is used to encourage switching.

## 5. Conclusion

If New Zealand's executive and legislature are serious about achieving or coming close to its 2025 goals, they should let the processes of technological disruption work synergistically with tobacco and nicotine regulation to drive down smoking at the greatest possible rate. The proposed Bill imposes a number of inappropriate throttles on this process that will serve to protect the cigarette trade and reduce the rate at which smokers quit or divert from smoking to far safer forms of nicotine use. Because switching to low risk nicotine products such as e-cigarettes involves smokers giving up much less (they retain nicotine, oral and throat sensation, hand to mouth motions, behavioural rituals) they provide a faster route to reducing smoking than quitting completely. Evidence from randomised controlled trials, observational studies, population data and user experience all converge on vaping providing abnormally high rates of smoking cessation compared to the alternatives.

The current Bill reads like a well-intentioned effort to exploit the opportunities of tobacco harm reduction but compromised by a failure of nerve on the part of ministers and drafters. This may have been conditioned by an uncritical reaction to the controversies raging in the United States over youth vaping and the recent episodes of lung injuries. However, dispassionate analysis shows the concerns about these to be largely hollow and heavily overplayed by well-funded activism. The United Kingdom has taken a more pragmatic approach and has good results to show for it.

## 6. About the author

**Clive D. Bates** is Director of Counterfactual, a consulting and advocacy practice focussed on a pragmatic approach to sustainability and public health. He has had a diverse career in the public, private and not-for-profit sectors. From 1997-2003 he was Director of Action on Smoking and Health (UK), campaigning to reduce the harms caused by tobacco. In 2003 he joined Prime Minister Blair's Strategy Unit as a senior civil servant and worked in senior roles in government and regulators, and for the United Nations in Sudan.