



24 August 2022

Mr Tangi Utikere
Chair
Health Committee
Parliament
WELLINGTON

Email: Health@parliament.govt.nz

Dear Mr Utikere

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Smokefree environments and regulated products (smoked tobacco) Amendment Bill*.

This submission may be released with my signature redacted. An NZFGC representative is available to present before the Committee.

Yours sincerely

Katherine Rich
Chief Executive



Smokefree environments and regulated products (smoked tobacco) Amendment Bill

Submission by the New Zealand Food & Grocery Council

24 August 2022

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (“**NZFGC**”) welcomes the opportunity to comment on the *Smokefree environments and regulated products (smoked tobacco) Amendment Bill* (the “**Amendment Bill**”).
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products sold in New Zealand supermarkets and other retail.

OVERARCHING COMMENTS

3. NZFGC has identified a drafting loophole in the definitions of ‘notifiable product’ and ‘smoked tobacco product’ that the Committee may wish to consider.
4. Limiting retailers to a chosen few, if this is to existing supermarkets as the outlets of choice for smoked tobacco products, would be **strongly contrary to the Government’s efforts to increase competition** in the supermarket environment as it would simply drive more people (possibly as many as 75% of all those purchasing tobacco products) to supermarkets. This will strengthen the duopoly and increase the profits of supermarkets.
5. Should supermarkets be anointed as the outlets of choice for smoked tobacco products, this would create significant opportunities for organised crime, including gangs, in two key areas:
 - Fewer but more lucrative targets for theft
 - Reduced availability opening the way for illegal suppliers to fill the gap
6. Rather than simply allocate the market to supermarkets, fair and equitable criteria should apply to the issuing of licenses. This will reduce the prospect of individual or class actions related to licence allocation. As well, the period of licensing should be time limited and attract an annual fee. Revenue from fees could be applied to compliance activity.
7. Vaping achieved in one year what took taxes, plain packaging and other policies, five years to achieve. Daily smoking has certainly been disrupted by vaping. Vaping will see targets of reduced tobacco smoking achieved over time.
8. Past models by the Ministry of Health and the Treasury have been massively over-optimistic such that excise increases over the past decade as well as plain packaging etc have only had a marginal impact on reducing smoking (see Figure 1). It was only the advent of vaping, a market-led solution, that has disrupted smoking. Continuing with vaping would likely see targets of reduced tobacco smoking achieved without further legislative changes.
9. The Amendment Bill could leverage the uptake of vaping further and provide current retailers with a softer landing than they would otherwise have under the proposed legislative changes to reduce outlets and mandate low nicotine tobacco. We also recommend the Committee consider requesting the Minister initiate research into the contribution of excise taxes and GST on excise, to social order, deprivation and inequality in New Zealand and restart and redesign the ‘Vape to Quit’ campaigns specifically focused towards Māori and Pasifika.
10. Specific recommendations are at paragraphs 14, 22, 28 and 40-41.

AMENDMENTS PROPOSED

11. In essence the Amending Bill proposes four key amendments:
- i) New definitions of ‘notifiable product’ and ‘regulated product’
 - ii) Rules on how many retailers will be allowed to sell smoked tobacco (cigarettes and roll-your-own) – as low as 500 nationwide
 - iii) Limits on how much nicotine can be in smoked tobacco – potentially mandating a 95% reduction in nicotine content and removing all smoked tobacco products from the market that are currently legal
 - iv) A ban on anyone born on or after 1 January 2009 ever being able to legally purchase smoked tobacco.

DETAILED COMMENTS

Definition of ‘notifiable product’ and ‘smoked tobacco product’

12. Any notifiable product can be freely sold provided it is notified. The definition of a notifiable product currently provides the following:

- “(a) A vaping product; or
(b) A smokeless tobacco product; or
(c) a herbal smoking product; or
(d) any other regulated product (other than a smoked tobacco product) declared by regulations to be a notifiable product.”¹

13. The inclusion of “a herbal smoking product” as a notifiable provides to retailers a *legal* means to sell combusted/smoked products that are branded products, have no health warning and can be in any flavour. Consumers may well do the unexpected and purchase these to create their own nicotine smokes by adulteration (or ‘joint’ if hemp-based with THC oil). Alternatively, a rational actor may exploit this definition to flood the market with non-excise based ‘fortified’ herbal cigarettes. Especially as this Bill conveniently clears the market of conventional cigarettes.

