12 September 2016

Ministry of Health
PO Box 5013
Wellington 6140
NEW ZEALAND

Dear Sir or Madam,

POLICY OPTIONS FOR THE REGULATION OF ELECTRONIC CIGARETTES

Thank you for the opportunity to make a submission as part of the public consultation process in relation to the New Zealand Government’s announcement that it has decided in principle to adjust the legal status of e-cigarettes, allowing their availability with appropriate controls.

As outlined in the Appendix, I have a background in Australian health policy, administration and regulation. I am not medically or scientifically qualified in relation to medicine, pharmacology and addiction. However, I have worked extensively in health policy-making in Australia, and currently consult and write on health policy, regulation and related politics, through which I developed a particular policy interest in personal health choices and harm reduction.

On the other hand, my experience in policy-making and politics is relevant to expressing considered views on the intent and practical implications of regulatory reform relating to ENDS and nicotine.

Introduction

The purpose of this submission is to offer policy-based insights drawn from Australian experience in relation to Electronic Nicotine Delivery Systems (ENDS), best known as e-cigarettes. It is not intended to be prescriptive or presumptuous, and does not presume that Australia is doing better than New Zealand in this space. If anything, it is lagging behind New Zealand.

New Zealand’s move to legalise access to nicotine-containing ENDS shows progressive yet practical policy thinking well ahead of Australia’s, embracing rather than rejecting a disruptive but still emerging new technology as a tobacco harm-minimisation approach to New Zealand’s ambitious Smokefree 2025 goal.

I also understand New Zealand is the first jurisdiction to make nicotine-containing ENDS legal before integrating them into a national tobacco harm reduction regulatory framework. That in itself is ground-breaking, and New Zealand is offering policy leadership to Australian and other jurisdictions as they grapple with similar decisions.

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Nicotine-containing ENDS and the harm reduction principle

The harm reduction principle should be the principal basis of both public and population health policy and regulation.

In that regard, there is a public policy case for disruptive new technologies, like ENDS, to be given the benefit of the doubt, under appropriate conditions, rather than suppressed from public access until sufficient evidence is deemed to be accumulated. If they mitigate risk, and therefore adverse morbidity and mortality consequences, for smokers who make the switch, that is a good thing.

Even more important is making ENDS technology to smokers on the balance of evidence probabilities and not waiting, as comparable jurisdictions are, until the weight of favourable evidence is irresistible.

This is the positive regulatory attitude taken to ENDS in the United Kingdom and, to a lesser extent, the European Union. In other countries, including Australia, the approach is the reverse. From a harm reduction perspective, an ultra-cautious approach is problematic and ethically-troubling: if there are reasonable grounds to legalise new technology but it is still withheld from at-risk smokers, it effectively prolongs the exposure of those smokers to the known deadly risks of cigarette use despite the less-risk alternative being available.

While proponents of the precautionary banning approach sincerely believe that if the weight of evidences justifies liberalising access to ENDS in due course, regulatory suppressions can always be eased at some later point. The practical problem, however, is that legislation-based regulation, once in place, is actually difficult to amend or repeal in the parliamentary process, especially if it is contested.

This submission therefore presumes that the early access to ENDS approach is the more ethical and more consistent with the spirit of the harm reduction principle.

ENDS and attaining a Smokefree 2025

The cross-party commitment to making New Zealand smoke-free by 2025 is respected in Australia and internationally as well as in New Zealand. Indeed, the cross-party support for the Government’s move towards legalising nicotine-containing ENDS to achieve the goals of Smokefree 2025 is commendable, and gives sensible policy change near unstoppable momentum.

Given current rates of smoking in the whole New Zealand population, and especially the very high rates among Maori and Pacific Islander communities, it is clear reducing smoking rates to zero in a decade is unrealistic unless drastic and costly measures are taken with no guarantees of success.

On the other hand, legalising and sensibly regulating access to ENDS is, as the Government and others have suggested, a potential disrupter that makes Smokefree 2025 potentially more than simply an aspirational goal. Regulated prudently, will offer New Zealand smokers a safer, more affordable and more socially-acceptable alternative to traditional cigarettes and their deadly chemical cocktail, and if taken up on a wide scale, offer the possibility of making big inroads on, especially, Maori and Pacific Islander populations smoking rates.

Content of this submission

In suggesting issues for consideration in framing enabling legislation and regulations to implement this policy change, this paper offers insights and suggestions in the following areas:
• Nicotine-containing ENDS as a legitimate tobacco harm reduction mechanism.
• Whether access to nicotine-containing ENDS should be general or restricted, including their sale, packaging and marketing.
• The appropriate fiscal treatment of ENDS products; and
• Regulating vaping in public and social spaces.

This paper is not intended to be prescriptive or exhaustive, and does not propose any specific amendments to the *Smokefree Environments Act 1990* and the *Smokefree Environments Regulations 2007*.

Rather, it offers comments and insights from a public policy perspective drawing on Australian experience that may assist the framing of new related New Zealand legislation.

