



Clauses of Tobacco  
Products and  
Electronic Delivery  
Systems Bill that  
VPASA is Concerned  
About

## Overview of the Bill

- The bill treats vaping and smoking as one - the bill interchangeably uses smoking and vaping. The two are not the same. Smoking delivers nicotine by burning tobacco, which can cause smoking-related illnesses while vaping delivers nicotine by heating a liquid in a much less harmful way.
- The use of “Must” and “May” interchangeably throughout the document
- Unfettered Ministerial powers - Health Minister will be given unfettered powers to regulate vaping ingredients, product standards, packaging, and where, when and by whom vapes can be sold - without undergoing normal consultation processes.

## Problematic Clauses

- Control Over Smoking/Vaping
- Public Vaping ban -essentially there will be no designated areas for vapers.
- Advertising, Promotion, Sponsorship, Distribution, and Display of Relevant or Related Product
- Display and advertising ban - the bill seeks to prohibit the display of vaping products in shops. ◦ No promotion of Harm Reduction - vaping products cannot be promoted or sold as less harmful than traditional tobacco products.
- Packaging and Labelling of Tobacco Devices, Electronic Nicotine Delivery Systems, and Electronic Non-Nicotine Delivery Systems
- Health Warning and Required Information
- Standards for Manufacturing, Processing, and Importing of Relevant Products and Related Products
- Ban on Flavours -only tobacco flavours will be permissible.
- Disclosure To Minister
- Offenses and Penalties

# Control Over Smoking/Vaping

## Section 2

### Clause No. 01 (a)

*No person may smoke in - an enclosed public place, enclosed workplace, or in or on a public conveyance.*

### **Key Concern**

- The proposed amendments lump ENDS/ENNDS and traditional tobacco together and commonly refers to vaping as smoking, which is inaccurate. The Bill imposes identical restrictions in terms of allowable smoking areas, including an increase in limitations for public use. This would nullify the incentive for consumers to responsibly decide and use ENDS/ENNDS as they would be prohibited from using these in public places and indoors.

### Clause No. 01 (D, E & F)

*No person may smoke in - (D) an enclosed common area of a multi-unit residence, (E) in a private dwelling or elsewhere on the premises of a multi-unit residence if smoking interferes unreasonably with the enjoyment of other persons lawfully on the premises, (F) a private dwelling, if that private dwelling is used for any commercial childcare activity, child stay, for schooling, tutoring, domestic employment or otherwise as a workplace.*

## Key Concern

- This will interfere with private property rights enshrined in the constitution.
- It is worth noting that vaping poses only a small fraction of the risks of smoking as vapours' biomarkers were significantly lower than those found in smokers. This is according to the **2022 Evidence Update Summary** by Public Health England which also found that there was no exposure to biomarkers from passive vaping<sup>1</sup>.
- There is no evidence that secondhand vaping could lead to harm. To seek to ban adults from vaping in their own homes could open the door for abuse by private citizens and will certainly overstretch the limited capacity of law enforcement. It is unwise for the government to incentivize private citizens to police the private behaviour of fellow citizens and could fray neighbourly relations, degrade neighbourliness and possibly lead to incidents of violence.

## We Propose

- That ENDS/ENNDS should not be subjected to the same public place usage bans as cigarettes.
- For adult-associated private venues, hotels, restaurants, cafes, and commercial offices, it should be left to owners to determine whether and in which areas ENDS/ENNDS use should be permitted.
- That there be separate regulations for vaping and smoking and that the two should not be categorised as one, as they are distinctively different from each other.

# Advertising, Promotion, Sponsorship, Distribution, and Display of Relevant or Related Product

## Section 03

### Clause No. 03 (1)

*All domestic and cross-border advertising or promotion and sponsorship of a relevant or related product is prohibited.*

#### Key Concern

- VPASA does not object to advertising restrictions of the kind that could promote youth vaping. It is sensible that vaping should not be advertised in places frequented by minors. VPASA is a member of the Advertising Regulatory Board, and an advertising code for the industry will be adopted by the end of March 2023.
- It will leave smokers unaware of available harm-reduced alternatives to help them kick away their habit of smoking.
- It is not clear how government intends to policy cross-border advertising of vaping products.

