



# **Risk proportionate regulation of nicotine and tobacco products: More rhetoric than reality**

2 October 2024

Richard Edwards, Janet Hoek, Andrew Waa, Nick Wilson

# Summary

The Government, and almost everyone considering how to achieve a Smokefree Aotearoa, agrees that nicotine and tobacco products should be regulated proportionate to the harm that they cause. However, following repeal of the previous Government's smokefree measures, regulation is now **disproportionate** to risk as, in many important areas, smoked tobacco products have weaker regulation than vaping products. The Government must urgently address its espoused commitment to risk proportionate regulation by introducing regulations to greatly restrict the availability, appeal, and addictiveness of smoked tobacco products. At the same time, they must implement robust policies to protect young people from addiction to alternative nicotine and tobacco products.

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This Briefing analyses how smoked tobacco and vaping products could be regulated with a risk proportionate approach in Aotearoa New Zealand.

Risk proportionate regulation requires regulation of consumer products proportionate to the harm they cause individuals and communities. The issue has become more salient following the introduction of new nicotine products like e-cigarettes and vapes which will likely cause fewer physical harms than smoked tobacco, though will nonetheless cause harm through addiction.

In Aotearoa, major health groups agree smoked tobacco and vaping products should be subject to risk proportionate regulation.<sup>1,2</sup> [International researchers](#), leading Māori health organisations (e.g., [Hāpai te Hauora](#)) and the [Ministry of Health](#) have issued similar calls. In recent Cabinet papers on [youth vaping](#) and [heated tobacco products](#), the [Associate Health Minister](#) committed to proportionate regulation (see [Appendix](#) for quotes), as have [the tobacco industry](#) and its [allies](#).

Despite this shared view, proposals on how to achieve risk-proportionate regulation vary greatly. Tobacco companies promote [minimal regulation of vaping products](#) while the vast majority of health groups urge far stronger regulation of smoked tobacco products,<sup>3</sup> whilst still stressing the need to protect young people from becoming addicted to any nicotine-containing product.

The Smokefree 2025 goal adopted by the National Party-led Government in 2011, took the latter approach and aimed to reduce smoking prevalence among all population groups **and reduce tobacco availability** to minimal levels by 2025.<sup>1</sup> The [Smokefree Aotearoa 2025 Action Plan](#)<sup>2</sup> and the [Smokefree Environments and Regulated Products Amendment Act](#) (SERPA) introduced in 2022 by the Labour-led Government followed the same logic and introduced much stronger regulation of smoked tobacco products, including mandatory denicotinisation, greatly reduced retailer numbers, and a smokefree generation policy (albeit this legislation has since been abandoned).

So is regulation in Aotearoa risk proportionate for tobacco and nicotine products?

We investigated this question by comparing the strength of regulation of smoked tobacco products and vaping products in relation to price, promotion, accessibility, and product constituents and design. We considered risk in relation to physical harm, assuming that for risk proportionate regulation to be present smoked tobacco products should be regulated more stringently than vaping products. We made the comparison for current or pending regulations and in a scenario where measures introduced in SERPA had been implemented rather than repealed (see table).

### **Regulation of price (Risk-proportionate)**

Regulation of price is highly risk-proportionate. The main price regulatory measures are excise taxes and GST; the latter applies to all nicotine and tobacco products but excise tax is applied only to smoked tobacco products. From 2011-2020, annual 10% plus inflation tobacco excise increases resulted in cigarettes in Aotearoa being among the most expensive in the world. Price differentials are further increased because discounting is allowed for vapes but not smoked tobacco products, with some disposable vapes available at pocket money prices.

### **Regulation of promotion (Partially risk-proportionate)**

Regulation of promotion is partially risk-proportionate. Strict controls (largely bans) apply to advertising and sponsorship of smoked tobacco and vaping products. Point-of-sale displays and packaging are more strongly regulated for smoked tobacco products (e.g., plain packaging is required and point-of-sale displays are not allowed).

Vaping products use branded packaging, though this may not feature cartoon or toy imagery, or use fanciful flavour descriptors. Retailers may display products (though this practice may soon be disallowed in general retailers). However, [social media promotion of vaping products circumvents](#) marketing restrictions, and very high youth vaping prevalence suggests further restrictions are required.

### **Regulation of retail access (Disproportionate)**

Regulation of retail accessibility is currently mostly **disproportionate** to risk. While the same age restrictions (18 years) apply to both products, retailers are not required to register or meet any criteria to sell tobacco products, and the number, density and location of tobacco retailers remains unregulated.