14. **Recommendations:** *Two amendments to definitions could be made to address this loophole:*

- a) Remove the provision for ‘a herbal smoking product’ from ‘notifiable product’
- b) Amend the definition of “smoked tobacco product” as follows:
“**smoked tobacco product** means a tobacco product or any other product that is intended to be used in a way that involves ignition or the combustion process, including but not limited to herbal smoking products”

Limiting retailers

15. Rules on how many retailers are to be allowed to sell smoked tobacco products are unclear. The suggestion has been made that this could be as low as 500 nationwide, down from around 8,000 currently. The administering department, in searching for an easy solution, may favour ‘supermarkets only’ but if retailers are limited to what has been suggested, then each smoking tobacco licence would be worth around \$4m. This has two major impacts as set out below.

16. Anti-competitive Duopoly Supported – The 2022 Grocery Market Study published by the Commerce Commission made extensive and substantial recommendations to address the anti-competitive environment that New Zealand has with only two major supermarket chains:

¹ Current definition in the *Smokefree environments and regulated products (smoked tobacco) Amendment Bill*

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- New Zealand is unique in the world for such supermarket concentration and
 - the Government is now moving to implement the recommendations of the Commerce Commission report.
17. There are around 740 supermarkets from the two supermarket chains and an estimated 8,000 other outlets selling tobacco products described by the Commerce Commission as “convenience stores (eg, dairies, petrol stations, Night 'n Day)”.
18. Should supermarkets be selected as the outlets of choice for smoked tobacco products, this would be **strongly contrary to the Government’s efforts to increase competition** in the supermarket environment as it would simply drive more people (possibly as many as 75% of all those purchasing tobacco products) to supermarkets. This would operate to confirm/support/cement the duopoly and increase their profits.
19. As the Commerce Commission identified, consumers rarely go to the supermarket for single items, so not only would supermarkets get a windfall in consumers of tobacco, but they would also get an increase in many other areas of grocery purchasing and profits.
20. The economic pain for such a move would be borne by small retail businesses. The estimated 8,000 non-supermarket outlets selling tobacco products are often the small family businesses spread throughout New Zealand.
21. Limiting retail could create significant additional opportunities for organised crime, including gangs, in two key areas:
- a) Fewer but more lucrative targets for theft. Data released recently to Radio New Zealand under the Official Information Act showed that in the 12 months until July 2022 the police recorded 436 ram raids, more than double the 12 months before it, when there were 191 ram raids recorded. Top on the list of targeted items was money and the cash register, followed by retail goods and cigarettes². The most recent ram raid has been to an Auckland supermarket (Fresh Choice Waimauku) with young thieves seemingly targeting the store for vape products³.
 - b) Reduced availability opening the way illegal suppliers to fill the gap – if significant inconvenience is applied to smoked tobacco products, consumers will be increasingly tempted to purchase from the black market.

22. **Recommendations: Licensing retailers**

Rather than simply allocate the market to supermarkets, fair and equitable criteria should apply to the issuing of licenses. This will reduce the prospect of individual or class actions related to licence allocation, especially in rural/remote areas.

23. The period of licensing should also be time limited and attract an annual fee. Revenue from fees could be applied to compliance activity. (See closely related Bill recommendations at paragraph 40).

Limits on how much nicotine may be in smoked tobacco

24. Smokers will not want to smoke low nicotine products opening the way for illegal/black market activity. As the Committee is aware, the growing and manufacturing of tobacco for personal consumption remains legal under the Customs and Excise Act 2018. Including, we note, for the “smokefree generation.”

