

## Auckland Regional Public Health Service

Rātonga Hauora ā Iwi o Tamaki Makaurau



Working with the people of Auckland, Counties Manukau and Waitemata

## Auckland Regional Public Health Service

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### **Submission from the Auckland Regional Public Health Service on the Changes to the Tobacco Display Guidelines August 2004**

Thank you for the opportunity for the Auckland Regional Public Health Service (“the Service”) to provide a submission on the proposed changes to the *Tobacco Display Guidelines August 2004* (“Guidelines”). The Service has previously commented informally (via email of 15 May 2006), and now wishes to comment in detail.

This submission has been prepared by Smoke-free Enforcement Officers for the Auckland Region (Jennifer Lamm and Sunder Lokhande), and represents the views of the Auckland Regional Public Health Service. The Service provides public health services for the three district health boards in the Auckland region (Auckland, Counties Manukau and Waitemata District Health Boards), with the primary governance mechanism for the Service resting with Auckland District Health Board. This submission represents the views of the Service and does not necessarily represent the views of the three District Health Boards.

The Service understands that all submissions will be available under the Official Information Act 1982, except if grounds set out under the Act apply.

The primary contact point for this submission is:

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## Introduction

The Service understands the desire by the Ministry of Health to develop Guidelines, and the need to revise these Guidelines if required. This is particularly the case where the wording of the Smoke-free Environments Act (“the Act”) is vague or subjective. The Service understands that Guidelines are aimed at providing clarification and information - rather than “advice”, and acknowledges that the Smoke-free Environments Act (“the Act”), Regulations and case law are the primary sources of law on this issue. However, the Service believes that the general public could mistakenly view the Guidelines as “law” and rely on them to their detriment, should a court rule otherwise.

Therefore, the Service is keen to see Guidelines that are worded precisely, and are consistent with the wording of the Act. Where this is not possible, the Service suggests that the development of specific guidelines be deferred until the situation becomes clearer (typically with the development of case law).

Given this proviso, the Service now comments in detail:

### **1. Visible from outside a retailers’ place of business: Section 23B(1)(b)(i)**

Section 23A prohibits a retailer of tobacco products from exposing a tobacco product for sale inside the retailer's place of business *unless* a number of conditions are met, as set out in section 23A(1)-(6). Section 23A(2)(a) is one such condition, namely that the display provisions comply “if and only if” no tobacco product exposed for sale is visible from outside the place.” Section 23B provides a definition of “exposed for sale” where any part of a tobacco package or tobacco carton ... is visible from outside the place...”

The draft Guidelines fail to mention the proviso in 23A(2)(a), and this omission impacts on the interpretation contained in the draft Guidelines. In addition, the Service believes that the interpretation in the draft Guidelines is inconsistent with the definition in 23B.

The Service is particularly concerned about the specific reference to “tobacco product brand trade marks” which must be “clearly identifiable and arranged in a way to plainly attract the attention of passers-by.” This interpretation in the draft Guidelines will make compliance and enforcement difficult in the extreme. The Service believes that such specific language is inconsistent with the provisions of sections 23A and 23B and the purpose of the legislation, which is (*inter alia*) to: “impose controls on the marketing, advertising or promotion of tobacco products...”. What is more, by specifically referring to trade marks, it fails to take account of names, get-up or other “words, pictorial representation, design, or device” associated with tobacco companies (see the definition of “tobacco product advertisement”, section 2 of the Act).

### **2. No counter-top display**

The Service believes that the revised wording in the draft Guidelines does not clarify or add to the original wording in the Guidelines of August 2004, and therefore should be excluded, with the exception of the following statement: “Tobacco product displays will not be allowed on circular continuous shaped counter tops.” Thus, the draft Guidelines may provide guidance on the display of tobacco products on circular counter tops, but case law may need to be developed before there can be an

understanding of phrases such as a “similar surface”. In the meantime, it should be dealt with on a case by case basis.

### **3. Exposed for sale at any point of sale: number of displays and the point of sale – Guideline 3.2 and section 23A, SFEA**

As stated previously, Section 23A prohibits a retailer from exposing tobacco products inside the retailer’s place of business *unless* a number of conditions are met. With regard to tobacco displays, the location of the visible display of tobacco products is restricted to “a point of sale”. However, the phrase “at a point of sale” (or “at any point of sale”) has not been tested in the courts to see what it means in any given situation. Therefore, with the possible exception of section 23A(6), there are no set maximum (or minimum) distances between a cash register and a tobacco products display in order to be considered “at a point of sale”.

### **4. “Smoking Kills” signs placement at the POS and vending machines – Section 32(3) SFEA and Guideline 3.6.2**

The Service notes the heading in the draft Guidelines – “at the POS and vending machines” – and suggests that the wording should be changed to “at the POS *for* vending machines”.

In addition to the provisions of section 23A, sections 32(3) and 32AA(3) require “any health message required by or under this Act” to be displayed *on* a vending machine. The Service does not believe that a “pragmatic approach” is necessary, as recommended in the draft Guidelines, nor does the Service believe that the legislation permits such an approach. Most vending machines are large enough to accommodate such signage, and all machines inspected in the Auckland Region already have the “18+” sign *on* the machine (not near the machine). The purpose of health messages on vending machines is to raise awareness among smokers that “smoking kills”. The legislation acknowledges that this is best achieved by placing signs *on* vending machines. Any deviation from the provisions of sections 32(3) and 32AA(3) will be inconsistent with the purpose of the Act, which is “to reduce the social approval of tobacco use by ... requiring health messages and other information to be displayed ... *on* automatic vending machines (s21(a)(iii)).

## **5. Other Guidelines**

### **Oral tobacco - Section 29(2)**

Section 36(5) states that: “Every person who ... who imports, sells, packs, or distributes any tobacco product in contravention of section 29(2) of this Act commits an offence...” Section 29(2) refers to “any tobacco product labelled or otherwise described as suitable for chewing, or for any other oral use (other than smoking).” Therefore, oral tobacco may only be for “personal use”. The Service believes that there is an urgent need to clarify what could be considered for “personal use”. The Service wonders if the “presumption of supply” contained in the Misuse of Drugs Act (Schedule 5) would offer some assistance in formulating guidelines on “personal use” with regard to oral tobacco.

### **Regulations**

The Smoke-free Environments Act was substantially amended in 2003. References to “Regulations” contained in the Act currently refer to the Smoke-free Regulations of 1999. With the promulgation of new Regulations, it is hoped that any inconsistencies between the Act and Regulations will be removed.

## **Conclusion**

As an enforcement agency, the Service welcomes guidance from the Ministry of Health on interpretation of the Smoke-free Environments Act and is grateful for the opportunity to comment on amendments to the Guidelines before they are finalised. Clear and precise guidelines will aid voluntary compliance and reduce costs associated with administering and enforcing the legislation. However, this goal will not be achieved where the Guidelines are inconsistent with the Act. The Service therefore urges the Ministry of Health to take into account this submission and revise the draft Guidelines accordingly.

Yours faithfully

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