While this paper draws on the scientific and policy debate over ENDS, it does not claim to be based on any expertise as a scientist, clinician or researcher. While they inform policy and politics, and can be cited in support of policy positions, opinions on scientific matters must be left to scientific experts in the field.

**Presumptions of this submission**

Based on the emerging expert analysis, in turn based on related scientific and clinical studies – especially the scientific reports by Public Health England (2015) and Royal College of Physicians (2016) – the policy commentary in this submission is predicated on the following presumptions:

• Nicotine, separate from the chemicals and gases of tobacco smoke, is relatively safe to users in low-level doses ingested in moderation.
• ENDS vaping solutions, or heat-not-burn tobacco products, contain a range of chemical substances ingested in the vaping process. Therefore, ENDS products themselves are not risk-free.
• ENDS nevertheless are very significantly safer than combustible tobacco for direct users people passively exposed to their vapour.
• In respect to “dual use” of cigarettes and ENDS, there is a *prima facie* net health benefit to dual users if their cigarette consumption is reduced significantly in favour of ENDS.
• International emerging evidence indicates the vaping cohort almost entirely consists of ex-smokers and dual users and that, beyond youthful experimentation with vaping use among minors is also minimal; and
• Emerging evidence indicates the danger of passive exposure to ENDS vapour is very low, and possibly negligible. Therefore, the major problem with ENDS vapour is it can be an unsociable environmental nuisance rather than a serious danger to non-vapers.

**Relevant current Australian development**

As indicated above, this submission approaches the issues from a public policy and not scientific expertise.

It could, however, be noted that the Australian Therapeutic Goods Administration (TGA) currently is considering an application by a non-profit group, the New Nicotine Alliance Australia, to redefine the access conditions to nicotine under the Schedule 7 of the Australian Poisons Standard to permit ENDS vapour solutions (“e-liquids”) with a nicotine content of up to 3.6 per cent.
Forty Australian, New Zealand and international tobacco control and harm reduction experts have made a joint submission in support of that application, which was released publicly on 7 September 2016. A link to the joint submission is at Note 1.

Beyond the calibre and professional standing of the comprehensive group of signatories to that submission, it provides an up-to-date evidence-based case for nicotine-containing e-liquids, which is also relevant to considering the legislative and regulatory approach to ENDS and nicotine in New Zealand.

Examining the current Australian TGA nicotine application process, and related public consultation submissions, may assist the Ministry of Health in considering New Zealand specifications for nicotine-containing ENDS.

Part 1: Tobacco harm reduction is best served by better access to nicotine-containing ENDS

If public health policy is about reducing harm to individuals and the community, surely it should welcome and fast-track new methods and technologies meeting this important social goal.

In its intention to legalise nicotine-containing ENDS, the New Zealand government recognises this, and that is welcomed by many of those supporting more effective tobacco harm reduction in New Zealand, Australia and more widely.

There are three public policy principles highly relevant, but often disregarded in the heat of controversy, to the debate over tobacco control and ENDS:

- Most individuals with access to accurate and reliable information about health risks are able to make informed judgments about the health and other implications of pursuing risky behaviours such as smoking.
- Public policy should concentrate on reducing risk of great harm wherever possible, as early as defensibly possible, and always on the basis of sound objective evidence.
- When new technology that can significant reduce risks and harm becomes available, it should be embraced, not prohibited, if the balance of available evidence fails to prove it is as high-risk as the activity it is intended to replace.

Instead of taking an over-cautious approach as are a number of other jurisdictions, including Australia, New Zealand is embracing these principles as new and flexible policy tools that can make achieving smoke-free goals more rather than less likely.

The New Zealand government effectively is accepting that the steady accumulation of scientific evidence is sufficient to indicate they are relatively and significantly safer to direct and passive users than combustible cigarettes, and should be legally available for smokers determined to quit or reduce their smoking. Moreover, it is doing so with broad acceptance from across the political spectrum, as indicated by the August 2016 announcement of these consultations.

This is why New Zealand’s proposed move on ENDS is highly important and ground-breaking harm reduction policy, and is welcome way beyond New Zealand itself.

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Adopting the UK/EU approach

Unlike in Australia, the British government and public health establishment have embraced these principles and got behind ENDS as aids to both helping smokers reduce or quit cigarette consumption, and to mitigate tobacco-related harm.

Beyond the August 2015 Public Health England evidence review that concluded e-cigarette use is up to 95 per cent safer than for combustible tobacco products, and the April 2016 Royal College of Physicians report giving effective clinical endorsement of the PHE conclusions, ENDS are being advocated and recommended by the National Health Service in England, and increasingly NHS Scotland, an integral part of funded smoking cessation services.

Indeed, in January 2016 it was announced that the UK Medicines and Healthcare Products Regulation Agency has licensed a vaping product, thereby making it available to be prescribed as a smoking cessation aid through the NHS.

Former Prime Minister David Cameron declared his personal endorsement of the British harm reduction approach in Parliament in 2015:

> We need to be guided by the experts, and we should look at the report from Public Health England, but it is promising that over one million people are estimated to have used e-cigarettes to help them quit or have replaced smoking with e-cigarettes completely. We should be making it clear that this a very legitimate path for many people to improve their health and therefore the health of the nation.