² [400% increase in ram raids, few prosecutions - police data | RNZ News](#), 21 Jul 2022

³ [Auckland ram raids: Supermarket targeted for vape products in latest incident - NZ Herald](#), 10 Aug 2022

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25. Nicotine, while addictive, does not cause cancer as smoking most certainly does. A new generation of smoked cigarettes would be based on the myth that smoking these is 'safer' than consuming nicotine by other means. This would be injurious to decades of public health work if 'low nicotine' smoked tobacco products' prevail. Low nicotine cigarettes may have a role in cessation, but they are just as deadly as any cigarette currently being sold.
26. We note Professor Donny is on the low nicotine advisory group. He led a clinical trial in 2015 involving 840 participants⁴. It was critiqued by several researchers (Cao C et al 2016, Anselm E, 2016 and Goldstein JA and Goldstein LKS 2016)⁵. The last mentioned analysed the trial data and found creatinine levels were suggestive of 'compensatory smoking.' Participants received less nicotine but more smoke — the key factor causing lung cancer. The New Zealand market comprises 451,000 current smokers. The proposed legislation is experimental policy that raises issues of health, social deprivation and crime.
27. There is also the question of who will supply the \$2b New Zealand market and 451,000 current smokers. Who will import, who will distribute and who will manage the supply chain if current participants elect not to? These are real questions that require consideration otherwise government may have to establish "KiwiSmoke" to fill the void. There is only one US company behind Professor Donny's trials; 22nd Century Group (XXII) which, in 2022, had total revenues of just US\$39.29m. Noting it uses technologies that the *Hazardous Substances and New Organisms Act* may class as 'genetically modified,' the target market may show far less enthusiasm for low nicotine tobacco than academics and the Ministry of Health.

28. **Recommendation: A community scale trial is needed**

Given how experimental this type of tobacco is and an uncertain supply chain at scale, we recommend a two-year community scale pilot be conducted to ensure the real-world efficacy. This policy trial, we contend, is essential:

- The US (Massachusetts) town of Brookline has done just this, however, a New Zealand experiment could choose a town of average smoking prevalence by way of a "smokefree town." A representative sample of smokers and non-smokers would be recruited backed by wastewater surveillance for creatinine.
- A two-year trial would test take up and abandonment, cessation support systems, legal/illegal sales, crime, retail leakage as well as vaping prevalence and quit rates. New Zealand has to be certain this works.

Smokefree Generation

29. Those born after 2009 may not be able to buy smoking tobacco but they can legally grow and manufacture 5kg per year. Tobacco seeds are readily available on the internet⁶ as the screenshot below shows:




⁴ Donny EC, Denlinger RL et al. Randomized Trial of Reduced-Nicotine Standards for Cigarettes. *New England Journal of Medicine*, 2015; 373:1340-1349. DOI: 10.1056/NEJMsa1502403

⁵ *New England Journal of Medicine*, 2016; 374;4.

⁶ [Buying tobacco seeds in New Zealand - Google Search](#) 21 August 2022

About 1,530,000 results (0.53 seconds)

Ads · Shop buying tobacco seeds in new zealand

 <p>1000 Tobacco Seeds Virginia Gold \$12.14 Etsy Free delivery</p>	 <p>Virginia Gold Tobacco Seeds \$7.63 Etsy</p>	 <p>Virginia Gold Tobacco Seeds Canada Non-GM... \$5.81 Etsy</p>
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<https://www.wickedhabits.nz> › product › tobacco-seeds-...

Tobacco Seed 1000pk GT012 - Wicked Habits

Our prime Golden Virginia tobacco seeds are harvested annually from a local NZ grower, making them ideal for NZ conditions. They have been batch tested for ...



30. There must also be a deliberate exception to the smokefree generation, as those born after 1 January 2009 may still manufacture 5kg for personal smoking use.

