**Submission**

**By**

THE NEW ZEALAND INITIATIVE

And

reason FOUNDATION

# To the Health Select Committee

on the

# Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill

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Prepared by:
Guy Bentley
Reason Foundation
and
Dr Eric Crampton
Chief Economist
eric.crampton@nzinitiative.org.nz

## 0. INTRODUCTION AND SUMMARY

0.1 This submission on the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Bill is made by the New Zealand Initiative, a think tank supported primarily by chief executives of major New Zealand businesses, and the Reason Foundation, a non-profit U.S.-based think-tank. The Reason Foundation's nonpartisan public policy research promotes choice, competition, and a dynamic market economy as the foundation for human dignity and progress. The Initiative undertakes research to contribute to the development of sound public policies in New Zealand to help create a competitive, open and dynamic economy and a free, prosperous, fair, and cohesive society.

0.2 The Initiative is funded by the subscription fees of its members. The Initiative's membership spans the breadth of the New Zealand economy, from telecommunications and banking to construction, retail, and tertiary education. It also includes two tobacco companies. Its work remains independent; the breadth and diversity of our membership ensures we are not reliant on any one company or sector's continued membership. Its members in the tobacco industry have not been provided an opportunity to provide feedback on this submission.

0.3 The Initiative has, over the past several years, undertaken research into tobacco harm reduction policies because of our concern for the inequities caused by the existing tobacco control regime. That research includes *Smoke and Vapour: The changing world of tobacco harm reduction* (2018) and *The Health of the State* (2016). We have maintained a watching brief in this policy area and regularly provide public commentary on policy developments. We also submitted on the Smokefree Environments and Regulated Products (Vaping) Amendment Bill in April 2020, on vaping regulations in March 2021, and on the Proposals for a Smokefree Aotearoa 2025 Action Plan. We have consistently supported measures enabling greater access to reduced-harm alternatives to smoked tobacco.

0.4 The Bill proposes a set of novel and largely untested interventions aimed at reducing smoking rates, harms from smoking, and narrowing health disparities between Māori and non-Māori New Zealanders.

0.5 We support goals of reducing harm. But we see more downside risk than upside promise in the proposed measures, especially when viewed in the context of declining smoking rates that, in the assessment of Action on Smoking and Health's Professor Robert Beaglehole, have resulted in youths being "almost smoke-free".[1]

0.6 If nicotine content in cigarettes is restricted to levels low enough to be unsatisfactory to current smokers, the proposal risks fuelling the illicit tobacco trade while making the other proposed measures largely superfluous. If Very Low Nicotine Content rules make cigarettes unpalatable, we will have de facto prohibition on cigarettes – in the same way that, under alcohol prohibition in the United States, very low alcohol beers were not forbidden. Who is allowed to sell unpalatable cigarettes, and who is allowed to purchase them is largely irrelevant.

0.7 If allowable nicotine levels remain high enough that legal cigarettes remain palatable for current smokers, the proposal risks increasing harm if smokers respond by smoking more intensively, or by increasing the number of cigarettes smoked, to attain a desired level of nicotine. And, in that case, regulations restricting outlet numbers risk causing further harm by

[1] Professor Robert Beaglehole. 2022. "Smokefree by 2025 – fairly and simply". *The New Zealand Herald* 27 June. Available at https://www.nzherald.co.nz/nz/robert-beaglehole-smokefree-by-2025-fairly-and-simply/6YBFQFDWUXVL7Y72MIMRQW4TZE/

creating local monopoly rents. Imposing prohibition on an increasing number of Kiwis brings some of the harms of other forms of prohibition, overlaid with a potentially indefensible differential treatment of, for example, 32- and 33-year-olds with the passage of time.

0.8 We note that harm-reduction alternatives are available. Legislation currently restricts access to reduced harm alternatives. Snus has proven very successful in encouraging shifts away from combusted tobacco in Scandinavia but is prohibited in New Zealand. The SmokeFree Environment Act currently draws little distinction between smoking and vaping in designating places where nicotine consumption is allowed. Allowing vaping in more places where smoking is currently prohibited would recognise the difference in potential harm imposed on others and help encourage more smokers to shift to vaping. If combined with a shift to an air quality standard, rather than a designated spaces standard, it could also be part of an appropriate pandemic response.

0.9 We urge that the Committee reconsider the legislation. We note that the New Zealand Council for Civil Liberties has concluded that the Bill is not compatible with a free and democratic society, nor can it be amended to become compatible.[2] The Council consequently called for the legislation to be withdrawn. We support the Council's view. If the government proceeds with this legislation regardless, we urge that it drop measures that risk doing more harm than good. The government should consider alternative approaches building on existing work encouraging voluntary shifts to reduced-harm alternatives. We urge strong monitoring and review to provide off-ramps if its preferred measures do, in fact, increase net harm.

## 1. VERY LOW NICOTINE CIGARETTES (VLNCs): THE EVIDENCE

1.1 According to modelling estimating the overall health gains and reductions in health inequality between Māori and non-Māori of the government's tobacco control strategy, the vast majority of the benefits derive from denicotinisation of retail tobacco.[3] The policy rationale of mandating dramatic reduction of nicotine in combustible cigarettes has an intuitive appeal. The British tobacco researcher Michael Russell once said, "people smoke for nicotine but they die from the tar." By cutting nicotine in cigarettes to de minimus levels, the hope is that youth who experiment with cigarettes never become addicted in the first place and that a large portion of current smokers will find VLNCs unsatisfying to the point that they will quit or switch to safer nicotine alternatives. The policy remains untested, and New Zealand would be the first country to do so and within a very short time frame.

