

4 October 2024

Secretariat  
Health Select Committee  
Parliament Buildings  
WELLINGTON

Kei te rangatira, tēnā koe

## **SMOKEFREE ENVIRONMENT & REGULATED PRODUCTS AMENDMENT BILL (No2)**

1. Retail NZ is a membership organisation that represents the views and interests of New Zealand's retail sector. Our membership accounts for 70% of domestic retail turnover.

### **Summary of Submission**

2. Retail NZ supports the following:
  - The purpose of the Bill to reduce access to regulated products by children and young people.
  - A prohibition on sale of all-in-one disposable vapes. These are generally sold at a lower price than other vaping alternatives and are the product of choice for youth that vape.
  - Increasing the penalties for selling vaping products to minors.
  - Greater enforcement of existing legislative provisions.
3. Retail NZ would also support a new provision introducing the offence of supplying a minor, to deter social supply, noting that minors predominantly source vape products from family and friends.
4. Retail NZ seeks the following amendments to the draft legislation:
  - A change to the definition of 'disposable vaping product' to limit application to all-in-one single-use vaping devices and exclude pre-filled replaceable vape pods which are safer than tank systems.
  - Extension of the transition period to 12 months.
5. Retail NZ does not support:
  - The proposed ban on retail visibility of vaping products. Instead, we recommend that for general vape retailers, which are open to the public, sales must be by attendant sale i.e. displays occur behind the counter and the customer must request the product from a sales assistant to purchase.

### **Purpose of the legislation**

6. Clause 5 of the Bill amends the purpose section of the principal Act to add a new purpose statement. The new purpose statement is to reduce access to regulated products by children and young people.
7. While any health impacts of vaping have yet to be quantified, Retail NZ acknowledges public and government concern about young people, particularly minors, taking up vaping having never smoked. On this basis, and noting we already have age restrictions for the purchase of these products, but a large and increasing number of young people vape, we support the government taking additional steps to reduce young persons' access to these products. Notwithstanding, we believe all new regulatory measures introduced for this purpose must meet two tests. First, any restriction that limits personal liberties and commercial freedoms must be proportionate to the risk the government is attempting to reduce, and second, the measure must be effective in reducing youth access to vaping products. We are concerned that the proposed prohibition on disposable vaping products (as drafted) and the introduction of visibility prohibitions, are not proportionate, and neither will be effective.

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#### **RETAIL NZ // HQ**

Level 9, 175 Victoria Street, Wellington 6011  
PO Box 12-086, Wellington 6144

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P // 0800 472 472

E // [info@retail.kiwi](mailto:info@retail.kiwi)

W // [www.retail.kiwi](http://www.retail.kiwi)

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## Potentially Effective Measures

8. Retail NZ believes there are three things that the government could do to reduce youth access to vaping products in an effective and proportionate way. These are:
- Increasing penalties for the illegal sale of vaping products to minors.** This will create stronger incentives for retailers to comply with age restrictions. We would also support a three strikes rule - banning a retailer from selling the product if offending multiple times in a specified timeframe. We acknowledge that provisions in the Bill increase penalties for the offence of selling to a minor and we support this proposal.
  - Introducing an offence for social supply.** The Regulatory Impact Statement (RIS) for increasing penalties for sale to minors summarises the current research on how minors obtain vaping products. Most commonly this is from friends (40.1%), followed by family (18.5%), while 'bought from a vape shop' is lower (14.6%).<sup>1</sup> As minors most commonly obtain their vapes from friends and family, there is strong grounds for an offence of social supply. There is precedent for this in Sale and Supply of Alcohol Act 2012.<sup>2</sup>
  - Greater enforcement of existing legislative provisions.** We note that the Minister has signaled that government intends to increase enforcement of Smokefree law<sup>3</sup> and we fully support this. Recent media coverage of the high incidence of illegal sales of vaping products points to a need for greater levels of enforcement.<sup>4</sup> This would have a deterrent effect. Areas of concern extend beyond sales to minors to vaping product compliance with pre-notification criteria including safety standards, and the operation of SVRs within general stores, with concern these may not always be properly monitored as R18 venues.
9. Taken together these measures could significantly reduce minors' access to vaping products and reduce the incidence of minors' vaping.

