



## **Nicotine e-cigarette cartridges can be sold as tobacco products**

End Smoking NZ, a charitable trust focussed on tobacco policy, has identified the sale of safer, satisfying nicotine products as a top priority for greatly reducing smoking.<sup>1</sup> Tobacco smoke includes thousands of compounds, including carcinogens, and lung and cardiovascular toxicants. In contrast, pure nicotine carries far less risk, and can provide a safer alternative for those too addicted to yet quit smoking.

Medsafe's interpretation of the Medicines Act is that nicotine electronic (e-)cigarettes (which vapourise nicotine into a mist for inhalation) are medicines "even if they are not represented as aids to smoking cessation",<sup>2</sup> and cannot be sold unless medicinally licensed. As no such licensing is imminent, a virtual ban is in place.

Instead, we argue that nicotine e-cigarettes are primarily recreational nicotine alternatives to smoking, though some brands may obtain licensing as medicines at some future date. We argue they already qualify as tobacco products under the Smoke-free Environments (SFE) Act, which has regulated all tobacco products for (recreational) human consumption since 1990. For example, at Section 30, the Act bans their sale to those under 18 years of age, while at Section 31 it has powers to reduce or remove any substances deemed hazardous. All that e-cigarette distributors would have to do, is strictly refrain from making therapeutic claims, and abide by current or future regulations of the SFE Act. We now examine how the SFE Act can accommodate nicotine electronic cigarettes.

The SFE Act's interpretation section defines a tobacco product as:

... "any product manufactured from tobacco and intended for use by smoking, inhalation, or mastication and includes nasal and oral snuff, but does not include any medicine (being a medicine in respect of which there is in force a consent or provisional consent under section 20 or section 23 of the Medicines Act 1981) that is sold or supplied wholly or principally for use as an aid in giving up smoking."

Thus the nicotine e-cigarette can be classified as a tobacco product, if its nicotine is manufactured from tobacco (it is) and it is not supplied wholly or principally as an aid in giving up smoking.<sup>3</sup>

Nicotine e-cigarettes, unlike medicinal nicotine patches or gum, are shaped and designed to provide nicotine-based and smoking-ritual-based pleasure by inhalation, and so can be regarded as tobacco products provided no medicinal claims are made. A recent United States district court decision,<sup>4</sup> upheld on appeal in December 2010, supports the classification of e-cigarettes as inhaled tobacco products, and recognises that almost all nicotine is consumed for recreational, not medicinal purposes.

According to the definition above, tobacco products can be used for smoking, inhalation or mastication. Of these three, the SFE Act permits sale for smoking, but not for oral use, and does not mention sale for inhalation:

... "No person shall import for sale, sell, pack, or distribute any tobacco product labelled or otherwise described as suitable for chewing, or for any other oral use (other than smoking)".<sup>5</sup>

Sale of nasal tobacco snuff for inhalation remains legal. Sale of nicotine electronic cigarettes for inhalation is not mentioned; and their import, distribution and sale can we believe, be allowed under the SFE Act. This is reinforced by observations on how e-cigarettes are used—for inhalation, not oral use.

As with cigarettes the e-cigarette mist is inhaled, but more negative pressure is needed,<sup>6</sup> requiring inhalation directly to the lungs. Smokers switching to e-cigarettes, instead of holding smoke in the mouth before inhalation as many smokers do, learn to inhale mist into the lungs in a one-stage manoeuvre.

The mouth has a separate secondary role as part of the respiratory tract, and the inhaled mist transits the mouth in seconds, whereas oral products (snuff or nicotine gum) are normally held in the mouth for half an hour. For the above reasons, we believe the sale of electronic cigarettes is not caught by the Act's ban on sale of oral tobacco products.