1.2 While there are no real-world examples indicating whether the policy would be a success or failure, a range of studies examining smokers' responses to lower nicotine-content cigarettes in controlled settings have been conducted in the past 15 years. Even under favourable conditions that are not reflective of the real-world such as being assigned free reduced-nicotine cigarettes, and financial inducements to participate, the results are disappointing in terms of increasing in smoking cessation. Two studies on VLNCs led by University of California San Francisco Professor Neal Benowitz, published in 2007[4] and 2012[5], found no significant

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2 New Zealand Council of Civil Liberties. Submission available at https://nzccl.org.nz/submission-smokefree-environments-and-regulated-products-smoked-tobacco-amendment-bill/

3 Ouakrim, D, T Wilson et al. 2022. "Tobacco endgame intervention impacts on health gains and Māori:non-Māori health inequity: a simulation study of the Aotearoa-New Zealand Tobacco Action Plan." *medRxiv* 18 July. Available at https://www.medrxiv.org/content/10.1101/2022.07.17.22277571v1.full

4 Benowitz NL, Hall SM, Stewart S, et al. 2007. "Nicotine and carcinogen exposure with smoking of progressively reduced nicotine content cigarette." *Cancer Epidemiol Biomarkers Prev*.

5 Benowitz NL, Dains KM, Hall SM, et al. 2012. "Smoking behavior and exposure to tobacco toxicants during 6 months of smoking progressively reduced nicotine content cigarettes." *Cancer Epidemiol Biomarkers Prev*.

change in the number of cigarettes smoked per day or exposure to toxicants among smokers assigned to using VLNCs. While respondents reported lower nicotine dependence, they will still consume roughly similar levels of lethal tobacco smoke.

1.3 A more recent study from Benowitz et al., published in 2015, randomised smokers who were not interested in quitting into two groups. One group was assigned their regular cigarettes, while the other was assigned VLNCs. Again, there was no change in the number of cigarettes smoked per day among the group assigned to VLNCs. "In smokers not interested in quitting, reducing the nicotine content in cigarettes over 12 months does not appear to result in extinction of nicotine dependence, assessed by persistently reduced nicotine intake or quitting smoking over the subsequent 12 months," the authors concluded.[6]

1.4 A 2015 randomised controlled trial by Donny et al. claimed to show more impressive results: smokers assigned the lowest nicotine cigarettes were more likely to report a quit attempt than those who continued to use regular cigarettes.[7] Study subjects were paid up to $835. Among those instructed to use VLNCs, between 73 to 81 percent said they broke the study's rules by using cigarettes with normal nicotine content between a quarter to a third of the study period. Aside from most participants not following the rules of study, Brad Rodu, professor of medicine at the University of Louisville, highlights a more alarming aspect of the study's findings:

> "The number of cigarettes smoked in the Donny study is interesting. At baseline, every group was smoking about 15 cigarettes per day. Although Gottlieb and Zeller imply that low-nicotine groups smoked fewer cigarettes at the end of the study, they actually averaged 15 to 16 cigarettes per day. Smokers of usual-brand and full-nicotine cigarettes smoked 21-22 per day after six weeks, an increase of 6-7. Perhaps Donny contributed to this increased consumption by providing full nicotine cigarettes for free."[8]

1.5 Even more worrying than the lack of evidence demonstrating clear reductions in smoking are the impacts VLNCs could have on specific populations. A 2015 study on the extent of compensatory smoking in response to reduced-nicotine cigarettes showed that those participants found to be higher in nicotine dependence as measured by the Fagerstrom Test of Cigarette Dependence actually smoked more cigarettes per day over the course of the study.[9] Research by Higgins et al. focusing on socioeconomically disadvantaged women, people with opioid use disorder, and those suffering from psychiatric or mood disorders found those assigned to VLNCs did smoke five to seven fewer cigarettes per day than those using regular cigarettes. But, unfortunately, they were no more successful in quitting smoking altogether.

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6 Benowitz NL, Nardone N, Dains KM, Hall SM, Stewart S, Dempsey D, Jacob P 3rd. 2015. "Effect of reducing the nicotine content of cigarettes on cigarette smoking behavior and tobacco smoke toxicant exposure: 2-year follow up." *Addiction*. October. Available at https://pubmed.ncbi.nlm.nih.gov/26198394/

7 Donny, Eric, Rachel Denlinger et al. 2015. "Randomized trial of reduced-nicotine standards for cigarettes." *New England Journal of Medicine* 373: 1340-9. Available at https://www.nejm.org/doi/full/10.1056/nejmsa1502403

8 Rodu, Brad. 2017. "Negligible evidence of radical nicotine reduction benefit." R Street. 24 August. Available at https://www.rstreet.org/2017/08/24/negligible-evidence-of-radical-nicotine-reduction-benefit/

9 Bandiera, F, K Ross, et al. 2015. "Nicotine dependence, nicotine metabolism, and the extent of compensation in response to reduced nicotine content cigarettes." *Nicotine Tobacco Research* 17:9, pp 1167-1172. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4542742/ .

1.6 There is some limited research, some of which conducted in New Zealand,[10] suggesting that VLNCs combined with traditional nicotine replacement therapies can yield some success in increasing smoking cessation among smokers who are already motivated to quit.[11] The study also finds that while reduced-nicotine cigarettes were associated with compensatory smoking behaviours, where smokers try to make up for reduced nicotine content by smoking more or more intensely, very low nicotine cigarettes were not so-associated. It should be noted that all studies of VLNCs suffer from serious drawbacks that put into question their value in assessing what the real-world consequences of a VLNC mandate would be. Typical trials suffer from substantial dropout among participants, noncompliance with the study's rules and include financial incentives.