In the European Union, a new Tobacco Products Directive (TPD) came into force in May this year, including regulated access to nicotine-containing ENDS. While the TPD has attracted deserved criticism from vaping advocates for being too restrictive and bureaucratic, it offers cross-EU regulatory consistency for providers and users, and accepts nicotine-containing ENDS as legal products.

Crucially from the harm reduction perspective, therefore, the TPD does not prohibit e-cigarettes containing nicotine, but instead regulate their accessibility, quality and safety. While it is not as liberal as UK regulatory and policy thinking, and has erred on the side of over-regulation, it nevertheless is heading in the right harm reduction direction.

Adopting potentially harm-reducing new technologies is ethical

No-one claims ENDS are absolutely free of risk. But the extent of risk needs to be kept in perspective. It increasingly is clear that they are far less dangerous than cigarettes, yet many policymakers and influential public health figures and organisations in New Zealand, Australia and elsewhere remain to be persuaded.

The medical profession and public health experts advocate the principle of *primum non nocere*: first do no harm. In public health circles it is also known as the “precautionary principle”. Opponents of nicotine-containing ENDS are well-intentioned in regard to preventing the re-popularising of smoking, and preventing possible exposure to alternative health risks.

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The policy problem this creates is that, by applying the precautionary principle too rigidly, it deprives smokers of lawful access to nicotine delivery systems with the potential both to reduce risks of direct and passive exposure and improve smokers’ health status. In so doing, they inadvertently are potentially doing harm to New Zealanders and others who still smoke, notwithstanding the aggressive turning of policy, regulatory and excise screws in recent years.

In other words, stopping access to e-cigarettes exposes people to ongoing risks that we all say we want to suppress. People who may have quit or reduced smoking by vaping won’t have a convenient alternative source of nicotine delivery to cigarettes, and therefore will continue to be exposed to tobacco smoke and its deadly chemical cocktail.

And, of course, the financial and social costs to individuals and the state of treating the consequence of avoidable smoking-related death and illness will continue.

It is ethical to mitigate or avoid such consequences by relatively early adoption of new innovative technologies that are likely to do much greater good than harm. Each life saved, and each person’s health outcomes improved through access to harm-reducing choices, justifies the policy decisions permitting those choices.

**The New Zealand Government is on solid policy ground in legalising ENDS**

While it may not appear so from media coverage and academic commentary, Australian and New Zealand expert opinion is not solidly in favour of banning ENDS until there is no doubt. For example, In a recent article in the scientific journal *Addiction*, Australian harm reduction experts Wayne Hall, Coral Gartner and Cynthia Forlini argue that prohibiting smokers’ access to ENDS until there is sufficient evidence to be definitive is increasing harm, not reducing it.4

Nevertheless, harm reduction views of the likes of Gartner, Hall and Forlini, and pro-ENDS colleagues in New Zealand including Drs Marewa Glover and Murray Laugesen, are still opposed by some high-profile figures in the public health and clinical communities, and their research and pro-ENDS advocacy is shouted down by those opponents. Often *ad hominem* campaigns against ENDS expert advocates, and indeed vapers themselves, has not helped policy-makers and the public get a good understanding of the issues, or the opportunities in taking tobacco harm reduction down new paths unimagined less than 20 years ago.

Although it will be criticised by some tobacco control advocates, the New Zealand government has made the decision to regulate. It is now a matter of how not if. The Government is on solid ground.

**Legalising nicotine-containing ENDS is ethically and politically justified**

Prevailing policy mindsets that ignore evidence-based alternative views and deny smokers access to ENDS “until sufficient evidence is in”, should trouble policy-makers. If people lose their health or their lives because policy-makers and regulators are too reluctant to embrace ENDS as harm-mitigating opportunities, and at least consider giving ENDS the interim benefit of the doubt as evidence continues to accumulate, public policy is contradicting itself by tolerating increased harm to citizens when that harm can be minimised by appropriate policy and regulation.

Given these considerations, and the Government’s declared goal of doing everything possible to make New Zealand smoke-free by 2025, becoming the first Western jurisdiction to not just regulate but legalise nicotine-containing ENDS is not only ground-breaking, but sound and ethical policy.

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4 Hall, Gartner and Forlini, Ethical issues raised by a ban on the sale of electronic nicotine devices, *Addiction*, 2015.
Governments and political parties should always be placing the best interests of citizens ahead of other considerations. Legalising nicotine-containing ENDS, thereby gives smokers legitimate harm-reducing choices, is politically defensible, and is potentially popular with both smokers, vapers and their families. New Zealand’s cross-party consensus on this move indicates that this is understood in the Parliament itself, which in itself is very welcome, and is a positive example to Australian and other jurisdictions.

Part 2: Access to ENDS: therapeutic or general?