### Clause No. 02 (a, b & c)

*No person shall - (a) advertise, promote or sponsor or cause any other person to advertise, promote or sponsor or be a party to any advertisement, promotion or sponsorship of a relevant or related product, (b) notwithstanding the provisions of paragraph (a), no person may initiate, produce, or publish any advertising, promotion, or sponsorship content, (c) in the course of that person's business, for financial or other gain, be a party to an agreement for or related to sponsorship in respect of a relevant or related product.*

#### Key Concern

- The proposal will prohibit educational and awareness campaigns to educate consumers about related and relevant products (in this case, ENDS/ENNDS). It will also prohibit campaigns that are aimed at preventing youth access to vaping products.
- It is not sensible to prevent the industry from communicating with adult smokers about vaping and vaping products. On the contrary, government should work with the industry to design messages that would appeal to adult smokers to encourage them to switch from smoking to vaping to reduce their harm exposure to the toxicants found in combustible tobacco.

The UK Health system already encourages smokers who do not wish to kick their addiction to nicotine to switch to vaping to reduce their harm, recognising the public health benefits of smokers' switching their nicotine delivery system.

Clause No. 04 (e)

*Any commercial communication, act or practice that is likely to advertise or promote a manufacturer, wholesale distributor or importer of the relevant or related product, or a retailer who deals exclusively in a relevant product or related product.*

### **Key Concern**

- This provision does not make sense for a novel product such as vaping. Not only will it prevent smokers from gaining knowledge about vaping, but it will also leave smoking unchallenged as the dominant form of nicotine delivery. It is counter-intuitive to protect a product that is known to be harmful against one which is scientifically proven to be at least 95% less harmful and claim to care about the health of smokers.
- While the concern about youth vaping is warranted, it does not make sense to extinguish any possibility for alternative forms of nicotine delivery to gain a foothold in the nicotine delivery market, if such would have the perverse effect of protecting the more harmful product from being displaced by a less harmful and popular alternative.
- Retailers will now be prohibited from informing consumers on which brands are available in store - thereby, making it difficult for information sharing.

### **We Propose**

1. No manufacturer, importer, distributor, or retailer may advertise or promote, or cause any other person to advertise or promote, electronic nicotine delivery systems except through the following means:

- (a) adult publications;
  - (b) communication with adult consumers, including electronic mail, short messaging service whereby text is sent over an electronic communications network and telemarketing;
  - (c) point-of-sale promotional materials;
  - (d) commercial radio during general adult listenership;
  - (e) commercial television during general adult viewership;
  - (f) online advertising;
  - (g) outdoor promotional materials;
  - (h) sponsorship of cultural, social, or recreational events by manufacturers, importers, distributors, or retailers, provided that such events are directed at an audience of 18 years of age and above.
2. All advertising and promotion of electronic nicotine delivery systems must clearly indicate that the product contains nicotine;
  3. No manufacturer, importer, distributor, or retailer may take any action, targeting persons under 18 years of age when it advertises or promotes electronic nicotine delivery systems or take any action;
  4. No manufacturer, importer, distributor, or retailer may place or cause to be placed any advertising or promotion of a product at any educational establishment or health facility, except in the pursuit of a normal retail channel such as that of a pharmacy.

#### Clause No. 04 (f)

*The offer or the supply of a relevant or related product to any person for their use or for subsequent supply for free, or as a sample or at a reduced price other than normal trade discount.*

#### **Key Concern**

There will be no sampling or giveaways of vaping products - which means consumers will be deprived of an opportunity to test products before purchasing.

Clause No. 05 (d & e)

*(d) A retailer or wholesaler who offers for sale or sells a relevant or related product to consumers may display at his or her place of business a single prescribed notice informing consumers that a list of relevant or related product for sale, along with their prices and quantities, may be requested at the sales counter.*

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### **Key Concern**

- Clause 5 (d) is an infringement of the freedom to trade of retailers. Not only is the injunction unwarranted, but it will also only serve to protect combustible tobacco from fair competition. To be sure, combustible tobacco is the dominant form of nicotine delivery. Any effort to curtail awareness raising about alternatives will only achieve the perverse outcome of protecting the industry from legitimate competition and disadvantage adult smokers from exercising informed choice.
- A ban on product display would be prejudicial to small traders who will also be prevented from marketing their products if this Bill is adopted in its current form. Point of Sale product displays act as an affordable platform for retailers to create awareness about the products they have on sale as well as an opportunity for consumers to acquire information about brands, and thus to differentiate.