1.7 Speaking to The New York Times in reference to a similar proposal to reduce the amount of nicotine in cigarettes in the United States, Lynn T. Kozlowski, a tobacco control expert from the University at Buffalo, expressed caution. He warned that VLNC rules would amount to an experiment without adequate real-world testing, that trials involved paid participants, and that some trial participants surreptitiously continued smoking their preferred brands while participating in the trial.[12]

1.8 Given the paucity of evidence suggesting smokers abruptly faced with a market only consisting of VLNCs will substantially reduce their smoking (let alone quit), it is difficult to ascertain why the modelling, which has not yet received peer-review, suggests such an immediate and dramatic decline in smoking as a result of denicotinisation. There is a particular reason to believe the modelling's assumptions are overgenerous as there is very little account given to the likely rise in the illicit tobacco trade and the possibility of consumers and entrepreneurs finding ways to easily add nicotine to VLNCs. The most recent and previous modelling on which the authors partially base their assumptions use a process known as "expert elicitation."[13] This process involves asking experts to assign probabilities to various outcomes of as yet untested or little-tested policy interventions. These are educated estimates and guesses of what may occur in a given policy environment, not empirically tested or replicated data. Unfortunately, that may be the best that can be done in novel areas.

1.9 To their credit, the authors concede that: "To date, the implementation of endgame interventions has been minimal and, consequently, the evidence base of their potential effects is weak." The authors go on to state: "These measures do not directly address basic causes or social determinants of smoking related inequities. However, they substantively circumvent the role of agency (e.g., individual access to necessary social or economic resources) in being able to quit smoking or resisting initiation."

1.10 Smoking is disproportionately concentrated in low-income communities and those with less formal education. Building upon relevant community experience in encouraging shifts to less

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[10] Walker, Natalie, Colin Howe et al. 2012. "The combined effect of very low nicotine content cigarettes, used as an adjunct to usual Quitline care (nicotine replacement therapy and behavioural support), on smoking cessation: a randomised control trial." *Addiction* 107:10, pp 1857-67. Available at https://pubmed.ncbi.nlm.nih.gov/22594651/

[11] Hatsukami, D, M Kotlyar et al. 2010. "Reduced nicotine content cigarettes: effects on toxicant exposure, dependence and cessation." *Addiction* 105:2, pp 343-55. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4565618/

[12] Jacobs, A. 2022. "Breaking nicotine's powerful draw." *The New York Times* 2 August. Available at https://www.nytimes.com/2022/08/02/health/fda-nicotine-addiction.html

[13] Wilson, N, J Hoek, et al. 2022. "Modelling the impacts of tobacco denicotinisation on achieving the Smokefree 2025 goal in Aotearoa New Zealand." *New Zealand Medical Journal* 135:1548, pp 65-76. Available at https://pubmed.ncbi.nlm.nih.gov/35728131/

harmful alternatives to combusted tobacco may yield far more promising results in terms of reducing smoking than the prohibition of an entire category of tobacco products and their replacement with an equally deadly but substantially altered product.

## 2. PROHIBITION AND SOCIAL JUSTICE

2.1 One of the driving forces behind the Smokefree Aotearoa 2025 Action Plan is the goal to narrow health disparities between Māori and non-Māori New Zealanders. Māori smoking rates are elevated compared to the rest of New Zealand's population. It is a pattern not unique to New Zealand. Groups with fewer educational opportunities and lower incomes are far more likely to smoke. They can also be disproportionately harmed by prohibitionist approaches.

2.2 VLNC rules, if sufficiently binding to make smoking unpalatable, amount to tobacco prohibition. Alcohol prohibition in America allowed the sale of 'near-beers' of less than 0.5% alcohol. Despite beer-like liquids being legal, illicit trade in alcohol flourished. We will here refer to VLNC rules sufficiently stringent as to make cigarettes unpalatable to current smokers as constituting tobacco prohibition.

2.3 However, alcohol prohibition was fundamentally different from the proposed tobacco prohibition. Alcohol itself was prohibited except as prescribed medicinally, or as used in religious sacraments. Under stringent VLNC rules, cigarettes would be de facto prohibited, while nicotine would remain legal if delivered through vaping.

2.4 How tobacco prohibition will play out in New Zealand, where the illicit tobacco trade is growing but where many legal and safer forms of nicotine are available, is impossible to predict accurately.

2.5 Results of trials of VLNC cigarettes in combination with less-preferred alternatives like lozenges, gums and patches could underestimate shifts to less-harmful alternatives if applied in places where legal access to vaping is widespread. To the best of our knowledge, no studies have tested whether VLNC cigarettes increase uptake of vaping in places where vaping is readily available. One New Zealand trial tested e-cigarettes against the patch as a stop-smoking method, and found that smokers assigned to the patch-only test group abandoned the trial.[14] But assigning VLNC cigarettes in combination with e-cigarettes has not, to the best of our knowledge, been tested, whether with e-cigarettes supplied by the researchers, or simply available in the community.

2.6 Smith et al (2018)[15] suggest that nicotine content restrictions at moderate nicotine levels are likely to encourage greater amounts of smoking while restrictions to very low levels are likely to encourage smokers to shift to other ways of getting nicotine. They also warn that smokers "could try to add nicotine to their cigarettes, possibly by adding e-liquids or other nicotine-containing fluids." They also warn some smokers may see lower-nicotine cigarettes as less harmful, so strengthened information campaigns will be necessary.

