

Submission by Nicoventures to the Health and Social Care Committee on the Public Health (Wales) Bill

1. Introduction

1. This is Nicoventures Holdings Limited's (Nicoventures) submission to the Health and Social Care Committee of the National Assembly for Wales (the "Committee") concerning the consultation on the Public Health (Wales) Bill (the Bill). Nicoventures is engaged in the development and sale of innovative and high-quality nicotine products, including vaping products (also commonly referred to as e-cigarettes)¹. It is part of the British American Tobacco Group, but managed separately from the tobacco business.

2. Nicoventures appreciates this opportunity to comment on Part 2 of the Bill, concerning Tobacco and Nicotine Products and will use it to reiterate several points put forward in its response in the Consultation concerning the White Paper issued on 2 April 2014.

2. Vaping products: the evidence

3. Vaping products do not contain tobacco, they do not rely on combustion and, as a consequence, no smoke is formed when the e-liquid is "vaped" and no tobacco tar is formed. Instead, nicotine is delivered in an aerosol predominantly of inert glycerol or propylene glycol. Moreover, vaping products do not expose users to any significant level of toxicants, and nicotine itself is not related to chronic health effects such as cancer, heart disease or pulmonary disease. Indeed, as reported by the Royal College of Physicians: "[a]lthough nicotine is the addictive component of tobacco products it is the toxins and carcinogens in tobacco smoke that cause most of the harm from using tobacco."² The UK National Institute for Health and Care Excellence similarly concludes: "Most health problems are caused by other components in tobacco smoke, not by the nicotine."³

4. A panel of experts in nicotine science, medicine, toxicology and public health policy applied a multi-criteria decision analysis approach to tobacco and nicotine products based on harms to users and harms to the wider society. The study attributed a relative harm score of 100% for conventional cigarettes, while giving a score of 4% for vaping products.⁴

5. More recently, an independent expert review commissioned by Public Health England found, among others, that:

- a. The current best estimate is that vaping products are around 95% less harmful than smoking.⁵

¹ In this submission, the term "vaping products" refers to electronic nicotine and non-nicotine delivery systems ("ENDS", also commonly referred to as e-cigarettes), including e-shisha and e-liquids that deliver an aerosol, which may contain nicotine, composed predominantly of inert glycerol or propylene glycol.

² Tobacco Advisory group of the Royal College of Physicians. 2007. *Harm reduction in nicotine addiction. Helping people who can't quit*. London RCP.

³ UK National Institute for Health and Care Excellence (NICE). 2013. *Tobacco: Harm reduction approaches to smoking*.

⁴ Nutt et al, Estimating the Harms of Nicotine-Containing Products Using the MCDA Approach. *Eur Addict Res* 2014;20:218-225, at 224, Fig 3 at 223. See also Fagerström Report, ¶ 20 and fn. 18.

⁵ Public Health England, *E-cigarettes: an evidence update*, A report commissioned by Public Health England, p. 80. Available at

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454516/E-cigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England.pdf>

b. Vaping products release negligible levels of nicotine into ambient air with no identified health risks to bystanders.⁶

6. In view of this evidence, there is a growing consensus that vaping products are in general significantly less risky than conventional cigarettes and that they have a significant potential for harm reduction. Already in May 2014, 53 leading experts on Nicotine Science and Public Health Policy addressed a letter to Margaret Chan, Director General of the World Health Organization, expressing their concern about the marginalisation of and insufficient emphasis on harm reduction as part of a critical strategy of tobacco policy. These experts concluded:

*The potential for tobacco harm reduction products to reduce the burden of smoking related disease is very large, and these products could be among the most significant health innovations of the 21st Century – perhaps saving hundreds of millions of lives. The urge to control and suppress them as tobacco products should be resisted and instead regulation that is fit for purpose and designed to realise the potential should be championed by WHO.*⁷

7. Bearing in mind the significant potential for public health benefits and harm reduction, Nicoventures argues in favour of an evidence-based regulatory framework that provides adult consumers with access to high quality and safe vaping products without imposing unwarranted or disproportionate restrictions.