## Part 1AA: Prohibition of disposable vaping products - Need to modify definition of disposable vapes

10. Clause 4 of the Bill amends the interpretation section of the principal Act to add a new definition of disposable vaping product. Disposable vaping products are to be banned as a measure to reduce youth vaping. Retail NZ supports a ban on single-use disposable vaping devices noting that other countries have already introduced such bans while others are in the process of doing this. However, as drafted, the definition of a disposable vaping product captures both all-in-one single-use disposable devices [as described in proposed s2(1)(a)], and pre-filled pods which are replaceable in reusable vaping devices [as described in proposed s(2)(1)(b)]. Retail NZ and its members are opposed to the second limb of the clause, banning replaceable pre-filled pods. We believe a ban on replaceable pre-filled vape pods is ill-conceived, will not reduce youth vaping as intended. Instead, it will have the unintended consequence of raising a barrier for tobacco smokers to switch to vaping, which is less harmful to their health. Requiring vapers to use open tank systems will also give rise to increased risks described below.
11. Vaping products have proven to be an effective smoking cessation tool. The continuing availability of vaping products with high user-acceptance by tobacco smokers is imperative to New Zealand meeting its 2025 smokefree goal. Sales data shows customers have a clear preference for using reusable vapes with replaceable pre-filled pods, over tank systems, with pods accounting for a very high proportion of vaping product sales in New Zealand. Consequently, the forced removal of these products has the potential to significantly disrupt New Zealand's steady progress towards becoming smokefree.

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<sup>1</sup>Supplementary Regulatory Impact Statement: Banning disposable vaping products.... 12 August 2024, para 11, page 6.

<sup>2</sup> Sale and Supply of Alcohol Act 2012, s241.

<sup>3</sup> [Government to crack down on youth vaping](#), Press release by Hon Casey Costello, 20 March 2024

<sup>4</sup> ['Unacceptably high' sales to underage vape buyers revealed](#) 1News, April 2024

12. We recommend the second limb of the proposed definition of disposable vaping product is withdrawn so the ban specifically targets all-in-one single-use disposable devices, enabling pre-filled pods for use in reusable vaping devices to continue to be sold. We note that this is the approach recommended by officials in advice provided via the RIS dealing with disposable vaping products, being the option with the highest score when evaluated by the criteria set for assessing the merit of alternate options.

*“On balance the Ministry’s preferred option is Option 2 - narrowly defined scope - all vapes that are not both rechargeable and refillable are banned. This option is a proportionate response to meeting the objectives based on the available evidence and balances the competing objectives of reducing youth vaping and achieving the Smokefree goal by (amongst other things) allowing access to vaping products for adults as a smoking cessation tool. It is unclear whether the additional trade-offs involved in pursuing a wide definition would sufficiently target youth vaping.”<sup>5</sup>*

13. In reaching this position, we note the RIS recounts the following evidence to support retaining pods:

- a. Pod products meet the current definition of a reusable device.<sup>6</sup>
- b. There is a risk that reducing youth access to vapes will lead to higher youth smoking rates, with evidence this has occurred in other markets.<sup>7</sup> Alternatively, it is thought likely that daily vapers would move to using tank systems. As tank-based vapes are legally permitted to contain higher maximum nicotine levels than disposable vapes, there is the potential unintended consequence of exposing youth who vape to higher nicotine levels.<sup>8</sup>
- c. Prefilled single-use containers such as pods are considered a safer alternative to refillable tank systems as they do not allow people to add other substances to the e-liquid. Notably, EU research identified hazards relating to the refill process for tank-style products.<sup>9</sup>
- d. The 2022 EASE/International Tobacco Control New Zealand Survey found that 60% of people who smoked used a vape as part of an attempt to quit. This figure rose to 64.3% of people who quit smoking.<sup>10</sup> The majority of vape customers prefer pods over open systems.
- e. Other countries that have banned disposable vapes, including Australia and the UK, have defined disposable vapes in a manner which excludes replaceable pods, enabling these products to continue to be sold. France and Belgium have adopted a similar approach with their new regulation coming into effect in late 2024, and early 2025, respectively.<sup>11</sup>
- f. Tighter regulation in Australia has seen a significant increase in illicit market activity, with 87% of Australians who vape reporting sourcing vapes illegally.<sup>12</sup>

#### **Section 14: Introduction of Visibility Restriction**

14. Clause 14 amends section 37 of the principal Act to extend the restrictions on the visibility of smoked tobacco products to vaping products. We do not believe visibility restrictions would contribute to any significant reduction in vaping, but the proposal imposes very significant compliance costs on vape retailers, particularly for the SVR sector, with SVR retailers having to either block out store frontages, with attendant security risks, reconfigure internal layouts, and/or sell vapes from closed opaque cabinets. In this regard the cost of the measure would be disproportionate to the anticipated benefit.