As the Consultation Paper implies, if nicotine-containing ENDS are to be legalised in New Zealand, there are two access options for policy-makers:

- Open access to nicotine-containing ENDS as a commercially-available retail product to compete with combustible cigarettes at usual points of sale; or
- Restricted access to nicotine-containing ENDS, individually or as a therapeutic product category, as Medsafe-approved smoking cessation aids, with limited availability on prescription through doctors and pharmacists.

On balance, open access is the way to go, and the Government’s willingness to doing so is welcome.

The reason is simple. Instead of over-reacting to fears about “renormalising” smoking, if we are truly serious about normalising harm reduction from tobacco and cigarettes, it must be ensured that ENDS, both nicotine and nicotine-free, are unequivocally legal and commercially-available under appropriate regulation, and affordable to adult New Zealanders.

If nicotine-containing ENDS are pigeon-holed as medicinal or therapeutic cessation aids available only on prescription or through pharmacy-only access, comparable to established cessation aids like nicotine patches and chewing gum, they won’t be able to provide direct competition in the marketplace with combustible tobacco cigarettes. They may also be spurned by smokers who refuse to see themselves as needing “treatment”. That largely would defeat the purpose of legalisation.

It therefore would be far better to ensure ENDS are readily available to smokers and vapers as affordably-priced retail products, positioned to take significant market share off deadly cigarettes. If this means using e-cigarettes become accepted as a “normal” behaviour in New Zealand social culture while smoking is further marginalised, that should be seen as a net positive, not an unacceptable negative.

It would also send a powerful message to other countries that access to ENDS can be broadened practically but responsibly with sensible, pragmatic policy and political leadership.

Conditions of sale and access to ENDS

ENDS containing nicotine should be legal and readily available but, contrary to the views of some in the vaping community who resent any regulation of their activity, they must not be left unregulated.

While some hard-core vapers see any regulation as intruding on personal freedoms and behaviours, prudent public policy can and should impose reasonable conditions on access, sale and marketing.
While the evidence of vaping as a gateway to smoking are hotly contested, from a policy-making perspective it is also reasonable for Government to regulate carefully to minimise any such risks, while allowing ENDS to be a more attractive and contestable alternative to current smokers than combustible cigarettes.

Nevertheless, any such regulation should be lighter-touch rather than heavy-handed to ensure the widest possible reach of ENDS as an alternative to smoking. Wherever possible, social norms and common sense should be left to govern access to and the use of ENDS outside the home, provided the interests of non-smokers and non-vapers are understood and respected by both regulators and users.

**Sale of ENDS to minors**

Whether containing nicotine or not, ENDS are products for adults. They are not toys for children, and always should be used responsibly. When containing nicotine, they deliver a substance that creates pleasurable sensations and can and does lead to addiction.

If general sale access to them is legalised for adults, they therefore must not be sold, distributed or marketed to persons under the age of 18.

Opponents of ENDS often cite certain flavours of “e-liquids” making them attractive to young people and potentially a gateway to smoking. If banning the sale of ENDS to minors – including vendor sanctions and penalties – is applied sensibly, however, regulatory specifications about flavouring of ENDS “e-liquids” that appeal to children should not be an issue, even if inevitably some determined minors get around the prohibition.

Adults themselves can also be educated by information campaigns about the importance treating ENDS as products suitable for adults only.

This is the one way in which e-cigarettes must be treated the same as combustible tobacco cigarettes. Besides making access to ENDS by minor more difficult, it reassures the wider public that the general sale of ENDS is being permitted only on a responsible basis.

**Importation of ENDS products into New Zealand**

New Zealand and Australia currently have the same problem. In both countries, nicotine-containing ENDS generally are illegal.

This means determined vapers, as otherwise law-abiding citizens, use the Internet and mail order to import vaping products in defiance of these bans, and Government’s ability to interdict and suppress this trade is limited to the point of being useless.

It allows for a black market of ENDS and vaping accessories that both deprives governments of revenue and risks citizens importing items of inferior manufacture, non-compliant with any product safety and tamper-proofing standards and having nicotine contents that are highly risky and dangerous.

Admittedly the problem is small, as few smokers and vapers are determined enough to pursue their habit in this way. Nevertheless, legalising the trade is appropriate.

If nicotine-containing ENDS are legalised, New Zealand vapers would not be placed in the position of breaking the law in their determination to access a product they find both beneficial and pleasurable.
From the Government’s perspective, curtailing the black market trade in vaping products the New Zealand government can at least supervise the trade, but benefit from the taxation and excise revenue that it may apply (further discussed below). At any rate, convenient onshore access would end the need to go offshore for vaping supplies as these products would be readily available without the inconvenience of personal importation by users.

**Points of sale, promotion and marketing**

To make the vaping alternative as attractive as possible, nicotine-containing ENDS, and e-liquid cartridges, should compete with cigarettes at any point where the latter can lawfully be sold.

In public policy terms, it makes no sense to legalise ENDS yet regulate access to them more severely than cigarettes and other deadly combustible tobacco products.

While they impose heavy restrictions on where tobacco may be smoked, and on their packaging and marketing, the *Smokefree Environments Act* and *Regulations* do not limit where cigarettes and other tobacco products may be sold, and therefore New Zealanders can buy tobacco products in convenience stores and dairies.