# Packaging and Labelling of Tobacco Devices, Electronic Nicotine Delivery Systems and Electronic Non-Nicotine Delivery Systems

## Section 5

Clause No. 01

*The Minister may make regulations for the packaging and labelling of an electronic nicotine delivery system, electronic non-nicotine delivery system, or a tobacco device, which may include standardised packaging.*

### **Key Concern**

- For smoking, the bill says the minister must while it says the minister may for ENDS/ENDS.
- The industry objects to any such power vesting in the Minister. While we accept that packaging should be aimed at adult users, we are concerned that applying smoking-related restrictions to vaping will only protect the tobacco industry and prejudice existing smokers.
- The industry has voluntarily adopted packaging requirements to prevent the use of cartoons and candy on product packaging to avoid attracting young kids and non-smokers to vaping.
- This creates uncertainties and we believe this is a way for the Health Department to buy time to have conversations about vaping at a later stage. Also, if the bill gets passed in its current form, it will empower the minister to change regulations at a later stage without necessarily consulting with stakeholders.

### **We Propose**

1. The packaging for an electronic nicotine delivery system or electronic must -
  - (a) be child-resistant and conform to standard ISO 8317;
  - (b) include a visible tamper-evident seal;
  - (c) not contain any cartoons action heroes or popular characters designed to appeal to persons under 18 years of age and;
  - (d) display the following information:
    - (i) a statement of the manufacturing date and batch number of the product; and
    - (ii) contact details of the manufacturer to enable consumers to provide feedback on the product.

# Packaging and Labelling of Non-Nicotine and Nicotine- Containing Products

## Section 06

### Clause No. 01

*The Minister must make regulations for the packaging and labelling of non-nicotine substances or products that are used with the electronic non-nicotine delivery system and electronic nicotine delivery system, and nicotine-containing substances or products, which may include standardised packaging.*

### **Key Concern**

- This is contradictory to 5 (Clause 1), as (5. 1) says May while the latter (6. 1) says Must. Similar to clause 5 (clause 1), the proposal will give the minister unfettered powers to determine the regulations.
- Further, it is not clear why the Minister should have regulatory authority over non-nicotine products as there is no evidence of harm that has been adduced to support such vesting of authority.

### **We Propose**

- That the Minister is not given the power to unilaterally set regulations for the industry. All regulations should be included in the Bill with Ministerial regulations merely for clarification purposes.
- Proposed tobacco control packaging and labelling laws should not apply to ENDS/ENNDS as they do not contain tobacco.
- There should be a legal requirement for e-liquids to carry a general safety warning such as: *“This product may be hazardous to health. Keep out of reach of children.”*

# Health Warning and Required Information

## Section 07

Clause No. 02 (a)

*The packaging for an electronic nicotine delivery system and electronic non-nicotine delivery system including any non-nicotine substances or products that are used with an electronic non-nicotine delivery system and electronic nicotine delivery system, and nicotine-containing substances or products sold separately, and of a tobacco device, must display the following information - (a) message as described in subsection (1)(a)(i) and (ii) on each principal display area of the packaging, which may include a picture, graphic, or image.*

### Key Concern

- This is a contentious requirement as there is no verifiable evidence of long-term harm that has been adduced in support of the regulatory aims of the Bill.
- Throughout the Consultation processes, the Department has justified the need for regulation on the grounds that not enough is known about the harms of vaping. Further, the products could act as a gateway to smoking. It is thus unclear what harms are to be communicated to the public if, as the Department readily admits, not enough is known about the harms of vaping. Furthermore, the Department cannot move from protecting young people from progressing to smoking and claiming that the products which may act as a gateway are themselves harmful.