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<sup>5</sup> Supplementary Regulatory Impact Statement: Banning disposable vaping products.... 12 August 2024, para seventy-one, p18

<sup>6</sup> Ibid, para eighteen, page 7

<sup>7</sup> Ibid, para thirty-two, page 9

<sup>8</sup> Ibid, para thirty-six, pages 9-10

<sup>9</sup> Ibid, para sixty-five, page 14.

<sup>10</sup> Ibid, para thirty-three, page 9

<sup>11</sup> Ibid, paras forty-three to fifty-five, pages 11-13.

<sup>12</sup> Ibid, para sixty-six, page 14.

15. In taking this position we make the following points:

- a. The proposal seeks to mirror visibility restrictions for smoked tobacco products. However vaping products are acknowledged to be less harmful than smoked tobacco and are an effective smoking cessation tool. Treating them in the same way as smoked tobacco sends a message that vaping products are “bad” and should be avoided. This is likely to undermine attempts to promote vaping as a smoking cessation tool.
  - b. Youth do not generally purchase vapes from retail stores. Minors predominantly obtain vapes from friends and family members and only 14% of youth get their vapes from retail stores. The RIS relies on UK research to predict the reduction in youth vaping, estimating that the regular vaping prevalence of 3.7% among 11-17-year-olds might reduce to 3.1%, a reduction of just 0.6%.<sup>13</sup> The measure is at best only modestly effective while the cost to retailers to comply, as described below, would be very significant and therefore disproportionate.
  - c. There has been insufficient time for retailers to gauge the full cost of compliance with the proposed visibility restriction, however SVRs would need to frost out their shop windows, reconfigure internal layouts, or sell vaping products from closed opaque cabinets. Covering shopfronts is the easiest and lowest cost option but would lead to increased security risks as acknowledged in the RIS.<sup>14</sup> It would invite more crime at a time when retailers are already grappling with unprecedented levels of crime and anti-social behaviour. Retailers, like other businesses, have a legal responsibility to minimise health and safety risks for employees, customers, and others, while workers have the right to refuse to work in unsafe conditions. Blacking out windows removes visibility into a store and is contrary to guidance on good environmental design for liquor stores<sup>15</sup> produced by the Health Promotion Directorate of Te Whata Ora - Health New Zealand and heavily promoted by the NZ Police. This recommends that staff can clearly see the outside of the store and the public inside the store, for security purposes. Eliminating visibility into a store is unsafe and therefore unacceptable, while reconfiguring internal layouts or replacing current displays with opaque cabinets means incurring costs in the thousands of dollars for each of thousands of retail premises. Imposing such high costs on vape retailers would be highly disproportionate when vapes are an effective smoking quit tool, and when compared to the expected reduction in youth vaping (0.6%).
16. SVRs already operate as restricted areas where persons under 18 are prohibited to enter, so youth should not be visiting these stores, but if they do, they should be refused sale by virtue of the age restriction that applies to the purchase of vaping products. With the plan to increase fines for selling to minors, we should see a further reduction in minors buying vapes from vape retailers and in this context, we don't believe the additional impost of a visibility prohibition can be justified.
17. In relation to General Vape Retailers, instead of banning the visibility of vaping products which would require significant investment in new cabinets, we recommend an alternate approach of requiring vapes to be an attendant sale i.e. imposing a condition that vaping products may only be sold when a customer specifically requests them from a sales assistant. This would require products to be sold from behind a counter. This additional step would reduce visibility at much lower cost than requiring new cabinets to be purchased and is likely to further deter minors attempting to buy vaping products, while allowing adult vapers to see the range of vaping products available for purchase. Most general retailers already voluntarily adopt this approach for loss prevention reasons; however, we would support attendant sales becoming mandatory in General Vape Retailer settings.

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<sup>13</sup> Regulatory Impact Statement: Visibility of vape products and proximity of Specialist Vape Retailers - reducing youth vaping. 11 June 2024, para seventy-three, page 19.

<sup>14</sup> Ibid paras forty-nine-fifty, page 10.

<sup>15</sup> [Safer bottle stores - A guide to Crime Prevention through Environmental Design](#), Te Whatu Ora

**Transition Period**

18. Providing the approach proposed by Retail NZ is accepted, a transition period of six months may be sufficient. However, if the government proceeds with the current proposal of phasing out disposable pods, and/or introducing a visibility restriction, a minimum of twelve months would be required for retailers to sell through existing stocks and/or reconfigure existing displays. Additional time may be required if new product development is required to bring new compliant products to market. The suppliers of vaping products are better placed to provide advice on the timeframes for new product development.

**Conclusion**

19. In conclusion Retail NZ thanks the Health Select Committee for considering its submission. Retail NZ would like to make an oral submission to the Committee.

Nāku iti noa, nā



**Carolyn Young**  
**Chief Executive**