Key design features of a new smokefree law to help achieve the Smokefree Aotearoa New Zealand 2025 goal

Louise Delany, George Thomson, Nick Wilson, Richard Edwards

ABSTRACT
AIM: To design new tobacco control legislation to achieve the New Zealand Government’s 2025 smokefree goal.

METHOD: An original analysis of the legislative options for New Zealand tobacco control.

RESULTS: ‘Business as usual’ is most unlikely to achieve smoking prevalence that is less than 5% by 2025. Key components of a new Act would ideally include plans and targets with teeth, a focus on the industry, a focus on the product, reduction of supply, and a whole-of-society approach to promote consistency in policy implementation through: i) a public duty on government agencies to act consistently with smokefree law; ii) a general duty on those associated with the tobacco/nicotine industry in relation to tobacco control objectives; and iii) a principle requiring international treaties to be interpreted consistently with tobacco control objectives.

CONCLUSION: Strategies such as those identified in this Viewpoint should be explored further as part of urgently needed planning to achieve the New Zealand Government’s goal for Smokefree Aotearoa by 2025.

In 2010, the Māori Affairs Committee of Parliament justified the need for, and recommended the goal of, making New Zealand a smokefree nation by 2025. The Government response said that “the Government agrees with a longer term goal of reducing smoking prevalence and tobacco availability to minimal levels, thereby making New Zealand essentially a smoke-free nation by 2025”.

The Response did not specify the meaning of ‘minimal’, but as the then relevant Minister of the Crown (Hon Tariana Turia) noted:

Public health proponents and tobacco control advocates have interpreted the Government’s goal of reducing smoking prevalence and tobacco availability to minimal levels to mean a smoking rate of less than 5% of New Zealand adults, and that this should be achieved across all major ethnic groups.

In 2013, the Ministry of Health stated that to achieve the long-term smokefree goal, the specific goals for 2018 would be: “daily smoking prevalence falls to 10% in 2018”, and “the Māori and Pacific rates halve from their 2011 levels”. In 2015, the Ministry identified these 2018 goals as 19% for Maori and 12% for Pacific. In this paper the concepts of ‘minimal levels’ and ‘less than 5%’ will be understood as equivalent.

Developments since 2011

Since the Government response to the Māori Affairs Committee report, additional policy measures have been implemented. These include the point-of-sale display ban, annual above-inflation tobacco taxation increases, reductions in duty-free allowances, increased penalties for sales to minors, and other measures. A Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill to implement standardised packaging is before Parliament but not progressed, although there may be further developments in 2016.

These steps are very positive, but not sufficient to meet a ‘minimal’ prevalence
level of under 5% for 2025, or a 10% level for 2018. Research indicates that, following a business-as-usual approach:

... the projected smoking prevalences in 2025 are 8.3% and 6.4% for non-Maori men and women, and 18.7% and 19.3% for Maori respectively. Under this BAU forecasting scenario, a below 5% smoking prevalence will be achieved ... sometime after 2060 for Maori men and women. ...7

The New Zealand Government has not developed an action plan to achieve the 2025 goal of minimal prevalence despite recommendations.8

The need for a new approach

It has been 25 years since the original 1990 New Zealand Smoke-free Environments Act (SFEA). That Act, as amended a number of times, has served New Zealand well, but new thinking is now required to address the challenging goal of Smokefree Aotearoa in the context of major changes, including:

• International developments: Since the SFEA’s enactment in 1990, the Framework Convention on Tobacco Control (FCTC) has been ratified (entailing obligations under international law and a strong mandate for effective national law); worldwide awareness of non-communicable diseases to which tobacco contributes has increased, as emphasised in the United Nations Political Declaration in 2011;9 and globalisation has developed momentum. International trade and investment law has changed in character, increased in scope, and become stronger in terms of enforceability. International trade and investment law is increasingly converged,10 and more focused than 25 years ago on policies within countries with the potential to negatively affect tobacco control.

