



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Smokefree Environments and
Regulated Products (Vaping) Amendment Bill

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 262 of the Standing Orders of the
House of Representatives

1. I have considered whether the Smokefree Environments and Regulated Products (Vaping) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). I have concluded that the provisions of the Bill prohibiting the advertising, promotion, or sponsorship of vaping products and smokeless tobacco devices (the provisions in Part 2, subparts 1 and 2) are inconsistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.
2. As required by s 7 of the Bill of Rights Act and Standing Order 262, I draw this to the attention of the House of Representatives.

The Bill

3. The Bill amends the Smoke-free Environments Act 1990 ('the Act') to regulate vaping liquid (with and without nicotine), devices and components, and smokeless tobacco devices (the tobacco component is already regulated).
4. The Bill extends many of the existing provisions of the Act to vaping products and smokeless tobacco devices including:
 - 4.1 prohibiting the sale, and supply in a public place, of vaping products and smokeless tobacco devices to people under the age of 18 years;
 - 4.2 prohibiting advertising, promotion and sponsorship of vaping products and smokeless tobacco devices;
 - 4.3 prohibiting inducements and rewards associated with vaping products and smokeless tobacco devices (e.g. discounts and loyalty points); and
 - 4.4 prohibiting vaping and the use of similar tobacco devices in legislated smoke-free areas including indoor workplaces, early childhood centres, and schools, as well as, subject to passage of the Smoke-free Environments (prohibiting Smoking in Motor Vehicles Carrying Children) Bill, vehicles carrying children under the age of 18 years.
5. The Bill enables the Director-General of Health to approve a vaping retailer as a 'specialist vape retailer'. The Bill makes some distinctions within the regulatory framework between a specialist vape retailer and a (generic) retailer.
6. Certain provisions are specifically designed to reduce the appeal of vaping and smokeless tobacco products to young persons and non-smokers, including the creation of regulations restricting the permitted flavours and colours of the substances used by these products.
7. The Bill also contains provisions aimed at monitoring and improving the safety of vaping and smokeless tobacco products. It introduces a new notification regime for manufacturers and importers of these products, including obligations to provide the details of their product to a product database and to provide notice of any adverse reactions they become aware of. Retailers must not sell products which are not compliant with this regime.

8. In New Zealand, nicotine e-cigarettes were believed to be unlawful under the Act until the judgment in *Philip Morris v Ministry of Health [2018] NZDC 4478*, which found that the Act's prohibition on tobacco products used for chewing or 'any other oral use' extended only to products used in a way similar to chewing and not to heated smokeless tobacco products. Since then, there has been a rapid growth in vape stores and the availability of e-cigarettes in generic stores (supermarkets, dairies, service stations) and mass and social media advertising.
9. The Bill is designed to bring vapes and heated tobacco products within essentially the same set of regulations and restrictions as traditional tobacco products, subject to some tailored exceptions. The policy position underpinning the Bill recognises that vaping can be a legitimate and useful way of assisting smokers to cease tobacco use but seeks to prevent its uptake as a new habit by non-smokers.

The evidence of harm

10. An important issue underlying my advice on this Bill is the lack of available evidence for harm associated with vaping. The Regulatory Impact Statement ('RIS') accompanying the Bill notes the lack of conclusive evidence on the benefits or harm of vaping products, stating:¹

"There are limitations on the extent to which the problem can be accurately defined and the impacts of the proposals assessed and quantified. This reflects a lack of information on the long-term effects of vaping and using many types of smokeless tobacco product, as well as the local market."

11. The RIS goes on to explain the scientific consensus that vaping is "significantly (around 95 percent) less harmful than smoking".² These improvements in physical safety arise from a lack of combustion and the limiting of toxicants, where present at all, to levels considered a negligible risk to health. While the long-term effects of vaping will reportedly not be known for many years, and long-term exposure may be associated with increased health risks, "the magnitude of such risks is likely to be substantially lower than those of smoking, and extremely low in absolute terms".³ While vaping products do contain nicotine, the RIS advises that there is evidence that use of small quantities of nicotine is associated with few risks, and the addiction potential of nicotine in vaping products appears to be low, at least with current technology.
12. The RIS records that New Zealand has seen a rapid increase in vaping over recent years, including among young people. One survey found that 27.7 percent of 14-15 year olds had tried vaping in 2016, compared to 7.1 percent in 2012.⁴ Rates are higher among young Māori, 45.8 percent of whom had tried vaping in 2016, compared with 22.2 percent of non-Māori. As young adulthood represents a vulnerable time for the initiation, development and establishment of smoking behaviours, there is a concern

¹ Regulatory Impact Statement: Support smokers to switch to alternatives (Ministry of Health, January 2019) at page 3.