Some, including Professor Nick Wilson et al of the University of Otago, are suggesting that the impending legislation should restrict access to ENDS to licensed pharmacies and/or specialised “vape shops”5. While well-intentioned, and partly a reaction to the general availability of cigarettes, such proposed restrictions are short-sighted.

Where ENDS could be sold in a legalised market is a separate issue to the sale of cigarettes. Until any such time as tobacco points-of-sale themselves are licensed, however, ENDS and accessories should be able to be sold wherever cigarettes may lawfully be sold.

The important policy issue is that ENDS need to be available to smokers as a conveniently-accessible and competitive alternative to cigarettes and other combustible tobacco products, especially in Maori and Pacific Islander communities with high smoking rates. If access is restricted to therapeutic channels only, that gives cigarettes the very edge and ongoing convenience and attractiveness that policy-makers are seeking to curtail.

This does not preclude national and local government making sensible targeted regulations for marketing, point-of-sale displays and over-the-counter access to ENDS. But it recognises that ENDS being a key means to progressing towards a smoke-free New Zealand means making those products as convenient for smokers, and directly competitive with cigarettes, as possible.

**Product standards**

The product safety concerns outlined on page 12 of the Consultation Paper largely are valid. Legalising nicotine-containing ENDS enables the Government to set and monitor appropriate product standards if it deems this appropriate.

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If so, and as in the UK and Europe, New Zealand should implement practical but stringent product safety and quality standards for e-cigarettes and similar products. This includes manufacturing standards, especially in ensuring that cartridges of “e-juice” are not tampered with (especially by children), and ensuring that vapers do not risk serious injury by mixing their own potentially dangerous nicotine doses.

Preventing backyard operators from manufacturing shoddy ENDS devices, e-juice and e-juice cartridges is also an important consumer protection consideration.

**Packaging of ENDS**

As in other aspects of access, legalised ENDS need to be seen by smokers as a more attractive alternative to cigarettes and other combustible tobacco products.

In terms of packaging ENDS in an open market, there will be considerable pressure to package them identically to cigarettes under New Zealand’s impending plain packaging legislation with graphic health warnings. This effectively would do two unhelpful things:

- Create a public impression that ENDS are no different to cigarettes; and
- Make the promotion of ENDS as a harm-reducing alternative to cigarettes much more difficult.

Moreover, the sort of graphic health warnings that will be required on New Zealand tobacco would defeat the purpose of legalising the products – especially as the presumption of legalisation is that on the balance of evidence they are significantly less risky than cigarettes.

Instead of extending plain packaging to ENDS, it therefore is suggested the following principles of be considered for New Zealand ENDS packaging regulation:

- Distinctive product and brand packaging is permitted.
- Packaging presentation and messaging must not be child-friendly or child-targeted.
- Tamper-proof wrapping for e-liquid containers, including child-proof lids fitted to containers.
- Nicotine content in terms of percentage of solution, dose per unit and doses per pack or container is clearly displayed on labels and/or other packaging; and
- Other propellants and ingredients, and percentage of ingredients per 100 millilitres, also are listed.

This information could also be made available to consumers in product information available at points of sale.

**Marketing and advertising of ENDS**

As a starting point, the sale of legalised nicotine-containing ENDS and accessories would be subject to consumer law, and therefore sellers must comply with the *Fair Trading Act 1986* and the *Consumer Guarantees Act 1993*. That includes warranties given by manufacturers and retailers, and their not making unwarranted claims in relation to the quality, safety and efficacy of their products.

In respect of the advertising or promotion of ENDS products, it is also presumed the Advertising Standards Authority’s new *Therapeutic and Health Advertising Code*, effective from 1 September 2016, will also apply to legalised ENDS products\(^6\).

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\(^6\) [http://www.asa.co.nz/codes/codes/therapeutic-health-advertising-code/](http://www.asa.co.nz/codes/codes/therapeutic-health-advertising-code/)
The extent to which product category-specific regulation is necessary beyond standard consumer and advertising requirements will need to be resolved before nicotine-containing ENDS legalisation can be implemented. This would need to consider consumer information and awareness issues, including:

- Retailers of ENDS should not be precluded – as some Australian regulation does – from assisting new and continuing vapers making a choice of product, including the ability to try and compare different vaping products and e-liquids; and
- Point-of-sale marketing, including in supermarkets, general stores and dairies, should be minimal and unobtrusive, but still sufficient to alert and interest consumers to the vaping choice over cigarettes.

Advertising legal ENDS products in print and electronic media also should not be banned specifically, provided that they do not breach New Zealand consumer law of the *Therapeutic and Health Advertising Code*.

In terms of guidance from other jurisdictions, United Kingdom experience is a useful point of reference. Until the EU Tobacco Products Directive curtailed permissible advertising in May 2016, it was possible in the UK to advertise tobacco-containing vaping products generally, including on television in defined adult viewing hours. It should also be noted that the precise application of the TPD advertising restrictions is still being clarified in the UK, notwithstanding the Brexit referendum outcome.