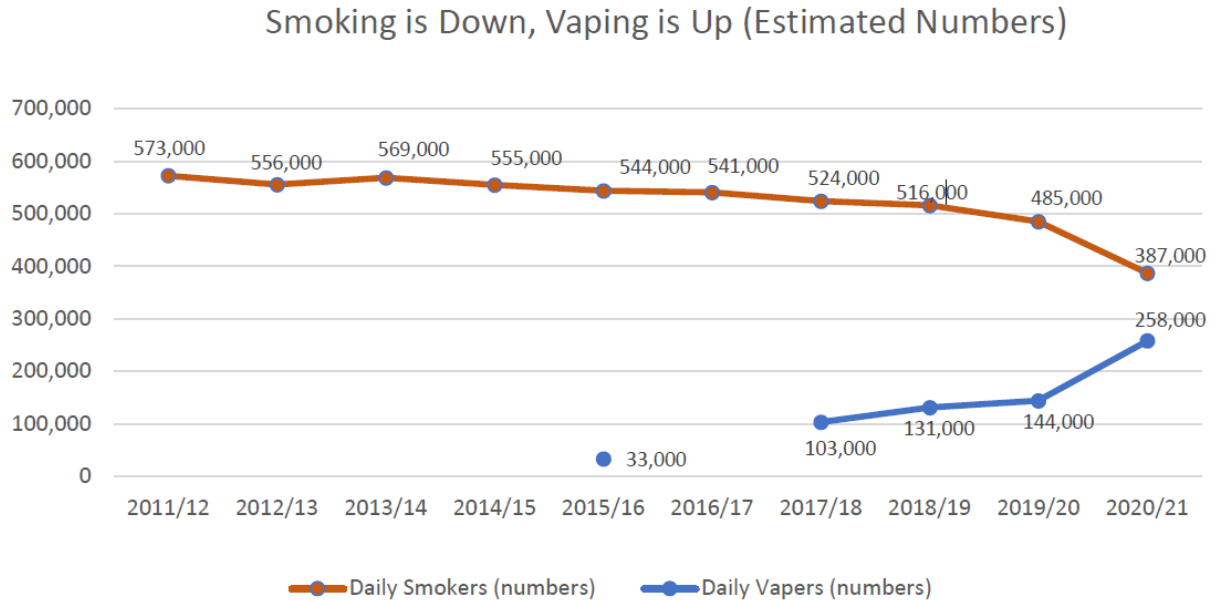
SOCIAL AND ECONOMIC CONSEQUENCES OF THE AMENDMENT BILL

Statistical analyses of New Zealand Health Survey data (Ministry of Health)

31. 2020/21 data tells us a record 98,000 New Zealanders quit daily smoking in the past year. There is a strong correlation to the public policy objective of vaping and the decrease in smoking tobacco – with 114,000 New Zealanders now daily vaping. Daily smokers have fallen from 15.9% in 2011/12 to 9.4% in 2020/21, a decrease of 186,000.
32. Past models by the Ministry of Health and the Treasury have been massively over-optimistic:
- an MoH Regulatory Impact Assessment forecast April 2010 modelled a 33.3% increase in excise would reduce smoking prevalence in 2021 by 6.5% (195,000 persons) – it did not even after excise went up 30%.
 - In 2012, the Treasury modelled further 10% annual excise increases arriving at a 7% reduction in smoking by 2021 (210,000 fewer smokers) – it did not but excise went up.
 - In 2016, Treasury remodelled annual tax increases for each of 2017, 2018, 2019 rounding out the ten excise tax increases. It predicted smoking prevalence in 2020/21 would be 12.7%. It was actually less but *only due to vaping* as Treasury never once considered this in the modelling.
33. The point is that:
- excise increases over the past decade as well as plain packaging etc has only had a marginal impact on reducing smoking (see Figure 1)
 - it was only the advent of vaping, a market-led solution objected to by some academics, that has disrupted smoking (see Figure 1)

- c) allowing vaping to continue would likely see targets of reduced tobacco smoking achieved without further legislative changes.

Figure 1: Daily Smoking vs Daily Vaping



Source: New Zealand Health Survey data, Ministry of Health

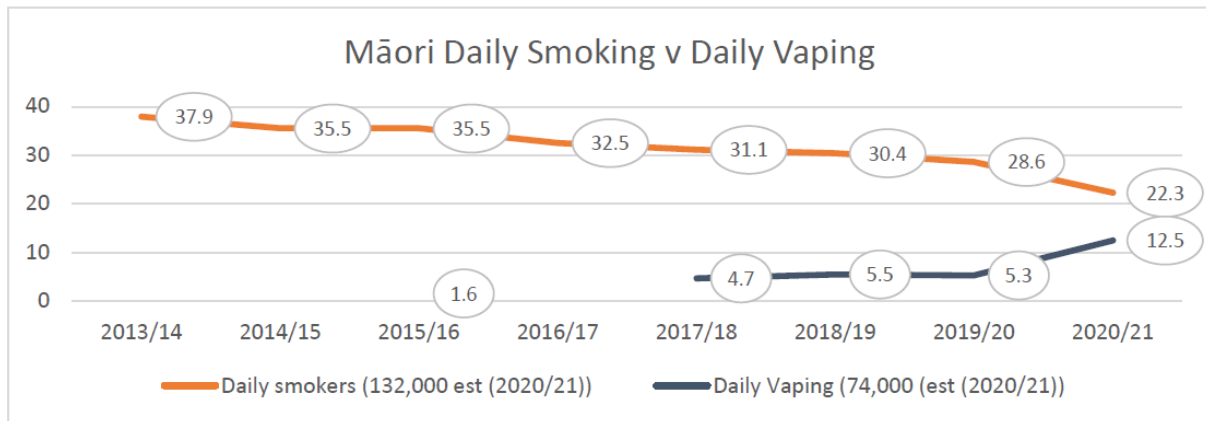
34. Vaping has had an enormous impact on smoking rates albeit in the absence of general retailers being permitted to provide vapers with information or suggest alternatives to smokers. Vaping has been a circuit breaker delivering the greatest annual decrease in smoking rates over any other single or collective intervention.