8. Turning to the specific consultation questions and the content of the Bill, Nicoventures wishes to express its concern about the proposed extension of the ban on smoking tobacco in enclosed public and work places in Wales to include the use of vaping products. As will be further explained below, in this respect the Bill appears to be unsupported by, and running counter to scientific evidence.

9. Moreover, from a legal point of view, the Bill gives rise to concerns under the European Convention on Human Rights (“ECHR”).

3. Consultation Questions

1. Do you agree that the use of e-cigarettes should be banned in enclosed public and work places in Wales, as is currently the case for smoking tobacco?
2. What are your views on extending restrictions on smoking and e-cigarettes to some non-enclosed spaces (examples might include hospital grounds and children’s playgrounds)?
3. Do you have any views on whether the use of e-cigarettes re-normalises smoking behaviours in smoke-free areas, and whether, given their appearance in replicating cigarettes, inadvertently promote smoking?
4. Do you have any views on whether e-cigarettes are particularly appealing to young people and could lead to a greater uptake of their use among this age group, and which may ultimately lead to smoking tobacco products?

10. In the following paragraphs, Nicoventures addresses the above four questions together. The ban on the use of vaping products in enclosed public and work places, as well as the possible extension to non-enclosed spaces is based on the following concerns and considerations:

- a. The use of vaping products may re-normalise smoking behaviours in places where the public has become unaccustomed to smoking as a result of the smoke free requirements.⁸

⁶ Public Health England, *E-cigarettes: an evidence update*, A report commissioned by Public Health England, p. 65. Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454516/Ecigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England.pdf>

⁷ Letter to Margaret Chan, Director General WHO. Signed by 53 leading public health leaders from around the world. Available at <<http://nicotinepolicy.net/documents/letters/MargaretChan.pdf>>

⁸ Public Health (Wales) Bill, Explanatory Memorandum, paras. 54 and 380–389.

- b. The use of vaping products may act as a gateway to nicotine addiction and tobacco smoking (with specific reference to youth).⁹
 - c. Vaping products contain various chemicals that are vaporised and emitted into the air, and studies have suggested that e-cigarette aerosol can contain some of the toxicants present in tobacco smoke, albeit at levels which are much lower.¹⁰ The possibility of adverse health effects for third parties exposed to e-cigarettes cannot be excluded.¹¹
 - d. E-cigarette use is undermining the enforcement of the smoking ban.¹²
11. As will be further explained below, these concerns and considerations are contradicted by the evidence.

“Re-normalisation”

12. In relation to re-normalisation, the Explanatory Memorandum fails to clearly articulate where the concern stems from because, as the Memorandum itself concedes, “[e]-cigarettes have not been on the market long enough for definitive evidence to be available about whether this effect is occurring.”¹³

13. The Memorandum goes on to refer to evidence that greater perceived difficulty of smoking in public places as being associated with a lower likelihood of smoking among youth.¹⁴ It then states that increasing number of youth have seen people vape in public places recently,¹⁵ that e-cigarette products closely replicate smoking¹⁶ and that passive exposure to vaping products use increases the desire to smoke in young adult daily smokers.¹⁷ The conclusion that the use of vaping products may re-normalise smoking because of a perceived similarity is conjecture for which no evidence is adduced. Moreover, even if it were correct that exposure to vaping products may increase the desire to smoke in young daily smokers, this specific category concerns persons who are daily smokers already and to whom re-normalisation concerns would not seem to apply. In any case, it is preferable for daily smokers to use vaping products instead of cigarettes.

14. The Memorandum’s reasoning appears to rest on the similarity in appearance, which is true for a limited number of vaping products only, and which has been contradicted in a report commissioned by Public Health England, which concludes that the use of vaping products in smoke free places is unlikely to give rise to normalisation concerns:

*[A]lthough similar in appearance, even cigalike products are easily distinguishable, both in appearance and smell, from tobacco cigarettes. Therefore, use of electronic cigarettes in smoke free places is more likely to lead to a normalisation of nicotine devices than to smoking, and hence potential benefit as a support to existing well smoke-free policies.*¹⁸

15. More fundamentally, however, is the fact that the evidence available to date plainly contradicts re-normalisation concerns and instead shows that vaping products are contributing to lower smoking prevalence rates. The most recent review of the available evidence by Public Health England concluded as follows:

Since EC were introduced to the market, smoking prevalence among adults and youth has declined. Hence there is no evidence to date that EC are renormalising smoking, instead

⁹ Public Health (Wales) Bill, Explanatory Memorandum, paras. 55 and 390–401.