The UK Committees of Advertising Practice, which write and administer British advertising codes has, however, have issued useful guidance to advertisers on promoting e-cigarettes and related matters.

**Product warnings**

In the public interest, the sale and display of appropriate advisory statements and product warnings on nicotine-containing ENDS should be required.

It is appropriate to alert users that ENDS are a new technology, and their long-term risks are still unknown: there is a “use at your own risk” element to using ENDS.

Product warnings, however, should be appropriate and not overstate potential risks from use. Graphic health warnings, as used on Australian plain packaging for cigarettes and to be introduced in New Zealand shortly would be inappropriate: graphic claims about impacts on health must not be made without substantiated clinical evidence to support them.

Given this, it would be appropriate to consider specific product warnings such as:

- Nicotine is addictive.
- There may be long-term risks from use.
- There is uncertainty about the long-term effects of vaping on women and foetuses.

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7 The just-passed Victorian tobacco and vaping control legislation does this.
Such warnings, however, should be determined by Government with expert clinical advice, and should not place manufacturers and retailers in a double jeopardy under consumer law and health regulation.

**Regulation should anticipate future innovations**

In the decade or so since ENDS first became a commercial success, the technology has evolved at a rapid rate. The Consultation Paper highlights how ENDS vaporising technology has already gone through several product generations, and that rapid evolution is ongoing.

Indeed, the Consultation Paper, and general public discussion of ENDS, focus entirely on vaporising devices as they are known now. It overlooks, for example, the recent emergence of viable “heat-not-burn” ENDS products, in which packed tobacco is heated but not ignited, giving off inhalable nicotine-containing vapour without the full toxicity of burned tobacco smoke.

Policy and regulation therefore need to keep pace with rapid technological progress. The risk is, having taken a highly-progressive step in legalising nicotine-containing ENDS, future technological and product innovation may be shut out by legislation and regulation lagging well behind.

In the best interests of New Zealand smokers seeking to reduce or quit their smoking habit, the new regulatory framework needs to anticipate and integrate new ENDS innovations as they are developed and proven fit for market.

Indeed, a lack of future-proofed regulation already applies to nicotine-containing ENDS in New Zealand and Australia. In both countries far more harmful combustible tobacco products are lawfully available for general sale, while new and disruptive nicotine delivery alternatives are not, simply because poisons regulations covering nicotine were drawn up when ENDS-like products were still many years in the future.

**Part 3: Fiscal treatment of nicotine-containing ENDS**

If nicotine-containing ENDS are legal, then they become taxable.

That is a good thing in public policy terms. Not only does it reflect the legitimate legal status of ENDS products, it enables the New Zealand government and community to receive revenue from their sale that can either contribute to consolidated revenue, or be hypothecated to the health budget or other specific public purposes. It would also end any tax and excise avoidance from the trade in illegally-imported ENDS products.

Effectively, Government has two revenue options for ENDS:

- GST only as for most retail goods; and
- GST plus excise.

**GST only for ENDS**

At minimum, legalised nicotine-containing ENDS would be liable to Goods and Services Tax like any other legally-available good or service. It could be assumed that the current small but active black market in these products would die away as they become available conveniently in New Zealand, so most sales would be brought in to the GST net.
Some argue the taxation treatment of nicotine-containing ENDS should attract minimal fiscal treatment as a legally-available retail product. In their view, only GST should apply to ENDS on that basis. Furthermore, there is a strong policy argument for GST-only fiscal treatment to ensure ENDS are affordable to disadvantaged groups including Maori and Pacific Islander smokers, and the welfare-dependent: GST-only fiscal treatment would make ENDS available to consumers at the cheapest possible price while still providing revenue to Government.

Some would also argue that ENDS should be treated as GST zero-rated products because of their role as smoking cessation aids. If general available is the desired policy goal, however, ENDS and accessories should be treated as general rather than therapeutic goods. This suggests zero-rating actually would not be appropriate.

From Government’s perspective, however, there is also the Treasury issue of protecting the revenue. If smoking rates fall significantly as a result of strong ENDS take-up, the GST collected from ENDS sales almost certainly would fall well short of the GST plus excise revenue from foregone cigarette and other tobacco product sales.

This suggests that a GST-only approach may not be the most realistic way of taxing ENDS, nor would it likely be acceptable to the wider New Zealand public in terms of foregone revenue.

**Excise on nicotine-containing ENDS**

Alternately, the view can be taken that nicotine is derived from tobacco. Tobacco is excisable. Therefore, nicotine-containing ENDS arguably also should be excisable.

Reducing smoking rates reduces tax and excise collected from cigarettes and other combustible tobacco products sold, and deprives the Budget of that revenue. Some of that revenue loss needs to be offset.

If GST plus excise is applied to nicotine-containing ENDS, however, the rates of excise would need to be sufficiently different to cigarettes and other combustible tobacco products. When protecting the revenue is also considered, a GST plus excise approach to nicotine-containing ENDS than cigarettes may be a reasonable balance of interests, provided that ENDS are a considerably more affordable after-tax alternative to cigarettes.