There is limited regulation of retailing of vaping products; for example, general retailers (e.g., dairies) may only sell three flavours of vapes, specialist vaping stores (SVRs) must be registered, and new SVRs (existing stores are exempt) may not open within 300m of marae and schools.

### **Product regulation (Highly disproportionate)**

Product regulation is currently strongly **disproportionate** to risk. Smoked tobacco products are unregulated regarding constituents (nicotine strength, additives and flavours) or design features (e.g., filters, filter ventilation, filter flavour capsules). This approach

allows the tobacco industry to manipulate constituents and design to maximise the addictiveness, palatability and appeal of their products. Research indicates that regulating these attributes<sup>6,7</sup> will likely reduce smoking uptake by youth and encourage people who smoke to quit.

By contrast, nicotine strength of vaping products is modestly restricted and limited regulation of design features has recently been implemented (e.g. requirements for removable batteries and child locks) or are planned (e.g., ban on [disposable vapes](#)).

## **Reduced risk-proportionality following repeal of smokefree legislation**

The table below shows that the repealed SERPA measures would have created risk-proportionate regulation of the accessibility and addictiveness of smoked tobacco products relative to vaping products, by greatly decreasing retailer numbers and minimizing the nicotine content of cigarettes and other smoked tobacco products.

**Table: Key features of regulation of smoked tobacco and vaping products currently and in scenario of non-repeal of the 2022 Smokefree Environments and Regulated Products Amendment Act** measures.

**Key**

Minimal/no regulation	Limited regulation	Moderate regulation	Strong regulation
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Regulatory domain	E-cigarettes/vaping products regulation *	Smoked tobacco products regulation (with SERPA #)	Smoked tobacco products regulation (post SERPA repeal)
<b>Price</b>	No excise tax, GST only. Relatively cheap products, discounting allowed.	GST + very high excise tax. Very expensive products, discounting not permitted.	GST + very high excise tax. Very expensive products, discounting not permitted.
<b>Promotion</b>	<p>Most marketing highly restricted e.g. no advertising, promotion or sponsorship allowed. NB: possible loopholes e.g., social media promotion.</p> <p>No plain packaging but images of cartoons or toys not allowed, flavour names restricted to approved list. Text warnings required about addictiveness for nicotine-containing vapes.</p> <p>Retail point-of-sale displays of products currently allowed. Planned regulations will disallow displays in general retailers and on websites; specialist retailers will be permitted to display products, though these must not be visible to people outside the stores.</p>	<p>Most marketing highly restricted e.g. no advertising, promotion or sponsorship allowed.</p> <p>Plain packaging and large pictorial health warnings required.</p> <p>Retail point-of-sale product displays not permitted.</p>	<p>Most marketing highly restricted e.g. no advertising, promotion or sponsorship allowed.</p> <p>Plain packaging and large pictorial health warnings required.</p> <p>Retail point-of-sale product displays not permitted.</p>
<b>Place (retail supply)</b>	<p>Very widely available.</p> <p>No restrictions on number of general or specialist (R18) vape retailers (SVRs).</p> <p>Full range of vapes available at &gt;1600 approved SVRs. Limited range of vapes (mint, tobacco, menthol flavours) available at several thousand general retailers.</p> <p>SVRs approved since September 2023 must be &gt;300m from marae and schools (no restrictions for SVRs approved earlier), and also proposed &gt;100m restriction from early learning centres.</p> <p>Sales not permitted to people aged &lt; 18 years.</p>	<p>Highly restricted availability.</p> <p>Maximum of 600 approved tobacco retailers.</p> <p>Density (potentially also location e.g. school proximity) controls.</p> <p>Approval required to be tobacco retailer. Criteria include enhanced security (secure storage, security cameras, alarm, fog canon, external protection) &amp; fit and proper person stipulations.</p> <p>Sales not permitted to people born after January 1 2009.</p>	<p>Very widely available</p> <p>No restriction on number of retailers, estimated 6000 tobacco retailers.</p> <p>No controls on location or density.</p> <p>No approval required to be tobacco retailer. No security standards or fit and proper person requirements.</p> <p>Sales not permitted to people aged &lt; 18 years.</p>
<b>Product</b>	<p>Disposable devices have ≤ 20mg/ml nicotine strength limit, must have removable battery and child safety features. E-liquids in other devices have limit of ≤ 28.5mg/ml for nicotine salt and ≤ 20mg/ml for other forms of nicotine.</p> <p>From October 2024 all reusable vaping devices must have a removable battery and child safety features. Government has proposed further restrictions e.g., disallowing vapes that cannot be refilled and recharged.</p>	<p>Mandated minimal (≤ 0.8mg/g) nicotine levels (i.e., non-addictive levels).</p> <p>No restrictions on additives, filters or other design/features.</p>	<p>No restrictions on nicotine levels.</p> <p>No restrictions on additives, filters or other design/features</p>