2.7 That there will be some increase in the illicit trade is obvious. But the proportion of current smokers who, under tobacco prohibition, shift to available reduced-harm alternatives, as compared to the illicit trade, is fundamentally uncertain.

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[14] Walker, N, V Parag et al. 2020. "Nicotine patches used in combination with e-cigarettes (with and without nicotine) for smoking cessation: a pragmatic, randomised trial." *Lancet Respir Med* 8:1, pp 54-64. Available at https://pubmed.ncbi.nlm.nih.gov/31515173/

[15] Smith, T et al. "Whether to push or pull? Nicotine reduction and non-combusted alternatives - Two strategies for reducing smoking and improving public health." Preventive medicine vol. 117 (2018): 8-14. Available at https://pubmed.ncbi.nlm.nih.gov/29604326/

2.8 What we do know is that prohibitionist approaches have inequitable effects. And we view it as particularly risky to encourage an increase in the illicit trade when far more work could be done in encouraging shifts to less-harmful alternatives.

2.9 Simply put, if current smokers have been able to find paths to less-harmful alternatives that work for them, illicit trade in cigarettes will not particularly matter. However, if a prohibitionist approach fuels the illicit trade before current smokers have made that shift, the government risks reducing those smokers' chances of shifting to a less-harmful alternative. If current smokers find reliable sources of illicit, untaxed, full-strength tobacco, the cost advantage of vaping over smoking substantially reduces. Strengthening supply chains in the illicit trade would undermine the purposes of the SmokeFree Environments Act in reducing harm.

2.10 To look at an even more extreme example of product restrictions gone awry, the Kingdom of Bhutan banned all tobacco products in 2004. A study in the International Journal of Drug Policy found that claims the ban would "induce tobacco consumption to cease or nearly cease has not occurred."[16] The ban sparked an enormous black market, and Bhutan abandoned its prohibition in 2020.[17]

2.11 More recently, South Africa banned the sale of all tobacco and vaping products as non-essential during their Covid lockdown. According to a 2022 study published in Tobacco Control surveying smokers before, during, and after the ban found that most smokers continued using cigarettes. Only 9% quit.[18] "Despite the ban, the sale of cigarettes did not cease; rather, it caused major disruption to the cigarette market," the authors write. "The ban inadvertently benefited manufacturers who were previously disproportionately involved in illicit activities; these manufacturers increased their market share even after the ban was lifted. The ban may have further entrenched South Africa's already large illicit market. Our results show that there are unintended consequences associated with a temporary ban on the sale of cigarettes." The researchers concluded that illicit markets must be under control before attempting to prohibit tobacco. South Africa has since reversed its tobacco prohibition.

2.12 Even total tobacco prohibition has not stopped smokers from smoking. Experience suggests that smokers will continue to be supplied with cigarettes from a greatly expanded market for illicit tobacco. However, vaping was not available as an alternative in Bhutan or South Africa during their experiments with prohibition.

2.13 Faced with VLNC rules, some proportion of current smokers may continue with VLNC cigarettes, some proportion will quit entirely, some proportion will flip to reduced-harm forms of nicotine, and some proportion will shift to the illicit market. Existing experiments with tobacco prohibition suggest that quit rates will be low. Lack of commercial success of low-nicotine cigarettes suggests few smokers will find VLNC cigarettes satisfactory.[19] The proposed

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[16] Givel MS. "History of Bhutan's prohibition of cigarettes: implications for neo-prohibitionists and their critics." International Journal of Drug Policy. July 2011. Available at https://pubmed.ncbi.nlm.nih.gov/21703843/

[17] "Bhutan lifts tobacco ban amid coronavirus measures," Aljazeera.com, Al Jazeera. 29 August 2020. Available at https://www.aljazeera.com/news/2020/8/29/bhutan-lifts-tobacco-ban-amid-coronavirus-measures

[18] Filby, S, K van der Zee, and C van Walbeek. 2021. "The temporary ban on tobacco sales in South Africa: lessons for endgame strategies." *Tobacco Control*. Available at https://tobaccocontrol.bmj.com/content/early/2021/10/20/tobaccocontrol-2020-056209

[19] See discussion in Crampton, E. 2022. "'Prohibition' approach to smoking unlikely to succeed." Dominion Post, 25 July. Available at https://www.stuff.co.nz/business/opinion-analysis/300644727/prohibition-approach-to-smoking-unlikely-to-succeed

legislation will only succeed in achieving the purposes of the Act if leakage to illicit markets is minimal. But there is no good basis for determining whether the Bill will do more to encourage shifts to alternative forms of nicotine, or to illicit markets.

2.14 Existing high excise rates provide a reasonable incentive to import illicit tobacco. Oxford Economics showed increasing illicit consumption in New Zealand through 2017, with the illicit market making up over ten percent of the overall market.[20]

2.15 There will also be an incentive for entrepreneurs to find ways to add nicotine to VLNC cigarettes. The Ministry of Health may wish to test whether there are any health risks of smoking e-liquids dried onto loose tobacco or other synthetic materials. The Ministry will be aware of cases where prisoners responded to a smoking ban by trying to smoke their nicotine patches,[21] or nicotine-infused tea leaves.[22]

2.16 To enforce a new prohibition, police and customs agents will need to dedicate resources to surveil and counter the likely growth of the trade in illicit tobacco. The Regulatory Impact Statement notes that "the illicit market has been increasing, and recommended policy changes are likely to exacerbate this" but does not otherwise consider compliance and enforcement.[23]

2.17 Budget 2022 allocated $2.5 million per year, over four years, to the Customs Service. The Minister of Customs noted that "Customs has seen a significant increase in the smuggling of tobacco products into New Zealand over recent years."[24] We suspect $2.5 million per year may be inadequate for this task. The excise content of a kilogram of tobacco is well over $1500 per kilogram. So smuggling less than two tonnes of tobacco into New Zealand could yield profits in excess of the entire annual increase in the customs budget to combat smuggling. When the illicit market is the only place to find full-strength cigarettes, demand for illicit cigarettes will increase.