If there is to be a positive incentive for smokers to make the switch to ENDS, a favourable differential excise compared to traditional cigarettes is essential. Less affluent smokers must not be priced out of the ENDS choice by tax and excise settings being too high.

**Framing a differential excise for ENDS**

Given that New Zealand, like Australia, is applying strong fiscal hikes to tobacco excise, with both countries in their current Budgets extending tobacco excise increases well above inflation year-on-year until 2020, it is essential that ENDS are not treated identically to cigarettes for excise purposes.

“Penalty” excise increases, especially those announced recently in the New Zealand Government’s 2016 Budget, should not apply to ENDS. If they do carry excise, as they should, it is imperative that the rate be lower than for combustible tobacco products for the same reason.
The appropriate tax and excise treatment for ENDS is, however, a second-order issue behind their full legalisation. Nevertheless, an excise value could be placed on, for example:

- The nicotine content per 100 millilitres of nicotine-containing e-liquid; or
- The tobacco weight of a heat-not-burn ENDS product.

How ENDS are taxed, and on what terms, needs to be part of a careful and comprehensive conversation beyond these consultations between the New Zealand government, wholesalers, retailers, the public health community and the general public, as part of preparing for the general sale of ENDS.

An interim decision to, say, fiscally treat ENDS identically to cigarettes would, once in place, be hard to wind back. It therefore is easier and more prudent to sort out fiscal issues before implementing a new legal regime for ENDS comes into effect, and the commencement date for any proposed legislation could take this into account.

**Fiscal treatment must send appropriate price signals**

In effect, the public interest indicates the fiscal treatment of nicotine-containing ENDS should be incentivising good policy outcomes, not punitive to those it is intended to help. It therefore should give positive motivations to smokers to shift to the lower-risk alternative for their nicotine consumption.

If an analogy is needed, the relationship should be like that for the dual sale of petrol and Liquid Petroleum Gas.

Given that the use of LPG is more environmental-friendly than petrol, and consumed by car engines at different rates, New Zealand excise per litre (10.4 cents) is one-sixth the excise per litre on petrol (67.1 cents)\(^{10}\). The differential excise treatment of LPG to petrol, therefore, gives a positive incentive for motorists to convert their vehicles to LPG. Not only do they benefit, but so do other road users, the environment and the wider community.

It is a win-win, just as shifting smokers from cigarettes to ENDS can be a win-win.

**Part 3: Use of ENDS in public and social places**

Like its counterparts in Australia, the *Smokefree Environments Act 1990* places major restrictions on where people may smoke in public and social settings. Some such legislated restrictions are perhaps excessive and difficult to enforce. Their broad intent, however, of disincentivising smokers, making smoking an anti-social act, and protecting third parties from passive exposure to tobacco smoke, are appropriate policy goals.

The Act currently does not place comparable restrictions of vaping in public and social places. In contrast, Australian legislation, including that passed in September 2016 in Victoria\(^ {11}\) is extending the reach of these restrictions very widely, but also are treating vaping identically to smoking for this purpose.


If, however, it is accepted that vaping has significantly lower health risks than smoking for direct users, and very low if negligible health risks from passive exposure, simply to replicate restrictions on where people can smoke to ENDS is excessive regulation. It negates the incentive to switch.

To help make vaping as competitive an alternative to smoking as possible, it is desirable that, if nicotine-containing ENDS are legalised, that the Smokefree Environments Act is not amended to replicate place-of-smoking restrictions.

**Let social norms inform regulating vaping in public and social venues**

Vaping is not just a harm reduction option. Compared to other smoking cessation aids, such as nicotine patches and gum, it is a pleasurable and sociable activity. It gives a nicotine hit in a manner that mimics smoking behaviours. Some vapers say that it also more than substitutes for the pleasurable stimulation of holding a cigarette, and still “having something to do with your hands”.

For many, smoking itself is a social activity, pursued and enjoyed in social situations. In seeking to suppress the prevalence of smoking, public health experts and regulators too often neglect this social side of the smoking experience.

On the presumption that passive exposure to ENDS vapour is low-risk to others, decisions on where people can vape could be left to “normative approval”: letting people, workplaces, social venues and communities determine consultatively what is appropriate for them.

That means respecting decisions not to permit vaping as well as those to allow it.

Under a normative approval model, vaping could be permitted openly, or in designated zones in:

- Pubs and clubs.
- Restaurants and cafes.
- Public open spaces; and
- Workplaces.

Vaping would be permissible at these venues at the discretion of proprietors, employers or managing authorities such as a local council, sporting ground trust or building management, provided it is done with the consent of employees and patrons. In these places and venues, those responsible could be expected to provide designated spacing zones and set internal rules for appropriate vaping practices, ensuring third parties who want vapour-free environments still have them.

The proprietor or responsible authority for the locality or venue could then be made accountable under national or local laws for any vaping on their premises, and for complying with any venue restrictions, product or public health warnings or advisories that are required by national or local laws.