How has the wider Community done before and after vaping?

35. Despite the use of typical WHO policy approaches, until vaping, smoking rates among Māori and Pasifika remained disproportionately high, leading to unequal health outcomes. Vaping has improved this with Māori and Pasifika seeing at or above the highest quit rates, ever. Māori and Pasifika could become smokefree within a decade:

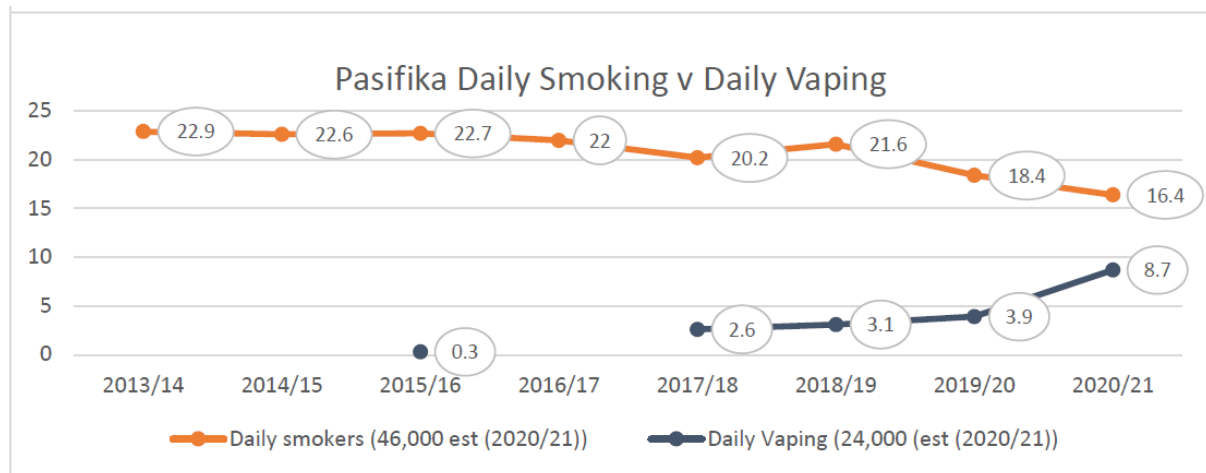
- Māori *daily smokers* have fallen 15.4% since 2011/12 to 22.3% in 2020/21. A record 6.3% (34,000) quit in 2020/21. Māori daily vapers grew 7.2% (33,000) in the year to 2020/21 to 12.5% prevalence (74,000). Note the similarity between Māori smoking quitters and daily vapers (see Figure 2).
- Pasifika *daily smokers* have fallen 6.2% since 2011/12 (47,000) to 16.4% in 2020/21 (46,000). This is the second highest annual quit rate. Pasifika daily vapers grew 4.8% (13,000) in the year to 2020/21 to 8.7% prevalence (24,000) (see Figure 3).
- Asian *daily smokers* became the first smokefree ethnicity in 2020/21. Daily smoking has fallen 4% since 2011/12 (30,000) to 3.9% in 2020/21 (25,000). Asian daily vapers grew 1.5% (10,000) in the year to 2020/21 to 3.3% prevalence.