2.18 Because Māori have higher smoking rates, we can reasonably expect much of the demand for illicit cigarettes to be concentrated in Māori communities. Criminalising the conventional tobacco market may unintentionally lead to more unnecessary police interactions with Māori, who are already 5.7 times more likely to have a police interaction than other New Zealanders.[25] If enforcement efforts focus on blocking illicit supplies at the border, those inequities may be smaller. If enforcement extends into the community, inequities may be exacerbated.

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[20] Oxford Economics, 2017. Available at https://illicittobacco.oxfordeconomics.com/markets/new-zealand/

[21] Johnston, Kirsty and Clio Francis. 2011. "Inmates smoke nicotine patches". *Stuff*. 30 June. Available at http://www.stuff.co.nz/national/politics/5209835/Inmates-smoke-nicotine-patches

[22] University of Queensland Centre for Health Services Research. 2018. "Prisoners smoke nicotine-infused tea leaves." 16 August. Available at https://chsr.centre.uq.edu.au/article/2018/08/prisoners-smoke-nicotine-infused-tea-leaves

[23] "Regulatory Impact Statement: Smokefree Aotearoa Action Plan." 2021. Available at https://www.health.govt.nz/system/files/documents/information-release/ris-smokefree-aotearoa-action-plan-nov21.pdf

[24] Hon Meka Whaitiri. 2022. "Stubbing out tobacco smuggling." Press release available at https://www.beehive.govt.nz/release/stubbing-out-tobacco-smuggling

[25] See, for example, "Turuki!: Transforming our criminal justice system. The second report of Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group." 2019. Available at https://www.beehive.govt.nz/sites/default/files/2019-12/Turuki%20Turuki.pdf

2.19 Proponents of the current tobacco control plan argue New Zealand's geography largely insulates it from any future trade in illicit cigarettes. But the existing illicit tobacco trade, combined with New Zealand's experience with other prohibitions, suggests this will not be the case. Like cannabis, tobacco can be and is grown in New Zealand. Methamphetamine is imported as finished product, despite vigorous enforcement efforts. In both cases, enforcement and penalties are likely to be more stringent than would be the case for tobacco. If there remains strong demand for full-strength cigarettes after VLNC rules are in place, supply will find a way.

2.20 The strongest defence against shifts to the illicit market is reducing demand for full-strength cigarettes by ensuring broadest possible access to reduced-harm alternatives. While New Zealand has, by international standards, a reasonable framework for vaping, it is still relatively recent. Some communities have not yet been reached. And different reduced-harm alternatives work for different smokers.

2.21 Part 4, below, will return to options for encouraging greater uptake of reduced-harm alternatives. It applies regardless of whether VLNC restrictions amounting to prohibition are put in place, or whether nicotine-reduction simply restricts against the highest-strength cigarettes.

2.22 If VLNC restrictions amount to prohibition on conventional cigarettes, retail and age restrictions will not have substantial additional effect. If they instead only restrict against the highest-strength cigarettes, the effects of retail and age restrictions are worth considering.

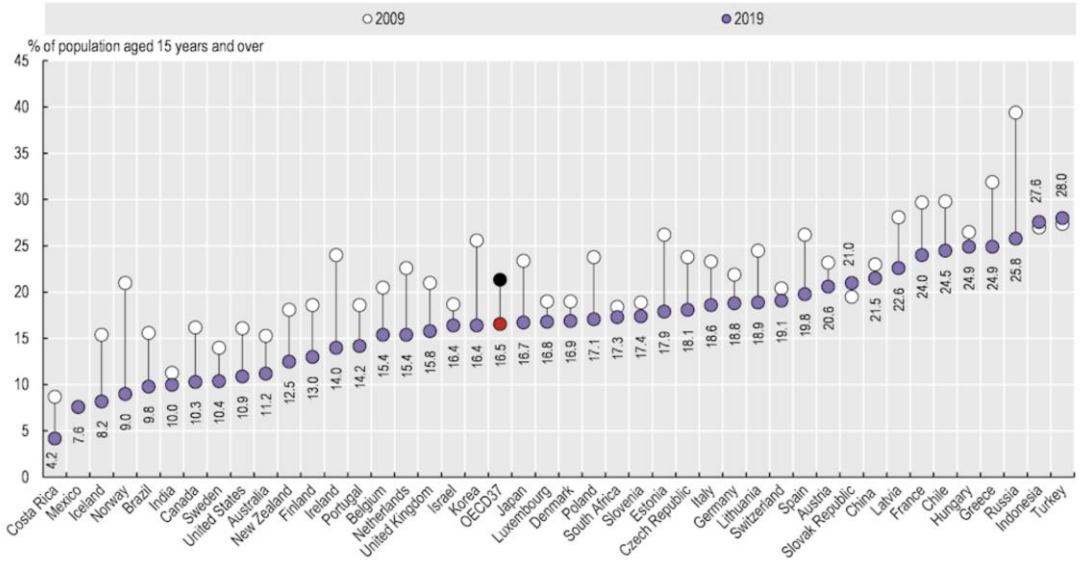
## 3. RETAIL AND AGE RESTRICTIONS

3.1 Hungary is the only country of which we are aware with a policy comparable to what the government is proposing with respect to retail outlet limitation. In 2013, Hungary cut the number of outlets in the country allowed to sell tobacco by 83 percent.