• Technologies: E-cigarettes and other new forms of nicotine delivery have been developed. Since 1990, global communication has been transformed by the internet, further enabling transnational marketing and cross-border consumer transactions with the use of new media, ie: “… the combination and convergence of computing and information technology, communications networks and digitised media and information content.”11

• Tobacco industry initiatives: The industry had continued to find ways to get around tobacco control policies, including tobacco taxation.12 For instance, following bans on advertising of tobacco products in most media in developed countries, the tobacco industry has focused on tobacco promotion by other means, including product placement on films and marketing through contact with retailers, social media, and the internet.11

• New tobacco control ideas: The tobacco control community has learned over the last 25 years to “imagine things otherwise”.13 New approaches and ideas, often conceptualised as ‘endgame’ strategies, include supply-side measures;14,15 denormalisation of tobacco and the tobacco industry;16 the need to protect child rights (crystallised in the United Nations Convention on the Rights of the Child, ratified in 1993); and product modification such as denicotinisation.17 There is now an increased awareness of inequalities in smoking and its adverse effects, and the need to address them both within and between countries.

Do we need a new Act, or would amending the present SFEA suffice?

The changes proposed in this Viewpoint could be implemented by either one new Act, or a number of incremental amendments enacted over time. The changes proposed are extensive, the need for action is urgent if smokefree goals are to be met, and significant time would be required to progress separate legislative amendments. This Viewpoint considers, therefore, that a completely new Act would be preferable.
The ideas set out below are structured as one Act with an integrated set of strategies.

**New legislative strategies proposed**

We suggest six strategies that are new for New Zealand tobacco control law to complement existing measures: a new Authority mandated to develop plans and targets, equity provisions, a focus on the industry, a focus on the product, provisions relating to supply, and promotion of consistency in policy and implementation.

**A new Authority mandated to develop plans and specify targets**

The proposed new Act would establish a government authority (a Tobacco and Nicotine Authority—TANA). This would not involve a ‘new’ agency but sit within the Ministry of Health (as does the Psychoactive Substances Regulatory Authority, see Section 10 of the Psychoactive Substances Act 2013). The TANA would have specific statutory duties and powers to develop and implement plans to reach specified smoking prevalence goals and interim targets. These would relate to both the general population of New Zealand, and specific population groups, with a primary focus on those groups with the highest current smoking prevalences. TANA’s powers would involve most aspects of tobacco supply and marketing, price issues, control of tobacco product design and content, and decisions on licensing. TANA would require dedicated legal resources, to ensure that legal challenges at domestic and international levels are effectively anticipated and met. TANA would also be a partner with Treasury in formulating advice to Government on issues relating to tobacco taxation. To ensure effective activity, for an initial 10-year period, TANA and its work would be financed from a fund that would receive 10% of tobacco tax revenue.

The cornerstone of this planning would be an explicit goal of under 5% smoking prevalence by 2025 for both the general population and specific population groups. Targets would be established for 2018 and 2020 as well as the overall goal for 2025. Strategies for achieving these targets would include specific measures, such as reducing tobacco availability, product modification, smokefree outdoor policies, increasing the minimum allowable age of tobacco purchase to 21 years, continued substantial tobacco tax increases and requiring minimum tobacco product prices.

Planning would also consider new nicotine devices (including fast-acting inhalers) and products. TANA would be required to report to Parliament annually on progress towards the targets. There would be four stipulated dates: 2018, 2020, 2025 and 2040. The date of 2018 is required because the Government has already set targets for lower prevalence rates to be achieved by that year (general, Māori and Pacific). The Act would require, during 2018, a formal review of Smokefree Aotearoa goals to be undertaken to gauge progress and make targets for a second date of 2020. This 2020 date would be critical given there would be then only 5 further years before 2025.

If the 2020 targets are not met, this could trigger a further set of conditional provisions in the Act to come into force in mid-2021. If the 2020 targets are met, these conditional provisions need not come into effect.

The conditional provisions would include, in particular, allowing the retail of tobacco and nicotine products only from those outlets with a limited incentive to profit from tobacco sales. This would exclude all existing retailers, such as dairies, supermarkets and petrol stations, but allow for the possibility of sale through ‘not-for-profit’ agencies or ‘health’ oriented outlets, with incentives (specified in contractual conditions) to reduce rather than increase sales. Such outlets would be relatively amenable to regulatory control. Further conditional provisions could include ‘smokefree generation’ policies (involving further progressive increases of the purchase age to reduce availability and ensure long-term sustainability of reduced rates) and licensing requirements for tobacco users. Inclusion of the 2040 date in TANA planning responsibilities responds to the...
need to think beyond 2025, which could include licensing for those people still smoking. By 2040 we should be able to demonstrate that new generations are virtually smokefree—with close to nil smoking in people aged under 40 years, and under 1% smoking prevalence for all population groups.

