Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill

Submission by Clive Bates
London, United Kingdom

I am Director, Counterfactual Consulting Limited,[1] former Director, Action on Smoking and Health (UK) and a former UK civil servant. I have no competing interests, and no issues arise in relation to Article 5.3 of the Framework Convention on Tobacco Control. I am writing in an individual capacity. I am a co-author of the ASH (New Zealand) report, *A Surge Strategy for Smokefree Aotearoa 2025: The role and regulation of vaping and other low-risk smoke-free nicotine products*.[2]

I would like to make a brief comment on the three core proposals:

> *This bill proposes to significantly limit the number of retailers able to sell smoked tobacco products; aims to prevent young people from taking up smoking by prohibiting the sale of smoked tobacco products to anyone born on or after 1 January 2009; and aims to make smoked tobacco products less appealing and addictive.*

In general: the importance of unintended or perverse consequences

The main issues with these three proposals will be from unintended and perverse consequences that will arise from the behavioural responses triggered by the measures. The behavioural responses will arise on the consumer side (changes in the products people buy, who they buy from, and what they pay) and the supply side (changes in the products on offer, who sells them and how, and the prices at which they are sold). The market will be dynamic and change over time. It will not necessarily behave as policymakers hope or expect. In particular, there should be concerns about those who will continue to smoke or choose adverse behavioural responses. It is very unlikely that smoking will disappear overnight as these measures are introduced, so some consideration of the effects on continuing smokers is warranted.

1. Limit the retailers able to sell smoked tobacco products

This means increasing *time costs* for people who continue to smoke and hoping that this quite arbitrary form of non-financial burden adds to the pressure to make them quit. It is a punitive measure for smokers, who are often both economically poor and time-poor. It will increase incentives to seek out black market supplies and increase the opportunities for

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1 See The Counterfactual website clivebates.com

2 Clive Bates, Robert Beaglehole, George Laking, David Sweanor and Ben Youdan, A Surge Strategy for Smokefree Aotearoa 2025: The role and regulation of vaping and other low-risk smokefree nicotine products, ASH (New Zealand), October 2019. https://bit.ly/3QKLcnh

illicit suppliers. It is likely to establish a grey market in which lawful bulk cigarette purchases at authorised retailers are sold in a way that is convenient for consumers. It will remove any age-related protections present at the point of sale and make purchases from intermediaries normal.

2. Prohibiting the sale of smoked tobacco products to anyone born on or after 1 January 2009

If age restrictions work, how is it that under-18s smoke today and have done so for many years, despite laws outlawing sales to under-18s? It will establish the conditions for tobacco to be traded illegally through older people selling to younger and for black marketeers to supply under-age adults and minors. It creates a situation in 2035 whereby people will have to prove they are 27 rather than 26 to buy tobacco.

The only argument for this is that the problem of youth smoking in New Zealand has already been addressed and, therefore that this measure will hardly affect anyone:[3]

> *Today most youth in Aotearoa are smoke-free with 1.4% of 15-17-year-olds being current smokers (this is down from 14% in 2006/07) and 1.1% being daily smokers.*
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> *Daily smoking rates in Year 10 students (14 -15 year olds) in 2021 were 1.3%. This is at an all-time low and is down from 15.2% when the survey began in 2000.*

However, the counterargument or residual concern is that prohibitions have the effect of making a product more attractive ("forbidden fruit")[4] or that the political capital required and enforcement challenges involved are not really worth it. It is likely that those young people who intend to smoke will find a way as they have done with under-18 laws, though that is unpredictable in advance.

3. Make smoked tobacco products less appealing and addictive

I understand this to mean reducing nicotine content in combustible tobacco to very low levels at which there would be no reinforcing reward and, therefore, no abuse liability. In practical terms, this amounts to a prohibition of cigarettes and other smoking tobacco, given that the purpose of smoking is to consume the recreational drug nicotine.[5]

In the context of the US Food and Drug Administration's proposals to introduce a similar measure, I have detailed twenty reasons to be sceptical about the proposal.[6] Not all of these

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3 Smokefree (New Zealand) Facts and Figures, Accessed 24 August 2022. https://bit.ly/3R2Wxi4

4 Sussman, S., Grana, R., Pokhrel, P., Rohrbach, L. A., & Sun, P. (2010). Forbidden Fruit and the Prediction of Cigarette Smoking. *Substance Use & Misuse*, *45*(10), 1683. https://bit.ly/3R5FADD

5 Note that the Volstead Act (1919) that implemented US alcohol prohibition allowed for minimal concentrations of alcohol (0.5%) that were intended to be below the level that could cause intoxication.

6 Clive Bates, Twenty reasons to be sceptical about rules lowering nicotine levels in cigarettes – and what to do instead, The Counterfactual, updated July 2022 https://bit.ly/3TdCG1K

apply in New Zealand – for example, the more positive approach to tobacco harm reduction will allow for more switching from high-risk to low-risk smoke-free products. New Zealand's remote and island geography may limit black market activity. New Zealand may be able to respond more flexibly if the policy has unacceptable adverse consequences.

However, several concerns remain. The key issue is the behavioural response on the supply and demand side to the regulation. A *de facto* prohibition of nicotine-containing cigarettes will not make these products disappear but will create a large perturbation in the market for tobacco and nicotine. Several points should be considered:

- The evidence base for this measure consists largely of trials that bear no relation to the measure in question, and no comfort should be drawn from them. The trials rely on volunteers, agreement to follow a study protocol, incentives to participate and comply, and often provide free products. There is also usually some information and a degree of support or investigator participation. All of this is very different from an enforced change in the products legally available and the decisions made by consumers about how to spend their money in response to changes in what is available in their shops.
- Where there are high levels of smoking, for example, in the Māori or other relatively disadvantaged populations, there is a danger that illicit commerce in smoked tobacco will develop, and a lawless marketplace will flourish. It is possible that this would be more deeply entrenched than the current smoking market. For example, it would not attract taxation. It is difficult to say what will happen, and the proponents of the measure have little informative evidence. At the very least, detailed monitoring is essential and a willingness to trigger a pause in the policy if the lawlessness is excessive.
- A significant degree of behavioural coercion is involved in this measure, and that will create a negative welfare effect, and this will be imposed on the population groups with the highest levels of smoking (i.e. the poorest and most marginal). The government cannot assume that its citizens affected will be grateful for coercive policies, even if these have benign intent. In my personal view, public health proceeds best and with the greatest legitimacy when it is done with the consent of those affected. Different considerations apply to communicable diseases and regulated entities. In behaviour change terms, this is less a 'nudge' and more of a body blow.

In my view, it would be better to focus policy and fiscal measures, supportive communications, and healthcare practice on maximising the opportunity for smokers to switch to non-combustible alternatives to smoked products: i.e. vape products, heated and smokeless tobacco, and oral nicotine products such as pouches. The UK New Nicotine Alliance has proposed twenty policies to achieve this in the UK context.[7] I hope these provide some constructive suggestions applicable to New Zealand.

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[7] New Nicotine Alliance (UK) Twenty policy proposals to address smoking and health disparities, March 2022 https://bit.ly/3KjvFrX