Clause No. 04 (a)

*The Minister **must** provide electronic files containing the required health warnings and any information including any pictures, graphics, or images, required to be displayed on or in the packaging of relevant products and related products.*

Key Concern

- We are of the view that Graphic Health Warnings for ENDS/ENNDS would be an oxymoron, considering that there is no firm evidence to support claims of overwhelming harm from vaping. To require manufacturers to display graphics showing the health hazards of these products will thus be impossible.
- This will empower the minister to change regulations whenever he/she wishes to.

### **We Propose**

1. The packaging for e-liquids must display the following information:

- (a) a health warning relating to the addictive effects of nicotine if the e-liquid solution contains nicotine;
- (b) a statement describing, or information on each ingredient in the product;
- (c) a statement describing the nicotine concentration present in the e-liquid solution component of the product if the e-liquid solution contains nicotine.
- (d) where the product, including any of its components, contains or may contain any common allergen, a statement indicating the presence or possible presence of such allergen;
- (e) both of the following warnings in the form of a written statement or symbol Privileged and Confidential - for planning purposes only;
  - (i) "sale to persons under 18 is prohibited"; and;
  - (ii) "keep out of reach of children and animals".

# Standards for Manufacturing, Processing, and Importing of Relevant Products and Related Products

## Section 08

### Subsection 1 (Clause D)

*The Minister may make regulations regarding the standards for manufacturing and processing of the relevant or related products and for their testing and measuring, including - (d) ingredients, additives, colourants, and characterised flavourings.*

### **Key Concerns**

- This is problematic as it will empower the minister to introduce a ban on flavours for ENDS/ENNDS.
- Flavoured vaping products are instrumental in aiding adult smokers in their quest to quit smoking cigarettes. It is our opinion that legislation on vaping flavours must take this fact into account.
- We also know that banning flavours runs the very serious risk of nudging vapers back to smoking cigarettes.
- This will also open the vaping market to self-mixing, which could be detrimental to health and lead to the proliferation of a black market.

### **We Propose**

We plead against the widespread implementation of such bans. As has been demonstrated, it is well known that flavour bans reignite the problems of prohibition, which is a net negative for society, both in terms of criminal activity and consumer safety.

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# Restriction of sales in respect of relevant product and related product

## Section 09

### Clause No. 05

*No person shall sell, offer for sale, supply or distribute a relevant product or 20 related product to a consumer through the postal services, courier services, internet or any other electronic medium, or by any other means as may be prescribed in furtherance of the objectives of the Act.*

## **Key Concern**

This is problematic because e-commerce is an important channel for selling products in South Africa, including electronic nicotine and non-nicotine products. Further, the evolution of the vape market in South Africa has tended to be urban-based, with peri-urban areas less likely to have physical vape shops. An injunction on remote selling may have the effect of limiting the reach of the products, thus excluding vast, less-developed swathes of the South African smoking population.

## **We Propose**

No person shall sell, offer for sale, supply or distribute a relevant product or 20 related products to a consumer through the postal services, courier services, internet or any other electronic medium, unless such sale is subject to verifiable, auditable, 3<sup>rd</sup> party age verification systems.

## **Disclosure To Minister**

### **Section 10**

Clause No. 03

*The Minister may make information contemplated in subsections (1) and (2) publicly available, subject to any other applicable law.*

## **Key Concern**

This is problematic as the minister could pick and choose which information is to be made available. Based on the posture of Department of Health towards vaping, the Minister may only make anti-vaping information publicly available.

## **We Propose**

11. (1) Same as above (Section 10: Clause No.03).

# Offenses and Penalties

SECTION OF THE BILL	OFFENSE	PENALTY
Section 3(1)	Advertising and marketing prohibitions	10 years
Section 3(5)(a)	Breach the retail display ban	10 years
Section 5(2)	Selling products that do not comply with the packaging requirements	10 years
Section 9(2)	Employing a minor to sell tobacco, vaping and related products	15 years
Section 9(3)	Selling confectionary or toys or any items designed to resemble or has the likely effect of promoting a relevant or related product	15 years
Section 9(5)	Selling products online or through electronic means	15 years
Section 8(2)	Failing to comply with prescribed standards on the products	20 years
Section 9(1)	Selling to children	20 years