¹⁰ Public Health (Wales) Bill, Explanatory Memorandum, paras. 56 and 402–403.

¹¹ Public Health (Wales) Bill, Explanatory Memorandum, para. 57.

¹² Public Health (Wales) Bill, Explanatory Memorandum, para. 58.

¹³ Public Health (Wales) Bill, Explanatory Memorandum, para. 380.

¹⁴ Public Health (Wales) Bill, Explanatory Memorandum, paras. 381 and 382.

¹⁵ Public Health (Wales) Bill, Explanatory Memorandum, paras. 383.

¹⁶ Public Health (Wales) Bill, Explanatory Memorandum, para. 386.

¹⁷ Public Health (Wales) Bill, Explanatory Memorandum, para. 387.

¹⁸ Electronic cigarettes: a report commissioned by Public Health England. Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311887/E-cigarettes_report.pdf>

*it's possible that their presence has contributed to further declines in smoking, or denormalisation of smoking.*¹⁹

16. In view of the above, Nicoventures submits that the evidence does not support banning the use of vaping products in enclosed public and work places in Wales because of any risk of “re-normalisation.”

Gateway concerns and youth uptake

17. Turning to the concerns that the use of vaping products might act as a gateway to nicotine addiction and tobacco smoking,²⁰ it is worth noting at the outset that even the Explanatory Memorandum concedes that “the evidence remains limited, but there is not sufficient evidence to rule it out.”²¹ This underlines the fact that there appears to be no clearly identified risk in relation to gateway concerns that would warrant a prohibition on the use of vaping products in public places.

18. There is, in fact, no meaningful data that supports gateway concerns. Instead, the evidence shows that “[r]egular use of the devices is confined to current and ex-smokers and use amongst never smokers remains negligible,” and that “[r]egular use of electronic cigarettes amongst children and young people is rare and is confined almost entirely to those who currently or have previously smoked.”²²

19. Similarly, a recent review of the available research concluded that “although there have been claims that EC [e-cigarette] is acting as a 'gateway' to smoking in young people, the evidence does not support this assertion. Regular use of e-cigarettes by non-smokers is rare and no migration from e-cigarettes to smoking has been documented (let alone whether this occurred in individuals not predisposed to smoking in the first place). The advent of EC has been accompanied by a decrease rather than increase in smoking uptake by children.”²³

20. Again with specific reference to youth, a report commissioned by Public Health England also found no data to support a claim of gateway effect or increased smoking uptake, especially amongst youth:

There have been some suggestions that among non-smokers, electronic cigarettes might be used as a gateway to smoking and promote smoking uptake and nicotine addiction, particularly among children and young people. However, to date there is no data supporting this claim. Experimentation with electronic cigarettes among non-smoking children in the UK is currently rare, and only about 1% of 16 to 18-year-old never smokers have experimented to electronic cigarettes and few if any progress to sustained use. Furthermore, experimentation with electronic cigarettes should be considered in the context of current levels of experimentation with tobacco cigarettes, which in Great Britain currently generates a prevalence of smoking of 15% among 16 to 19-year olds, and 29% in 20 to 24-year olds. It is therefore relatively unlikely that availability and use of electronic cigarettes causes or will cause significant additional numbers of young people to become smokers than do at present.”²⁴

¹⁹ E-cigarettes: an evidence update: a report commissioned by Public Health England. Available at <<https://www.gov.uk/government/publications/e-cigarettes-an-evidence-update>>

²⁰ Public Health (Wales) Bill, Explanatory Memorandum, para. 55.

²¹ Public Health (Wales) Bill, Explanatory Memorandum, para. 396

²² ASH UK Fact Sheet May 2015, Use of electronic cigarettes (vapourisers) among adults in Great Britain; see also ASH UK Fact Sheet May 2015, Use of electronic cigarettes among children in Great Britain).

