

## Cancer Council New South Wales: Submission on Public Health (Tobacco) Regulations 2016

To whom it may concern,

Thank you for the opportunity to submit on the Draft Public Health (Tobacco) Regulations 2016 (the Draft Regulations).

### *Overview*

The vision of Cancer Council NSW is *Together we will beat cancer*. A priority in achieving this vision is preventing cancer by encouraging people to lead healthy, cancer-smart lifestyles. Reducing smoking is one of the most important ways to prevent cancer.

The primary target of the Draft Regulations is on the tobacco retailing environment. Cancer Council NSW argues that controlling the retail environment is an important component of a broader range of interventions aimed at reducing the harm caused by tobacco. We note that tobacco, a product that kills two-thirds of its long term users and is Australia's leading cause of preventable death and disease, is startlingly easy to buy.

Cancer Council NSW argues that stronger tobacco retail regulation would contribute to the objectives of the Public (Health) Tobacco Act 2008 (the Act) because it would further reposition tobacco as the harmful product that it is, and would contribute to the de-normalisation of smoking and tobacco products. Other products that have varying degrees of risk associated with them are regulated more strongly than tobacco in NSW. For example:

- liquor licensing places limits on where, when and to whom alcohol may be sold
- pharmacists selling prescription medicines must have a pharmacy degree and maintain their registration or else face severe penalties
- pawnbrokers must have a licence and second-hand dealers must have a licence if they buy or sell certain goods such as musical instruments, sporting goods and photographic equipment.

Cancer Council NSW believes the public health risk posed by tobacco means that the tobacco retail environment should face strong regulation and licencing. Cancer Council NSW acknowledges that stronger regulation of the tobacco retail environment would require amendments to the Act rather than the Draft Regulations so our focus in this document is on making specific comments on the Draft Regulation and the Regulatory Impact Statement (RIS).

### *Response to the RIS*

Cancer Council NSW agrees with the argument set out in the RIS that Option 1 – No Regulation would undermine the purpose of the Act and would render significant sections of the Act nugatory. Cancer Council NSW agrees that the strong regulation of tobacco and e-cigarette retail environment plays an important role in supporting the objectives and operation of the Act. Cancer Council NSW therefore supports continuing to have regulations under the Act.

Cancer Council NSW does not support RIS Option 2 – Making the regulation with no provisions relating to advertising and signage requirements. Cancer Council NSW strongly supports placing strong restrictions on tobacco and e-cigarette packages, and strongly supports provisions to require the display of signage indicating the dangers of tobacco and the prohibition on selling tobacco products or e-cigarettes to minors. Cancer Council NSW agrees with the argument in the RIS that point of sale signage serves to remind smokers and potential smokers of the dangers of smoking and the prohibition against sales to minors. Cancer Council NSW agrees that Option 2 is therefore not appropriate to support the operation and objectives of the Act.

#### *Response to the Draft Regulations*

In general, the Cancer Council is supportive of the changes to the Public Health (Tobacco) Regulations indicated in the Draft Regulations. The Cancer Council NSW notes that passing the Draft Regulations would support the objectives and operation of the Public Health (Tobacco) Act 2008, particularly in relation to:

- limiting the scope of tobacco and e-cigarette advertising aimed at young people
- requiring health warnings to be on any tobacco product that has an advertisement
- giving effect to legislative changes regarding e-cigarettes in tobacco retailers
- giving effect to legislative changes to clarify prescribed quantities of illegal tobacco that is deemed to be for sale
- establishing provisions governing the advertising of tobacco products and e-cigarettes on premises
- requirements to display notices regarding the dangers of tobacco products and the prohibition on selling tobacco products or e-cigarettes to minors (including for vending machines)
- provision for new spot fines for specific offences.

The Cancer Council NSW further notes that e-cigarettes are not subject to the Commonwealth plain packaging laws, which limits the capacity of the Draft Regulations to further restrict advertising on packages in the same way required for tobacco products. However, long-term, Cancer Council NSW believes that the sale and use of e-cigarettes should be regulated in a similar manner as tobacco products. This is because:

- the health impacts of e-cigarettes are unknown
- e-cigarettes on the market have not been approved by the Therapeutic Goods Administration for safety, quality or efficacy
- research indicates that e-cigarettes appeal to children.