*\*For simplicity we have ignored therapeutic nicotine products such as patches and gum, and also other alternative products such as heated tobacco*

*#Smokefree Environments and Regulated Products Amendment Act 2022*

## Conclusions

Sixty years after the [US Surgeon General's report](#) presented unequivocal evidence that smoking is extremely harmful to health, highly disproportionate regulation of the constituents, design and retail availability of smoked tobacco products persists. These products remain widely accessible, despite the NZ Government's goal of achieving 'minimal availability' by 2025.<sup>1</sup> Tobacco companies remain free to develop highly addictive, palatable and appealing products, including cigarettes with: high nicotine content, design features and additives to [maximise addictiveness](#) and make tobacco smoke [less harsh and easier to inhale](#), and add flavour capsules that appeal preferentially to young people.<sup>3 4</sup>

Meanwhile initially permissive regulation of vaping products has resulted in [very high levels of youth vaping](#) and harms due to addiction. The Government has responded by proposing [additional measures to protect youth from vaping](#). Further measures [are very likely to be required](#) in future.

However, the Government has no proposals to strengthen regulation of smoked tobacco products, so the current areas of grossly disproportionate regulation are set to continue. Given there is no dispute that smoked tobacco products cause immense harm, particularly for Māori, we call on the Government to introduce measures that will greatly restrict the accessibility, appeal and addictiveness of smoked tobacco products. Doing so will rectify current regulatory anomalies and deliver on the goal adopted by the National Government in 2011.

## What this Briefing adds

- There is broad consensus for risk-proportionate regulation of tobacco and other nicotine delivery products like vapes.
- Repeal of the previous Government's smokefree measures created highly risk **disproportionate** regulation of smoked tobacco, particularly its accessibility and product attributes.

## Practice and policy implications

- The NZ Government should urgently implement proper risk-proportionate regulation by restricting the accessibility and reducing the appeal and addictiveness of smoked tobacco products.
- The NZ Government should also further tighten regulations to protect young people from addiction to all other nicotine containing products.

## Authors details

[Prof Richard Edwards](#), Co-Director of ASPIRE Aotearoa Research Centre, and Department of Public Health, Ōtākou Whakaihu Waka | University of Otago

[Prof Janet Hoek](#), Co-Director of ASPIRE Aotearoa Research Centre, and Department of Public Health, Ōtākou Whakaihu Waka | University of Otago

[Assoc Prof Andrew Waa](#), Co-Director of ASPIRE Aotearoa Research Centre, and Department of Public Health, Ōtākou Whakaihu Waka | University of Otago

[Prof Nick Wilson](#), Co-Director, Public Health Communication Centre, and Department of Public Health, University of Otago Wellington

## Appendix: Statements on risk proportionate regulation in Cabinet Papers

[Casey Costello, Cabinet Paper: Reducing excise duty from Heated Tobacco Products, May 20 2024](#)

*10. .... The report back will also include advice on a risk proportionate regulatory regime to protect non-smokers from the harms of any new products made available to support smokers to quit.*

[Casey Costello, Cabinet Paper: Smokefree 2025: Cracking Down on Youth Vaping, 23 May 2024](#)

*9. This paper is part of the Government's broader work programme to achieve Smokefree 2025, which focuses on:*

*9.1 reducing the harm from tobacco by supporting smokers to quit smoking and preventing our young people from smoking;*

*9.2 cracking down on vaping amongst young people;*

*9.3 implementing a regulatory regime that manages harm in a proportionate way to achieve the broader objectives; and*

*9.4 strengthening the range of non-regulatory interventions available for those groups most at risk. [...]*

*50. I want to ensure proportionality across the various products that are regulated under the Smokefree Environments and Regulated Products Act 1990. Smoked tobacco is the most harmful product and I have asked officials for advice on what further regulatory steps could also be undertaken for smoked tobacco to ensure consistency across the suite of regulated products.*

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Public Health Expert Briefing (ISSN 2816-1203)

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### Source URL:

<https://www.phcc.org.nz/briefing/risk-proportionate-regulation-nicotine-and-tobacco-products-more-rhetoric-reality>