Enhancing equity in process and outcomes

Provisions to address equity would respond to the major contribution that tobacco has made to ill-health and reduced economic well-being among Māori for many decades. Reduction of ethnic inequalities in health would be an explicit and major focus of planning, and for implementing activities and resources, as required by Section 3 of the New Zealand Public Health and Disability Act.19 The Act would require TANA to have appropriate Māori and Pacific leadership, and would require and empower all government agencies to ensure that policies and actions accord with the Government goals for reducing Māori and Pacific smoking rates. TANA would be required to ensure full stakeholder and community consultation on proposed strategies and measures for endorsement from Māori (and Pacific) communities.

TANA would address the need to reduce socioeconomic health inequalities in health (eg, smoking by level of area deprivation) in making recommendations on tax increases (including the use of tobacco tax revenue to increase equity),20 and in focusing tobacco control mass media campaigns towards high-need audiences.

A focus on the industry

Provisions that focus on the tobacco industry (including the related retail sector) would ensure that this industry is more transparent and accountable in relation to its activities, marketing, products, research, plans, taxation, lobbying activities and profits. The Act would include disclosure requirements that go beyond those in the current SFEA to include sales data and information on market research (see Canada’s Tobacco Reporting Regulations, which requires in Regulation 15 annual reports on research regarding the health effects of tobacco products, as well as marketing and the manner in which the product is used by consumers).21 Disclosure would also be required of tobacco industry accounts, including those of parent companies offshore, sufficient to enable independent calculation of profits within the New Zealand market. This would include relevant information such as international transfers and subsidies. Information on tobacco accounts would also be relevant to any future decision on additional taxes on corporate profits.

While substantial tax increases should continue, the tobacco prices that the industry could charge would be capped at the stage before release from Customs bond (ie, before tax) and revised as necessary by regulation, to limit the ability to make windfall profits from minimum tobacco price regulations.22,23 Minimum prices would, among other things, ensure that the purpose of tobacco taxation is not frustrated by, for instance, keeping the price of ‘budget-oriented’ products disproportionately low following tax increases. Currently, the impact of tobacco tax rises in New Zealand is partially eroded by low-cost brand price manipulation.12 Capped pre-tax tobacco prices would set a maximum price for a product, and enable government to control the revenue the industry receives. The intervention could be used to limit profits, while increasing revenue to government, and allowing minimum retail prices to be set.22,23

The Act could set out responsibilities relating to exporters that would require the industry to act in accordance with New Zealand law outside of the country (unless required otherwise by the relevant importing country). For example, if pictorial warnings with specified messages are required in New Zealand, these would also be required in countries to which the product is exported (modified as appropriate, for example translations for written parts of warnings). This policy option has been proposed in the US.24

Focus on the product

Provisions in the current Act that relate to the tobacco product itself are limited. For instance, although the regulation-making
powers in Section 39 enable prohibition of product constituents, there is no specific provision for reducing them (although that is probably the intent of the Act, see Section 31). Neither does the present Act authorise regulations on aspects of product design (for example, to remove filters, disallow perforations, or specifications for certain colours to be used for cigarette paper), although this is referred to in the Smoke-free Environments (Tobacco Plain Packaging) Amendment Bill.

A new Act would further regulate tobacco product constituents, as suggested by World Health Organization guidelines. This would include: i) direct prohibition in the Act of some constituents, and ii) regulation making powers to allow further constituents to be prohibited in the future (as required). Relevant criteria for constituent prohibition would include their potential for increased toxicity and addictiveness, and also potential for environmental harm. Examples of constituents that could be prohibited include menthol, addiction enhancers (eg, ammonia), sweeteners and flavours. In addition to prohibition of some constituents, the Act could require reduction of nicotine levels, or authorise regulations to that effect.