3.2 OECD statistics show that Hungary experienced one of the smallest declines in smoking from 2009 through 2019.[26] It is always possible that smoking rates might have increased in the absence of the retail rule, but the simpler explanation is that retail licensing had little effect.

[26] OECD Health Statistics 2021. "Population aged 15 and over smoking daily, 2009 and 2019 (or nearest years)." Available at https://www.oecd-ilibrary.org/sites/611b5b35-en/index.html?itemId=/content/component/611b5b35-en

Figure 4.2. **Population aged 15 and over smoking daily, 2009 and 2019 (or nearest years)**




3.3 A 2020 study published in Tobacco Control examining tobacco retail licensing systems in Europe found there is "little empirical evidence for the effect of tobacco licensing on smoking behaviors",[27] though it viewed retail licensing as promising toward denormalisation and monitoring of tobacco retail.

3.4 A recent metastudy[28] found that while there is some support for an association between outlet density and youth smoking, "current literature does not provide consistent evidence for a positive association between outlet density and smoking among youth." The policy may not be as effective as the Ministry wishes.

3.5 Retail licensing systems aimed at reducing retail prevalence, if binding, necessarily provide limited monopoly profits to retailers securing licenses. They restrict competition. If a set of retailers found a way, amongst themselves, to put some of their competitors out of business and to prevent new competitors from emerging in those places, the Commerce Commission would most likely deem it to be criminal cartel behaviour aimed at increasing their profits. The government here proposes a scheme that would be illegal for retailers to come to on their own.

3.6 Monopolies in the production of public bads are not necessarily bad: for economists, the main harm of cartels and monopolies is the restriction of output to levels below those that would obtain absent restrictions on competition. Such restrictions are a bad when considering goods, but may be viewed as a good when considering products viewed as bads.

3.7 However, monopoly or oligopolistic restrictions involve a reduction in sales with an increase in price. If government wished to effect a reduction in demand through an increase in price, excise may be preferred. To the extent that limitations on competition result in an ability of retailers to increase price on cigarettes above competitive norms, cigarette sales will become more profitable for those retailers than other product lines. And in other areas, the

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[27] Kuipers, M, P Nuyts, et al. 2021. "Tobacco retail licensing systems in Europe." *Tobacco Control*. Available at http://dx.doi.org/10.1136/tobaccocontrol-2020-055910

[28] P Nuyts, L Davies et al. 2021. "The Association Between Tobacco Outlet Density and Smoking Among Young People: A Systematic Methodological Review." *Nicotine & Tobacco Research*, 23:2, pp. 239–248, available at https://doi.org/10.1093/ntr/ntz153

government has been particularly worried about the potential for limited competition to result in transfers from consumers to vendors or suppliers. In this case, regulation will enforce that outcome.

3.8 The mechanism is fairly simple and is the same one that the Commerce Commission would consider when looking at private action achieving the same result. If there are many retail outlets, the ability to charge excess prices is constrained by nearby competitors. Suppose the nearest alternative supplier is some distance away. In that case, the local retailer can charge excess prices limited by the inconvenience of travelling to that alternative supplier, and by the threat of entry by a new supplier. When the nearest competitor is farther away, and no new competitor is allowed to enter, potential for local monopoly rents is higher.

3.9 The holder of a local monopoly licence, created and enforced by the state, will earn excess profits created by that licence – at least when the licensing system is first established. Any excess profits will, over time, capitalise into the value of the business until it is again earning only a normal rate of return on its capital base.[29] It becomes a wealth transfer, with higher ongoing payments from consumers funding an increase in the wealth of those holding permits to sell cigarettes when the regime is implemented.

3.10 Local monopoly rents that would obtain with any serious reduction in the number of allowed tobacco retail outlets would be reduced if competition can be provided by online retailers.

3.11 If the government is determined to go ahead with what amount to sinking lid policies on the number of allowed outlets, we urge that it think more deeply about the effects of creating what would amount to a cartel restriction against entry, to consult with the Commerce Commission about potential ways of maintaining competition despite the restriction, and to monitor the effects of the restrictions on retail pricing. Where tobacco control has increasingly become aware of the harms caused by high excise rates, it should also worry about the effects of local monopoly premiums.

3.12 We would also urge region-based staggering of the implementation of any reduction in outlet density to facilitate better evaluation of effects than has thus far been possible in the literature.

3.13 While enforcement action in preventing illicit tobacco, focused on the border, may have limited effects on exacerbating current inequities in the justice system, enforcement of creeping age restrictions on supply of tobacco products raises more serious concerns.

3.14 The Bill provides for penalties of up to $50,000 for supplying ineligible persons with a smoked tobacco product. Informal social supply, including by family, is included if the product is provided in a public place. If in 2039, a man born in 2008 provides a cigar to his sister, born in 2010, and aged 29, at a remote beach, he would be liable for a fine of up to $50,000 for doing so.

3.15 Legislation this broad and arbitrary strongly risks being enforced in a highly discriminatory fashion. All of the inequities currently seen in enforcement of cannabis legislation are likely to be replicated in enforcement of this legislation, unless the absurdity of fining a 31-year-old for giving a cigar or cigarette to a 29-year-old proves too great and the legislation crumbles under its own weight – either in favour of a return to a fixed age restriction, or to extend the prohibition to all ages.

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[29] See discussion in, for example, Tullock, G. 1975. "The Transitional Gains Trap." *The Bell Journal of Economics* 6:2.