² At page 10.

³ At page 11.

⁴ The Youth Insights Survey 2016, cited at page 10 of the RIS.

that the uptake of vaping will result in the establishment of smoking behaviour in some young people.

13. However, while recognising the broad concern by commentators that experimentation by young people may lead to regular vaping and/or smoking, the RIS indicates that the few studies on this topic to-date are inconclusive on the existence of such a ‘gateway’ effect.⁵ Some reviews have found a link between persons ‘ever vaping’ and ‘ever smoking at a later point in time’ but acknowledge that it cannot be concluded that the former causes the latter. Another study has concluded against such a relationship, as smoking has continued to decline while vaping uptake has increased. The RIS concludes, in relation to concerns that young people who do not smoke may become regular vapers, that “[t]here is, to date, no robust evidence to support this concern”.⁶
14. The Ministry of Health advises that there has been a rapid increase in vaping rates in the United States, and similar trends may also be appearing in Canada. It advises that a variety of approaches have been taken, or are being considered, in overseas jurisdictions to control the uptake in vaping. Although useful context, this information does not displace the conclusions in the RIS that there is currently no conclusive evidence of any harm or gateway effect associated with vaping.

Section 14 of the Bill of Rights Act (freedom of expression)

15. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression extends to all forms of communication which attempt to express an idea or meaning, including commercial speech such as advertising.
16. A number of clauses in the Bill contain provisions that engage the right to freedom of expression. These include:
 - 16.1 the prohibition of advertising of regulated products, subject to certain limited exceptions (Part 2, subpart 1);
 - 16.2 restrictions on the use of trademarks and company names, including parts of company names, related to the sale of regulated products (Part 2, subpart 2); and
 - 16.3 a requirement for standardised packaging on regulated products, as well as health messages and other information required by regulations (Part 3).
17. The above provisions in the Bill limit freedom of expression in a number of ways. Advertisements, notices, packaging and other communications to customers are forms of expression, and prohibition or regulation of their content engages section 14 of the Bill of Rights Act.

⁵ At page 10.

⁶ At page 2.

18. The focus of my concern with this Bill is whether the extensive restrictions on the advertising of regulated products (contained in Part 1, subparts 1 and 2) are justifiable under the Bill of Rights Act, given the limitations on the evidence of harm identified above.
19. For the avoidance of doubt, I note that the provisions of the Bill which limit the flavours and colours that can be included in a vaping substance (Part 4) are a balanced and proportionate approach to regulation.

Are the limitations justified and proportionate under s 5 of the Bill of Rights Act?

20. Where a provision appears to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:⁷
- a) does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b) if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

Is the objective sufficiently important?

21. The proposal for the Bill “seeks to strike a balance between the objectives of supporting smokers to switch to significantly less harmful products and protecting children and young people from any risks associated with an increased availability of vaping and smokeless tobacco products”.⁸ The Bill amends the purposes of the Act to refer to vaping, with new purposes including: “to prevent the normalisation of vaping”, “to regulate the safety of vaping products and smokeless tobacco products” and “to regulate and control the marketing, advertising and promotion of regulated products [...] in order to improve public health by– [...] (ii) discouraging non-smokers, especially children and young people, from vaping or using smokeless tobacco products”.⁹
22. The Bill therefore seeks to achieve several objectives. In respect of the provisions prohibiting advertising and marketing, the objective of the Bill is to protect the health of the public, particularly young persons, from the potential ill effects of vaping and smokeless tobacco products.

⁷ *Hansen v R* [2007] NZSC 7 at [123].

⁸ RIS, above n1, page 1.

⁹ At clause 6, replacing section 3A of the Act.

23. The protection of public health is an important objective, especially in regard to vulnerable groups such as children. In the abstract, such an objective can justify limitations on rights protected under the Bill of Rights Act. However, the importance of such an objective in context will be contingent on the evidence supporting the legitimate risk of harm which the public requires protection from. I address this issue in further detail below, in relation to the assessment of proportionality.
24. I accordingly consider that the objective underlying these provisions is sufficiently important to justify some limits on the rights protected in the Bill of Rights Act.

Is there a rational connection between the limit and the objective?

25. Some deference may be appropriate in assessing the requirement of rational connection, particularly for complex social policy issues.¹⁰ There can be ‘many ways to approach a particular problem, and no certainty as to which will be the most effective.’¹¹
26. While I have not been provided with any detailed evidence that the restrictions on advertising will lead to a reduced or more appropriate uptake of vaping (for example, among the smoking population as opposed to non-smokers), it is possible to draw a rational connection between those types of measures and that objective. Reduced advertising of a product may lead to reduced consumption of that product, and the requirement for health messages on products can improve public awareness of the potential risks associated with their use.