As nicotine e-cigarettes contain no tobacco, they attract no tobacco excise. Nicotine-free electronic cigarettes are widely advertised and sold, but most users want nicotine cartridges – which, being tobacco products, cannot be advertised (Section 22, SFE Act). Every nicotine cartridge sold means a pack of cigarettes not sold. UK surveys have shown 52% of smokers have heard of e-cigarettes but never tried them, 6% of smokers have tried them but no longer use them, and 3% currently use them.<sup>7</sup>

The Maori Affairs Select Committee Tobacco Inquiry recommended further research into the benefits and risks of alternative products.<sup>8</sup>

A recent review backs e-cigarettes as much safer than cigarettes, although absolute safety is yet to be proven.<sup>9</sup> Further reliance, however, on regulation solely under the Medicines Act, as at present, would deny satisfaction to the thousands of smokers who have already bought e-cigarettes without nicotine, as currently advertised. No hospitalisations or deaths have been reported globally so far from over 3 years of nicotine e-cigarette sales. Smokers merely want the choice now, without having to order the nicotine cartridges from China.

**Conclusion**—The Smoke-free Environments Act provides a comprehensive framework for governing recreational tobacco and nicotine, and already permits the import, distribution, and sale of nicotine electronic cigarettes as tobacco products.

Murray Laugesen, Marewa Glover, Trish Fraser, Ross McCormick, John Scott  
Board Members, End Smoking NZ Trust  
[chair@endsmoking.org.nz](mailto:chair@endsmoking.org.nz)

## References:

1. Laugesen M, Glover M, Fraser T, McCormick R, Scott J. Four policies to end the sale of cigarettes and smoking tobacco in New Zealand by 2020. N Z Med J 14 May 2010;123(1314). <http://www.nzma.org.nz/journal/123-1314/4107/>
2. Medical devices, Categorisation of electronic cigarettes. Medsafe website, accessed 22 Dec 2010. <http://www.medsafe.govt.nz/regulatory/medicaldevices/electroniccigarettes.asp>
3. Laugesen M. Nicotine electronic cigarette sales are permitted under the Smokefree Environments Act [Letter]. N Z Med J 29 January-2010;123(1308). <http://www.nzmj.com/journal/123-1308/3955/content.pdf>

4. Smoking Everywhere Inc and Sottera Inc c/b/a NJoy v. US Food and Drug Administration et al (defendants). Civil case 09-771 (RJL) Memorandum Opinion Jan 14, 2010. US District Court for the District of Columbia.
5. Smoke-free Environments Act, section 29(2).  
[http://www.legislation.govt.nz/act/public/1990/0108/latest/DLM224309.html?search=ts\\_act\\_Smoke-free+Environments+Act\\_rese&p=1](http://www.legislation.govt.nz/act/public/1990/0108/latest/DLM224309.html?search=ts_act_Smoke-free+Environments+Act_rese&p=1)
6. Trtchounian A, Williams Williams M, Talbot P. Conventional and electronic cigarettes (e-cigarettes) have different smoking characteristics, Nicotine Tob Res. 2010 Sep;12(9):905-12. Epub 2010 Jul 19.
7. Dockrell M. What smokers tell us about e-cigarettes. Society for Research on Nicotine and Tobacco Conference (Europe), Bath, England, 2010.
8. Maori Affairs Committee. Inquiry into the tobacco industry in Aotearoa and the consequences of tobacco use for Maori. Report. Forty-Ninth Parliament. Hon Tau Henare, chairperson. Wellington, November 2010. p40.
9. [http://www.parliament.nz/NR/rdonlyres/C6AAA494-A706-48C6-8F91-6CAF5EA7CA51/164754/DBSCH\\_SCR\\_4900\\_InquiryintothetobaccoindustryinAote.pdf](http://www.parliament.nz/NR/rdonlyres/C6AAA494-A706-48C6-8F91-6CAF5EA7CA51/164754/DBSCH_SCR_4900_InquiryintothetobaccoindustryinAote.pdf)
10. Cahn Z, Siegel M. Electronic cigarettes as a harm reduction strategy for tobacco control: A step forward or a repeat of past mistakes? J Public Health Policy. 2010;9 Dec: doi:10.1057/jphp.2010.41,1-16.