The Act would refer in a limited way to the role of alternative nicotine products in relation to the 2025 goals. Given existing uncertainty about the best way forward for such products (especially e-cigarettes), the Act might best take a cautious approach. This could continue the status quo (that is, a virtual ban except for personal imports of nicotine-containing e-cigarettes), with potential to regulate at a later date when there is more evidence on the population-level benefits and harms of such products. For example, regulation-making powers could authorise sales of alternative nicotine products by licensed retailers (eg, pharmacists) to licensed users.

A focus on supply

The control of the tobacco and nicotine supply would include licensing of tobacco/nicotine importers, wholesalers, and retailers. That is, neither manufacturers nor retailers would be able to sell or supply tobacco unless licensed to do so. TANA would process applications for licences.

The Act would specify criteria relevant to licence applications including, for retail outlets, geographical considerations. These would relate to density (that is, numbers of retail outlets per local authority district) and also proximity of outlets to facilities, such as schools and childcare providers, and venues, such as those with alcohol licences. Other criteria relevant to both manufacturers and retailers would relate to standards required of licensees, for example previous compliance with tobacco control obligations.

In accordance with Government’s long-term goal of reducing tobacco availability, the Act could enable progressive reductions of numbers of outlets. TANA would be empowered to set goals for maximum numbers of retail outlets, to be reached by 2020, and then 2025, in relation to the size or population of the local district.

The Act would also provide for reduced numbers of tobacco brands and descriptors. In particular, no licence might be granted to import, manufacture, or sell new tobacco brands or variants from a specified date.

Policy consistency

Tobacco control law and policies, and their implementation, are influenced by many actors and agencies within New Zealand and elsewhere. Policies emanating outside the health sector can negate health aims or frustrate real synergies in promoting them. Policy inconsistencies and a lack of congruence are apparent, especially between tobacco control objectives and “wider economic and foreign policy agendas, focusing particularly on tensions with trade agreements”. The lack of policy congruence internationally is reflected at the national level: governments pursue the implementation of trade and investment-related agreements at the same time as, and arguably with greater vigour than, law related to health objectives.

While the proposed strategies would not change the tensions at the international level, they will provide domestic levers to strengthen New Zealand’s commitment to international health-related law and enable implementation of such concepts as ‘health in all policies’, ‘whole of government’ or ‘whole of society’. As noted
in the New Zealand Ministry of Health Review of Tobacco Control Services Report, a focus on “joined up government and on Health in All Policies (HiAP) internationally and in New Zealand would provide a platform to increase cross-sectoral activity to achieve Smokefree 2025”. 29

‘Whole of society’ provisions would first include a public duty applicable to all government agencies to act consistently with the new Smokefree Act, the Framework Convention on Tobacco Control, and other relevant international law. Among other things, this would mean that legal advice, court action or other legal process would be required to have close regard to, and give effect to, national and international law relevant to tobacco control.

Drafting of such a ‘whole of society’ provision would affirm New Zealand’s commitment to the Framework Convention on Tobacco Control and protection of human rights (somewhat similar to the language in the long title of the New Zealand Bill of Rights Act 1990). This provision could be strengthened by a provision modelled on section 6 of the New Zealand Bill of Rights Act 1990 which states: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.” Such provisions would be enforced by generally accepted strategies such as Parliamentary oversight, scrutiny by the Auditor-General, and where necessary through judicial review.

Second, the Act would include a general duty relevant to those associated with the tobacco/nicotine industry (manufacturers and importers; retailers; and advisers in communication, policy, or law). This duty would require those associated with the industry to act consistently with the purposes of the Act, targets promulgated under the Act, and relevant international law. Breaches of such a duty would include the supply of misleading information to the public and parliamentarians, and lobbying against steps that would implement relevant international law, in particular the FCTC, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child. 30 A version of this concept is proposed in discussing elements of a global tobacco endgame. 31

A recent example of a relatively general duty to comply with ‘fundamental requirements’ is found in the New Zealand Radiation Safety Act 2016, a duty which in that Bill is backed up by a provision to the effect that contravention of a specified fundamental requirement is an offence. Clause 65 of the Bill provides that such an offence would be subject to, in the case of an individual, a fine not exceeding $100,000; or (b) in the case of a person or an organisation other than an individual, to a fine not exceeding $500,000 (section 62).