3.16 Restrictions on retail outlets will be of little consequence if VLNC regulations amount to prohibition of any cigarette that a smoker would be willing to consume. Age restrictions could continue to bind, however, as illicit supply strengthens. The 31-year-old, in 3.13, could be providing an illicitly-obtained tobacco product.

3.17 We very strongly expect harsh inequities in the administration of this legislation if passed in current form. If the government is determined to proceed with policy that applies prohibition to increasing proportions of the population, by age, we most strongly urge that the effects of the legislation be monitored to ensure that its penalties are not disproportionately being applied against marginalised communities.

3.18 VLNC restrictions, age restrictions, and retail licensing restrictions risk imposing substantial harm. VLNC restrictions particularly risk fuelling demand for illicit tobacco. If illicit supply channels become better entrenched, it will be harder to encourage shifts to reduced-harm alternatives.

3.19 A greater focus on promoting reduced-harm alternatives would do more good in achieving the purposes of the SmokeFree Environments Act and have less risk of adverse consequences.

## 4. A REDUCED HARM ALTERNATIVE

4.1 When the Smokefree 2025 target was set in 2011, reduced harm alternatives were not broadly available. Snus showed great promise in Scandinavia but was here asserted to be prohibited under the SmokeFree Environment's Act prohibition on the sale of chewed tobacco, or tobacco used through methods comparable to chewing. Vaping was becoming more prominent in the United States but was only beginning to be recognised as an aid in smoking cessation.

4.2 When people are addicted to nicotine and the only alternatives to smoked tobacco are patches and gums that many smokers found distasteful or ineffective, making smoking increasingly less attractive was the only viable policy for reducing smoking rates.

4.3 In the absence of palatable reduced-harm ways of accessing nicotine, restrictions could potentially be justified as making even smokers themselves better off under behavioural economics assumptions around the nature of addiction and internalities. Those justifications are debatable – internalities remain a contestable issue. But the case was defensible. Hefty informational campaigns about the harms of smoking would encourage some to quit, and more to avoid taking up smoking in the first place. But addiction makes quitting costly, and the health costs of smoked tobacco to the smoker are substantial. So more coercive measures, like prohibitions on use in a wider set of spaces and hefty increases in tobacco excise, could be justified on behavioural economics grounds. The measures are contestible but defensible.

4.4 It was in that context that SmokeFree 2025 was set. Getting smoking rates down to less than 5% through restrictive measures affecting smokers could potentially make smokers themselves better off if internality arguments held.

4.5 Since 2011, access to reduced harm alternatives has expanded considerably. But the path was and is fraught. For too long, the government actively discouraged uptake of less harmful alternatives to smoked tobacco. Legalisation of vaping was forced by a court decision that heated tobacco products were not covered by prohibitions on chewed tobacco. Parliament did not legalise vaping. The Court determined that it had never actually been prohibited. In effect, the Ministry of Health had for years been falsely asserting that a reduced-harm

alternative was illegal to supply. It actively prevented achieving the aims of the SmokeFree Environments Act. The regulatory regime around vaping came after the Court determined it had never been illegal.

4.6 The current regulatory regime around vaping is not perfect but is world-leading. Other reduced-harm alternatives like snus, which has proven effective in reducing smoking in northern Europe and was almost certainly legalised under the Court decision in PMI, because snus use is not at all like chewing, was explicitly banned.

4.7 Ensuring that smokers who wish to quit have ready access to less harmful alternatives, including not only patches and nicotine gums but also vaping products, heated tobacco products, and snus, is an enabling intervention.

4.8 New Zealand still has progress to make in encouraging switching to reduced harm alternatives, including vaping. There remain many smokers who could shift to vaping, or heated tobacco. The Ministry of Health and the Health Promotion Agency began informational campaigns like the Vaping Facts website in 2019 and the Vape To Quit Strong campaign.

4.9 These campaigns must overcome strong disinformation about vaping risks. In 2019, illicit THC vaping cartridges containing Vitamin E acetate led to severe lung disease in the United States. Media, including in New Zealand, frequently reported these cases as being due to vaping more generally, or provided headlines that failed to distinguish illicit THC vaping from nicotine vaping.

4.10 Media scare campaigns around vaping did real harm. In the UK, the proportion of 11- to 18-year-olds who thought vaping was less harmful than cigarettes declined from 68% in 2014 to 52% in 2019 – even though all of the scare stories were out of the United States.[30] While we have not seen comparable data in New Zealand, we would expect that these scare stories had similar effects on views about the relative safety of vaping. Radio New Zealand frequently provided stories on vaping during this period best described as misinformation.

4.11 The combination of media scare campaigns against vaping and slow legalisation of reduced-harm alternatives will have reduced switching, slowing progress toward SmokeFree 2025.

4.12 New Zealand Health Survey data suggests strong progress to SmokeFree 2025. We may not hit 5% by 2025, but it could be close on current trends. In 2006/07, 18.3% were daily smokers, and 10.7% of daily smokers were heavy smokers. In 2019/20, 11.6% were daily smokers and 6.2% of daily smokers were heavy smokers. The prevalence of heavy smoking has consequently dropped from 1.96% to 0.72%. And daily smoking rates have dropped by almost 40%.

4.13 In the subsequent year, smoking rates dropped again. From 2019/20 to 2020/21, the proportion of current smokers dropped from 13.7% to 10.9%; daily smokers dropped from 11.9% to 9.4%. The increase in daily e-cigarette users roughly matched the drop in daily current smokers.