In return for concessions like these, however, vapers must be considerate and mindful of others. They cannot expect to vape anywhere, anytime, treating any restriction on their vaping as intolerable restrictions on the personal rights and liberties. In other words, normative regulation of public and social vaping must involve give and take, respect for others and, above all, common sense all round.
Leave vaping venue regulation to local authorities?

Instead of national regulation of vaping venues under the *Smokefree Environments Act*, an alternative is to leave regulatory responsibility for public and social vaping with local authorities.

This approach was partly advocated by the National Smokefree Working Group in their August 2016 submission to these public consultations\(^\text{12}\). The Working Group proposed that regulating smokefree venues and sites not covered by the *Smokefree Environments Act* be left to local authorities, subject to designate vaping areas being identified clearly and after public consultation.

While not optimal in its simply accepting the Act’s existing venue restrictions should apply automatically to vaping, the Working Group’s recommended approach is a possible compromise as it assumes that local normative rule-making could apply. The outcomes of these consultations may well give an indication to what the New Zealand public, as well as experts, thinks the most appropriate form and level of venue regulation.

The downside of a localised regulatory approach is, of course, the fragmentation and inevitable inconsistency from council to council. For that reason, it would be preferable that national leadership in this regard be maintained.

Conclusion

Legalising nicotine-containing ENDS in New Zealand would, from a public policy perspective:

- Be a responsible and ethical policy approach to tobacco harm reduction consistent with the goals and principles of Smokefree 2025.
- Accept that nicotine-containing ENDS pose much lower, and arguably minimal, health risks compared to combustible tobacco, thereby offering a lawful and safer alternative to ingesting safe and modest quantities of nicotine than smoking.
- Give vapers, and smokers seeking to reduce or eliminate their cigarette habit, legalised access to ENDS products and nicotine-containing vaporising solutions without invoking personal importation rules or resorting to black or grey markets (especially Internet mail order) to obtain supplies.
- Facilitate a carefully-regulated New Zealand retail market for ENDS products and nicotine-containing solutions that can operate in direct competition to deadlier combustible tobacco products, especially cigarettes.
- Allow the regulation of ENDS products for safety and quality, including childproofing.
- Virtually eliminate New Zealand’s illicit market for nicotine-containing ENDS.
- Allow Government to determine the appropriate fiscal treatment of nicotine-containing ENDS solutions, and receive GST and possibly excise revenue from their lawful sale; and, above all
- Potentially make big further inroads into the prevalence of tobacco smoking in New Zealand’s general, Maori and Pacific Islander populations, further reduce smoking-related mortality and morbidity, and mitigate related economic and social costs to the community and taxpayers.

The value of ENDS as legitimate smoking-cessation choices for those wanting to enjoy the sensations of ingesting modest quantities of nicotine, and as far lower-risk alternatives to combustible tobacco and its deadly by-products, remains a highly-contested scientific and regulatory debate around the world.

In making this policy shift, however, New Zealand is showing a way ahead. It is demonstrating that promoting harm reduction, adopting practical regulator measures and applying common sense do not have to be mutually exclusive. The wider importance of this example cannot be understated.

A lighter-touch but effective regulatory regime for ENDS, including nicotine-containing ENDS, is sound and enlightened public policy. The public health policy community worldwide will be following New Zealand’s progress, and hopefully Australia and other countries will before too long follow New Zealand’s bold yet practical harm reduction leadership.

I would be very happy to discuss this submission if requested.

Yours faithfully,

Terry Barnes
Principal
Cormorant Policy Advice
APPENDIX 1

About the author – Terry Barnes

I have a background in politics and policy-making as a federal and state government official, and as a senior ministerial adviser to two Australian health ministers, Michael Wooldridge and Tony Abbott. My chief expertise is in social policy, particularly health and aged care.

Health policy based on reducing harm has interested me over a long time, and I have worked in developing and implementing policy with a harm reduction emphasis, including drug and HIV policy. I have also advocated Private Health Insurance incentives promoting people to take greater personal responsibility for their behavioural choices, especially in relation to smoking, alcohol consumption and improving diet and exercise.

Since 2007 I have run my own practice as a policy and regulatory analyst and consultant. In this capacity, in 2013-15 I was centrally involved in the policy debate over mandatory co-payments for GP services, after I was commissioned to write a discussion paper for a private health think tank, the Australian Centre for Health Research.

In 2015 was appointed as a part-time fellow in lifestyle economics of the UK Institute for Economic Affairs. As an IEA fellow I have complete freedom to write and advocate, and this submission represents my personal views, not those of the IEA or any third party.

I write and comment on harm reduction and ENDS in Australian media and policy circles, but I have never smoked or vaped. My concern simply is ensuring those who do and want to quit have the widest possible range of alternatives to smoking, and that new harm-reducing innovations are accepted as soon as there is sufficient empirical scientific evidence to justify them.

13 www.iea.org.uk – Like Australian think tanks, the IEA is an independent organisation that receives donations from a wide range of private sector sources and philanthropy.