Cancer Council NSW would welcome the opportunity in future to contribute to changes to primary legislation that would allow for e-cigarettes to be regulated in a similar manner as tobacco products, including:

- banning fruity, sweet and confectionery flavoured e-cigarettes and e-liquids
- requiring businesses wanting to sell e-cigarettes to register with the NSW Ministry of Health

- restricting the use of e-cigarettes in indoor and outdoor areas where it is illegal to smoke tobacco products (e.g. in workplaces, on public transport, in restaurants, near children's play equipment).

Cancer Council NSW supports the Draft Regulation introducing spot fines for minor display retailing offences in addition to existing spot fines. Spot fines represent a convenient method to punish minor display retailing offences and should contribute to retailers' improved understanding of the requirements of the Act.

The Draft Regulations give effect to many of the changes made to the Public Health (Tobacco) Act 2008 following the statutory review of the Act, however, Cancer Council NSW notes that further progress could be made in relation to implementing the recommendations of the Taskforce on Tobacco Retailing (the Taskforce) in relation to the operation of the NSW Tobacco Retailer Notification Scheme (TRN).

#### *Long term view on tobacco licensing and the TRN*

Cancer Council NSW's position on tobacco retailing is to limit the supply or availability of tobacco products, such as through a positive licensing scheme that can be used to shape the market size and composition. Cancer Council NSW acknowledges that the review of the Draft Regulations offers limited opportunity to further regulate this area, however, Cancer Council NSW believes that a positive licensing scheme would contribute to efforts to reduce the incidence of smoking and other consumption of tobacco products and non-tobacco products, which would reduce the adverse impact of these products on the health of the people of NSW. This position is reinforced by Cancer Council NSW's examination of the evidence relating to the retail environment and smoker behaviour.

Cancer Council NSW conducted an audit of 1,739 tobacco outlets in NSW as part of its ongoing work to contribute to improvements in the NSW tobacco retailer registration system. The results of this tobacco retailer audit were published in the Tobacco Control Journal in April 2016.<sup>1</sup> The audit found that for every 12.6 retailers that had registered under the TRN, one retailer had not registered despite there being no cost to do so. This ratio is likely to be an underestimation because of the difficulty in finding non-notified retailers. The audit found that unlicensed retailers were more likely to violate other requirements of the Regulations, such as tobacco product display requirements.

Most significantly, and of great concern, is the finding of the audit that the TRN does not accurately record the number, type and location of tobacco retailers in NSW. It found there were retailers not included in the list of notified retailers, and that the list of notified retailers included a large number of multiple listings and out-of-date retailer records. This suggests there is a significant issue concerning the TRN.

The identified issues with the TRN could be resolved in two key ways:

- shift to a positive licensing scheme that allows for better control of the tobacco retail environment and creates additional tools to track and enforce compliance
- improve the accuracy and usefulness of the current TRN.

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<sup>1</sup> Rae Fry, Suzan Burton, Kelly Williams, Scott Walsberger, Anita Tang, Kathy Chapman, Sam Egger (2016) Retailer licensing and tobacco display compliance: are some retailers more likely to flout regulations? *Tobacco Control* Published Online First: 8 April 2016. Abstract available at <http://tobaccocontrol.bmj.com/content/early/2016/04/08/tobaccocontrol-2015-052767.abstract>

Cancer Council NSW understands that shifting to a positive licensing scheme would require significant changes to primary legislation rather than making changes to the Draft Regulations but would welcome the opportunity to contribute to this discussion in the future.

Noting the opportunity to raise concerns with the TRN presented by the opportunity to submit on the Draft Regulations, Cancer Council NSW notes that significant progress could be made to improve the accuracy and operational effectiveness of the TRN through non-regulatory changes.

#### *Improvements to TRN*

Cancer Council NSW believes a stronger TRN is required. The stated objective of the TRN is to inform the Ministry of Health about the number and location of tobacco retailers in NSW in order to support enforcement of the tobacco retailing requirements of the Act. However, the Cancer Council NSW's research suggests that there are a relatively high number of tobacco retailers who are not registered, despite there being no cost to do so, and further understands there is limited capacity to monitor the specific activities of Local Health Districts in relation to their tobacco retailer compliance activities.