Figure 2 Smoking vs vaping – Māori population



Source: New Zealand Health Survey data, Ministry of Health

Figure 3 Smoking vs vaping – Pasifika population

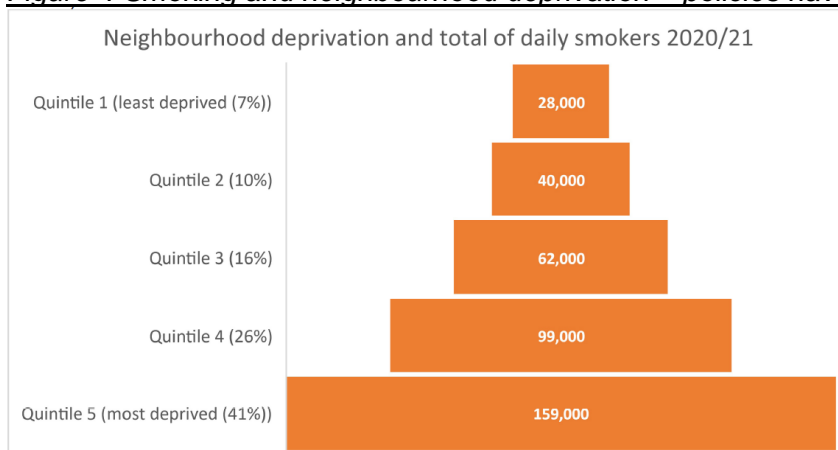


Source: New Zealand Health Survey data, Ministry of Health

Equity impacts across the population and who is paying most

36. Daily smoking prevalence remains highest among New Zealand’s most deprived populations with 67% (258,000) of daily smokers being in the two most deprived quintiles (quintiles 4 and 5 – see Figure 4). Māori, furthermore, comprise over half of all heavy smokers in New Zealand, those who smoke at least 21 cigarettes every day.

Figure 4 Smoking and neighbourhood deprivation – policies have been inequitable



Source: New Zealand Health Survey data, Ministry of Health

37. Tobacco excise is a highly regressive tax because smoking is highest among the poorest and it is a non sequitur, that squeezing the poorest through tax increases, will generate a rational quit response. In 2016, Treasury defined hubris:

“...increases in tobacco excise may make it less regressive. This is because low-income smokers are likely to be more price-sensitive than high income smokers. They are therefore likely to reduce their consumption of tobacco by a greater amount in response to an increase in tobacco excise.”

38. What we do know is that from 2011- 2021, Tobacco Excise Taxes and GST have generated around \$19.9 billion for the Crown. This means the poorest two quintiles (67% of daily smokers) have contributed over \$13b, a huge sum. If we further assume Māori comprised a third of smokers, then from 2011 to 2020, they have contributed around \$6.5b of the \$19.9b collected in excise and the GST on excise.

39. The social and economic inequities of this policy to date continue to lead to deprivation.

40. **Recommendations: For the Bill, Act and policy**

The Amendment Bill could leverage the uptake of vaping further and provide current retailers with a softer landing than they would otherwise have under the proposed legislative changes to reduce outlets and mandate low nicotine tobacco:

- a) greatly assist the reduction in current smoking by amending the prohibition on retailers providing oral information to allow them to actively sell vaping products to smokers (see *Smokefree Environments and Regulated Products Act 1990*, section 27(1) Prohibited oral communications)
- b) provide smokers easier access to heated/smokeless tobacco by correcting a 2020 drafting error within the Interpretation of “vaping substance.” This is resolved by deleting “not” from clause (c) of “vaping substance” noting that
 - (i) the Interpretation of “vaping product” includes a heated/smokeless tobacco device;
 - (ii) the Interpretation of “to vape” includes a heated/smokeless tobacco stick in that device, while
 - (iii) at subsection (4) of the Interpretation, it states that “a vaping product that contains tobacco is not a tobacco product.”

These two proposals taken together could help alleviate the impact of some of the Amendment Bill’s proposals for retailers while, most importantly, maximising the tools we know work with smokers

41. We also **recommend** the Committee consider requesting the Minister:

- a) initiate social, commercial and economic research into the contribution of excise taxes and GST upon excise, to social order, deprivation and inequality in New Zealand; and
- b) restart and redesign the ‘Vape to Quit’ campaigns specifically focused towards Māori and Pasifika.