²³ See Hajek 2014, citing US Center for Disease Control and Prevention. National Youth Tobacco Survey (NYTS). Smoking and Tobacco Use. 2012.

²⁴ Britton J, Bogdanovica I. (2014). Electronic cigarettes: A report commissioned by Public Health England, citing ASH, Use of e-cigarettes in Great Britain among adults and young people, May 2013. Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311887/E-cigarettes_report.pdf>

21. In conclusion, Nicoventures submit that the available evidence suggests that “gateway” concerns are unsupported by the available evidence and that, consequently, a ban on the use of vaping products in public places on the account of those concerns is unwarranted. Indeed, the evidence indicates that vaping products may in fact be acting as a gateway *out of* smoking.

Exposure to second-hand vapour

22. The Explanatory Memorandum’s concerns about exposure to second hand vapour are equally speculative and rely entirely on untested assumptions. Indeed, the Explanatory Memorandum cites a number of studies that suggest that there are no health concerns about exposure to second-hand vapour.²⁵ The Memorandum notes only one DKFZ study suggesting that second hand vapour *may* “justify health concerns”²⁶ even though the available evidence suggests that high quality vaping products emit vapour in which carcinogens are present in insignificant concentrations that do not warrant health concerns.

23. Nicoventures refers to the preceding section of this submission, showing that e-cigarette vapour does not expose users to any significant level of toxicants and nicotine itself is not related to chronic health effects that are associated with the consumption of combustible tobacco products. Given the extremely low level of exposure to users, risks to bystanders is likely entirely insignificant. Indeed, a wide range of authorities have concluded that second hand vapour of e-cigarette use poses negligible risks to the health of others. For instance, the international public health researchers who petitioned the World Health Organization to refrain from banning and/or unduly restricting e-cigarettes, noted that: *“It is inappropriate to apply legislation designed to protect bystanders or workers from tobacco smoke to vapour products. There is no evidence at present of material risk to health from vapour emitted from e-cigarettes.”*²⁷

24. Similarly, in their recently published survey on public place vaping, Public Health England state: “Based on the available evidence, the risk to the health of bystanders from exposure to vapour from nicotine vapourisers is extremely low. A legal ban on the use of nicotine vapourisers in enclosed public places and workplaces would not be justified on the grounds of passive exposure.”²⁸ Nicoventures recalls, in this respect, that the Bill and its proposed restrictions on the use of vaping products in public places was opposed by highly reputed public health bodies:

*“There isn’t enough evidence to justify a ban on using e-cigarettes indoors. The measure could create more barriers for smokers trying to quit tobacco.”*²⁹

*“To date, we can see no suggestion in the existing evidence base that would support an outright ban on the use of e-cigarettes.”*³⁰

Impact on the enforcement of the smoking ban

25. The Explanatory Memorandum raises the concern that the use of vaping products might undermine the enforcement of the smoking ban, noting that several prosecutions under the Health

²⁵ See studies referred in para. 402 of the Explanatory Memorandum.

²⁶ *Id.*

²⁷ Letter to Margaret Chan, Director General WHO. Signed by 53 leading public health leaders from around the world. Available at <<http://nicotinepolicy.net/documents/letters/MargaretChan.pdf>>.

²⁸ Public Health England. 2015. *Policies and practice on use of e-cigarettes in enclosed public places: towards a consensus*. Public Health England. Available at: <www.ukctas.ac.uk/ukctas/documents/e-cigarettes-in-enclosed-public-places-final-survey.pdf>

²⁹ Cancer Research UK. 2015. *Welsh Government proposes banning e-cigarettes in public places*. [News Report] [Online] Available at: <<http://www.cancerresearchuk.org/about-us/cancer-news/news-report/2015-06-09-welsh-government-proposes-banning-e-cigarettes-in-public-places>>

³⁰ Action on Smoking and Health Wales. 2015. *Electronic Cigarettes*. [Website] Accessed 23 July 2015. <<http://ashwales.org.uk/en/information-resources/topics/electronic-cigarettes>>

Act 2006 have failed where the defendant claimed to have been using an e-cigarette.³¹ This would not appear to be a serious concern. Indeed, it is a generally accepted principle that individuals must not be prosecuted or sanctioned without sufficient proof. If it cannot be conclusively established that a person actually violated a smoking ban, there simply is no reason for that person to be sanctioned.