Is the impairment on the right greater than reasonably necessary?

27. It is not clear that the approach taken in the Bill is the only response capable of answering concerns about the uptake of vaping. Other provisions such as the notifications regime introduced in Part 4, and restrictions on permitted substances and nicotine levels in vaping products, demonstrate the availability of more specific responses to the concerns about emerging health risks. It has not been shown that a complete prohibition on advertising is necessary to meet the objective, or that more limited measures (such as restrictions on advertising times, locations or content) would not be adequate.

Is the limit in due proportion to the importance of the objective?

28. The remaining element of the section 5 inquiry calls for an assessment of whether the limits are in due proportion to the importance of the objective.
29. In my view, the objective of protecting public health is limited by the extent to which the evidence actually demonstrates a potential danger to public health. As discussed above, the RIS supplied with the Bill indicates that:

29.1 there is no current evidence of health risks connected with vaping (and that on the contrary vaping is significantly safer than smoking),

¹⁰ *Canada (A-G) v JTI-McDonald Corp* [2007] 2 SCR 610 at [41 – 43].

¹¹ *Canada (A-G)* at [43].

- 29.2 the levels of nicotine used in vaping are unlikely to be harmful and present a low risk of addiction, and
- 29.3 there is no robust evidence supporting concerns of a ‘gateway effect’ leading young people who try vaping to subsequently take up smoking.
30. Vaping is associated with smoking and has unclear long-term health outcomes. Given the lack of research on this new product, some restrictive steps may be justified in protecting against the potential for future health risks to emerge. However, if the evidence for harm associated with vaping is very limited, the steps which can justifiably be taken to protect against the risk of harm will necessarily also be limited. At present, there appears to be no conclusive evidence that vaping is or will be harmful.
31. The Bill does seek to make some distinctions between the way in which its restrictive provisions apply to vaping, and specialist vape retailers, as opposed to other tobacco products and more generic retailers. All retailers are permitted to display vaping products within their premises. Specialist vape retailers are additionally permitted to recommend and allow customers to trial vaping devices within their premises. The plain packaging requirements, based on regulations yet to be developed, also appear intended to apply different requirements to different types of product.
32. However, the Bill’s prohibition on advertising (in addition to sponsorship and trademark usage) does not differentiate between vaping and traditional tobacco use in this way. With some limited exceptions, the Bill extends the majority of the existing restrictions on the advertising of tobacco and applies them to vaping products.
33. While some restrictions on advertising are likely justifiable in meeting the above objective, I do not consider that a blanket prohibition of the advertising of vaping products is a proportionate response given the lack of evidence for their being harmful. In contrast, blanket bans on advertising and significant restrictions on freedom of expression, in the context of smoking, can be justified due to the strong evidence of significant harm caused by smoking, and the further evidence that tobacco packaging is a highly effective form of advertising for smoking products. In the absence of any strong evidence of harm, the support for such broad measures falls away.
34. While I acknowledge the public interest in remedying the current gap in the regulation of vaping, particularly given its high uptake among young persons, the Bill of Rights Act requires such regulation to be measured where protected rights would be restricted.
35. Accordingly, given the broad nature of the advertising restrictions and in light of the limited evidence for harm associated with vaping, I do not consider this limit on freedom of expression to be in due proportion to the importance of the objective. I therefore conclude this limit on s 14 of the Bill of Rights Act cannot be justified.

Section 19 of the Bill of Rights Act (freedom from discrimination) – Age restriction

36. I have also considered whether the restrictions on the sale, and supply in a public place, of vaping products and heated tobacco devices to people under the age of 18 years gives rise to a limit on the right to be free from discrimination (section 19 of the

Bill of Rights Act) on the basis of age. One of the objectives of the Bill is to protect public health by limiting the adoption of vaping by non-smokers and, particularly, young persons.

37. Any bright-line age restriction is necessarily arbitrary but provides a level of certainty and consistency in regulating behaviour where an individual analysis is not practical. The age limit set by the Bill is one that has been generally adopted by society as appropriate for the purchase of other regulated substances, including tobacco, herbal smoking products and alcohol, and reflects the greater vulnerability of young people to harm from such substances as well as their decision-making ability in using them appropriately. Such a precaution is consistent with the objectives of the Bill, and in my view does not go further than necessary in regulating a new product that is seeing high uptake among young persons, is associated with tobacco and carries uncertainty as to its long-term health outcomes.

Conclusion

38. I have concluded the Bill appears to limit s14 of the Bill of Rights Act and cannot be justified under s 5 of that Act.



Hon David Parker
Attorney-General