Improving the coordination between the TRN and the real-time activities of compliance activities would make better use of the TRN database and allow for better use of limited compliance resources. For example, one approach would be 'rank' or categorise database information based on when it was last updated. This would enable the regulator to apply varying levels of confidence to the information held based on the recentness of data and focus compliance visits accordingly. For example, compliance visits could be prioritised around retailers that had not updated their details for a certain period of time. This approach would recognise that retailers that understand the need to update the TRN as their details change are more likely have better understanding of their other requirements under the Act. Focusing on those retailers that have not updated their details within a certain timeframe may therefore target retailers with a weaker understanding of their requirements under the Act, who may therefore be more likely to be non-compliance in other areas.

It would also facilitate cleaning of the database to remove or exclude old entries, thus meeting the stated purpose of the TRN to "... inform the Ministry of Health about the number and location of tobacco retailers in NSW in order to support enforcement of the tobacco retailing requirements of the Act". Cancer Council NSW research shows that the TRN is not currently meeting its purpose given the state of the database.

#### *Taskforce recommendations*

The Taskforce made a number of recommendations for improvements to the TRN. Cancer Council NSW supports the changes that have been made to date, including:

- updating the TRN database to allow large retailers to update their details online
- on-going 'interrogations' of the database to identify and consolidate or remove duplicate entries.

Cancer Council NSW strongly supports any initiative that aims to improve the accuracy of the TRN. Cancer Council NSW supports ongoing work to configure the TRN so all retailers can update or cancel their TRN online as retailers may be more likely to keep their details updated if the barriers to updating them are removed or reduced.

Cancer Council NSW would support further steps to make the TRN as user-friendly as possible to increase the likelihood that retailers keep it updated. This could include further improvements such as requiring retailers to provide their email addresses and consent to

receiving further information by email. Utilising email has a number of benefits for improving the accuracy of the TRN, and the implementation of the Act and Regulations more generally, as it provides an additional means to notify retailers of their obligations under the current Act and Regulations, as well as allowing for better communication with retailers about:

- emerging issues
- public health alerts
- updating their TRN details
- providing information on changes to the law in the future.

This represents a low-cost, practical method for improving the application of the TRN and contributing to the improved understanding of tobacco retailers regarding their obligations and would be in-line with the recommendations of the Taskforce.

Regarding enforcement, it is noted that Authorised Officers undertake the primary compliance role to ensure tobacco retailers are complying with the requirements of the Act and corresponding regulations. Cancer Council NSW believes more could be done to coordinate information between the TRN and compliance activities. Cancer Council NSW notes that developing an online Tobacco Information Management System to support the collection, collation and dissemination of tobacco compliance monitoring and enforcement information would be a significant undertaking, but this could have a significant impact on improving the value of the TRN. However, shifting to a positive licensing scheme, with annual licencing fees, would provide an ongoing source of funds to assist with the payment of such a system.

## **Conclusion**

Cancer Council NSW does not support Option 1 or Option 2 in the RIS as these would not contribute to the operations and objects of the Act. Cancer Council NSW notes that the Draft Regulations provide an improvement over the existing regulations, particularly in relation to the regulation of e-cigarettes in the retail environment, creating new spot fine offences, and clarifying language of the previous regulations.

Regarding registration of retailers, Cancer Council NSW argues that a stronger TRN is needed. Cancer Council NSW notes that its own research of 1,739 retailers concluded that the TRN does not accurately record the number, type and location of tobacco retailers in NSW. Cancer Council NSW argues that a positive licensing scheme would enable better managements of the tobacco retailer environment, which would contribute to the operation of the Act but notes that this would require legislative change, beyond the scope of the regulation review. Under the current system, significant improvements could be made without requiring further regulatory amendments. Suggestions for improving the TRN include:

- allowing all retailers to update their details online
- requiring retailers to provide their email addresses to allow for better communication with retailers, including reminders about updating TRN information to help improve the accuracy of the database
- categorising entries in the TRN based on recentness of update
- improving the links between the TRN and compliance activities to enable better prioritisation of scarce compliance resources, such as through an online system that would collect and collate compliance information and match this against the TRN.