26. The fact that some “cigalike” products, which account for a minority proportion of vaping products, may look similar to cigarettes does not undermine the fact that they remain easily distinguishable. Users are increasingly switching to second and third generation “pen” and “tank” devices which are clearly distinguishable from cigarettes, even at a distance.

27. In line with the above, the Chartered Institute of Environmental Health stated that there is a 99.7 per cent compliance rate with the smoking ban, and they have found no evidence to support the idea that the use of e-cigarettes in public is undermining this.³²

28. In view of the above, Nicoventures submits that there is no evidence that would support the notion that the use of vaping products in public places may undermine the enforcement of smoking bans.

11. What are your views on creating a new offence for knowingly handing over tobacco and nicotine products to a person under 18, which is the legal age of sale in Wales?

29. Nicoventures fully supports the prohibition on the sale of vaping products to persons under 18. At the same time, it is important that the minimum age requirement should be applied without depriving adult consumers of reasonable access to vaping products.

12. Do you believe the proposals relating to tobacco and nicotine products contained in the Bill will contribute to improving public health in Wales?

30. Nicoventures has explained in the preceding sections why the available evidence shows that there is little evidence to suggest that e-cigarette vapour is harmful to non-users. The available evidence suggests that vaping products do not re-normalise smoking behaviour, inhibit the enforcement of smoking bans or act as a gateway into smoking. Therefore, the available evidence does not support the introduction of a ban on the use of vaping products in public places. In view of this evidence, Nicoventures does not believe that the proposals relating to vaping products contained in the Bill will contribute to the improvement of public health in Wales.

31. On the contrary, bans on the use of vaping products in public places have the potential to damaging to public health by inhibiting the switching to products with a lower risk profile. Additionally, the legislative assimilation of vaping products to tobacco products (as far as restrictions on their public use are concerned) further undermines public health because it misinforms the public by incorrectly giving the impression that both product categories are equally harmful. It is worth noting in this respect that, in light of its findings concerning the lower risk profile of vaping products and of the shift to the inaccurate perception that vaping products are at least as harmful as cigarettes, Public Health England has recently argued that the public should be provided with balanced information on the risks of vaping products.³³

4. The Bill engages concerns under human rights law

32. The second paragraph of Article 1 of Protocol No. 1 to the European Convention on Human Rights provides as follows:

³¹ Public Health (Wales) Bill, Explanatory Memorandum, para. 58.

³² Meeting of the All Party Groups on Smoking and Health, Pharmacy, and Heart Disease 10 June 2014

³³ Public Health England, E-cigarettes: a new foundation for evidence-based policy and practice, p.4. Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454517/E-cigarettes_a_firm_foundation_for_evidence_based_policy_and_practice.pdf>

The preceding provisions [concerning the peaceful enjoyment of possessions and the protection against deprivation] shall not, however, in any way impair the right of a state to enforce such laws at it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

33. In application of this provision, the European Court of Human Rights has held that it protects against interference with the right of property that does not serve a legitimate general interest objective or that is disproportionate.

34. Nicoventures submits that in view of the lack of contribution to public health and the undermining of tobacco harm reduction strategies, as outlined in the preceding sections and in the answers to the first set of questions, the ban on the use of vaping products is manifestly disproportionate. Indeed, there is no balance between the interests of public health, which are not served by a ban on the use of vaping products in public places, and the prohibition imposed on users of vaping products.

5. Conclusions

35. Nicoventures appreciates this opportunity to provide its views on Part 2 of the Public Health (Wales) Bill to the Health and Social Care Committee. Throughout this submission, Nicoventures has expressed the view that the available evidence shows that high quality vaping products have the potential for significant harm reduction and public health. The available evidence shows that the concerns behind the proposal to ban the use of vaping products in public places are unwarranted. Moreover, such a ban engages concerns under human rights law.

36. In view of the above, Nicoventures urges the Committee to reconsider the proposal to ban the use of vaping products in public places and to refrain from imposing unreasonable and disproportionate limitations on their use.

3 September 2015