4.14 By 2025, every smoker should be aware of reduced harm alternatives. The Ministry of Health and Health Promotion Agency have launched laudable initiatives encouraging switching.

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[30] See Kelland, Kate. 2020. "'False fears' about vaping stopping smokers using e-cigs – UK report". Reuters, 4 March. The story cites survey work commissioned by Public Health England. Available at https://www.reuters.com/article/health-ecigarettes-britain/false-fears-about-vaping-stopping-smokers-using-e-cigs-uk-report-idUSL8N2AW74B

Community outreach programmes led by ex-smokers may also continue to assist if those programmes are not hindered by regulations restricting such work. If reduced harm alternatives are not accessible to all smokers and potential smokers at that point, it will be consequence of policy failures in setting the regulatory framework for those alternatives.

4.15 Broader availability of reduced harm alternatives to smoked tobacco should lead to reconsidering how we think about the SmokeFree 2025 target.

4.16 When viable alternatives to smoked tobacco are available, making smoking less attractive, whether by reducing a cigarette's nicotine content, removing its filter, or making it more difficult for smokers to find the product, is not the only route to reducing the harms associated with smoking. Encouraging smokers to find the reduced harm alternative that works best for them becomes possible. And there is progress yet to make in familiarising smokers with less harmful alternatives.

4.17 If no alternative to smoking exists for those addicted to nicotine, a plausible but debatable case can be made that at least some smokers are benefitted by restricting their access to tobacco. When smokers are well informed about alternatives, and the health harms of smoking, and they nevertheless choose to smoke rather than a reduced harm alternative, that case is more fraught. Addiction alone cannot make the case: less harmful ways of using nicotine are available. We then have a confronting public policy problem, which is in essence, a value judgement. Can an individual be allowed to choose to do something, knowing that it is harmful? Nicotine addiction alone cannot justify restrictions if less harmful ways of accessing nicotine are rejected by the smoker.

4.18 This leads us to a divergence of approaches to thinking about the SmokeFree target. If the target is taken as a goal that must be achieved, regardless of cost and regardless of the views of current smokers, then even very costly and punitive approaches can be justified in achieving it. In that case, strong monitoring against unintended adverse consequences can be warranted – as well as monitoring to ensure that illicit supply has not simply taken over the market.

4.19 If the target of smoking prevalence of less than 5% instead is viewed as an outcome that is likely to obtain when smokers have a wide variety of reduced-harm alternatives to smoked tobacco, then hastening the availability of reduced-harm alternatives and countering disinformation about those alternatives becomes more important. And the government's slow movement toward accepting reduced harm alternatives should be taken into account. The government's position, until very recently, was that these alternatives were illegal.

4.20 The Bill recommends licensing all tobacco and vaping retailers with a view to reducing tobacco availability by reducing outlet density. It recommends implementing tobacco prohibition, one year at a time, by increasing the minimum age for tobacco supply by one year every year until New Zealand achieves full prohibition of tobacco. It suggests reducing nicotine in smoked tobacco products to very low levels.

4.21 Restrictive policies are more difficult to justify when smoking is more likely to be an exercised choice rather than a habit compelled by addiction. If someone chooses to smoke, despite wide availability of reduced-harm alternatives and ample information about the harms of smoking, it is harder to make the case that the smoker can be made better off by further restrictions on tobacco.

4.22 Normally, we can draw from a strong international literature to see how policies have turned out in other places. Most of the proposals here are novel.

4.23 Continued and enhanced support for smokers in shifting to reduced harm alternatives is warranted. The government needs to ensure that the regulatory environment is not unduly restrictive to uptake of those alternatives.

4.24 Proposals to implement prohibition incrementally, year by year, in the first instance risks encouraging younger people to seek supply from older cohorts, and later encourages other illicit supply. It is also a substantial restriction on individual liberty that risks further substantial restrictions on individual liberty in other consumption areas to come. Youth smoking rates have declined substantially. One could, on that basis, argue that few youth would be adversely affected – since few now make the choice to smoke cigarettes. But one could argue, on the same basis, that the prohibition is not needed. Very few youths taking up smoking does not justify prohibition extending to an increasingly large cohort.

4.25 Measures are readily available to enhance access to reduced-harm alternatives. They should be preferred in the first instance. These measures include:

4.25.1 Legalising snus for retail sale through vendors authorised to sell vaping products;

4.25.2 Removing the prohibition on vaping in public places where smoking is currently banned. Current policy can force vapers out into the rain with smokers, which hardly provides encouragement to vape rather than smoke.

4.26 If desired, and in line with more public health concerns far more pressing than either smoking or vaping, the government could decide to set an indoor air quality standard for places wishing to cater to vaping and/or smoking customers.

4.26.1 Government has been reluctant to recognise indoor air quality as a substantial health and safety issue during pandemics. Worksafe will impose enormous cost to prevent falls from heights, but workplaces with no ventilation and no mask adherence are not considered under current health and safety regimes.

4.26.2 Government could well be justified in being reluctant to impose further costs on businesses through potentially costly air quality standards. However, it could provide incentive for hospitality and other venues to implement improved air quality by allowing them to cater to vapers, and potentially smokers as well, if indoor air quality can be maintained at levels consistent with preventing harms from second-hand smoke. Shifting from a defined-areas standard for deciding where consumption is allowed to an air quality standard has stronger public health basis and would simplify enforcement when the definition of outdoor areas, for example, is sometimes contentious.

4.26.3 Ventilation and air filtration sufficient to ensure second-hand smoke and vape is filtered from the air would also assist in reducing the spread of airborne illnesses like Covid. Government should consider providing venues with that option.