Third, the Act would set out principles for the New Zealand interpretation of international treaties. This would provide that all such treaties that New Zealand ratifies be interpreted (insofar as they affect New Zealand) so as to progress the implementation of international law that relates to tobacco control. Relevant international law would include, in particular, the FCTC and other relevant instruments relevant to tobacco control including the UN Political Declaration 2011.

The provision echoes to some extent the 2001 US presidential order requiring that implementation of international trade law by federal departments not conflict with tobacco control objectives through, for example, promoting the sale or export of tobacco products. 32

Our proposals would go beyond this Executive Order by the inclusion of language similar to that of the New Zealand Bill of Rights Act 1990, as proposed above. Additional wording could mirror both article 31(3)(c) of the Vienna Convention on the Law of Treaties (which states that in interpreting treaties relevant rules of international law applicable in the relations between the parties are to be taken into account); as well as Chapter 1 of the United Nations Charter. The Charter refers to one of the purposes of the United Nations: “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character...”

The provisions aimed at policy consistency could apply singly or together. In combination they could be relevant, for instance, to an attempt to invoke investor-
state dispute mechanisms in international trade law. Provisions that recognise corporate duties in relation to international law are consistent with the United Nations Framework for Business and Human Rights.31

Provisions in the present Act to be extended

The Act would carry forward existing strategies in the present Act that restrict the promotion of tobacco and related products, provide for smokefree environments, and restrict the purchase and supply age for relevant products. The new Act would also:

1. Extend the scope of the Act to nicotine delivery/vaping products and devices of all kinds so as to be explicit in disallowing use of such products in environments relevant to smoked tobacco products. Any regulations made (in accordance with regulation making provisions proposed above) to allow for sales of alternative nicotine products in limited circumstances, eg, to licensed users, would trigger an extension of TANA responsibilities to such products. This would include requirements for outlet licensing, ensure promotion is prohibited (except perhaps to note they may be a quitting tool for existing smokers) and require health information and warnings. The regulation-making powers would set out criteria for any future licensing of users (eg, age and history of use of tobacco or nicotine).

2. Extend the scope of smokefree outdoor environments and further promote the visual denormalisation of smoking. The present Act requires smokefree outdoor environments in some circumstances, that is, those associated with outdoor school and pre-school environments. Some other outdoor environments (some parks, playgrounds, beaches, malls, streets) are now also smokefree through local authority ‘educational’ and administrative policies. The new Act would explicitly recognise the role of local authorities in this area, and amend the bylaw making provisions in the Local Government Act 2002 to provide for greater certainty in the ability for local authority to create smokefree area bylaws, and provide a range of enforcement methods. The Act would also provide national standards, including for minimum smokefree distances from openings in buildings used by workers and the public. Additional smokefree requirements would apply to a range of outdoor areas such as transport waiting areas, playgrounds, and any property where alcohol is served.

3. Extend the scope of indoor environments. The Act would prohibit smoking in vehicles where a child or young person aged under 18 years is a passenger. The Act would also require TANA to promote smokefree domestic environments, where a child or young person lives, through educational and clinical strategies.

4. Extend marketing restrictions, including powers to classify movies according to smoking content, and controls on all aspects of marketing, such as brand variant names.34 Provision would also be made for ‘new media’ (that is, internet-based marketing via computing and information technology); for example, through requirements for content filters.

5. Provide for increasing the age at which tobacco (and other products/devices) may be sold or supplied by stages.

Conclusion

Ideas from experience in New Zealand and other countries have produced a range of ‘endgame’ ideas for a next phase of tobacco control. Strategies such as those identified in this Viewpoint should be explored further as part of urgently needed planning to achieve the New Zealand Government’s goal for a Smokefree Aotearoa by 2025.
Competing interests:
Nil.

Author information
Louise Delany, Public Health, University of Otago, Wellington; George Thomson, Public Health, University of Otago, Wellington; Nick Wilson, Public Health, University of Otago, Wellington; Richard Edwards, Public Health, University of Otago, Wellington, New Zealand.

Correspondence
Louise Delany, Public Health, University of Otago, Wellington, New Zealand.
louise.delany@otago.ac.nz

URL:

REFERENCES:


25. World Health Organization, WHO Framework Convention on Tobacco Control; guidelines for implementation. Article 5.3; Article 8; Articles 9 and 10; Article 11; Article 12; Article 13; Article 14., 2013: France.


