

**Submission
No 11**

E-CIGARETTE REGULATION AND COMPLIANCE IN NEW SOUTH WALES

Organisation: Drug Policy Australia

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Legislative Assembly, Committee on Law and Safety
Inquiry into E-cigarette Regulation and Compliance in New South Wales
Parliament of New South Wales, Macquarie St
SYDNEY NSW 2000

Drug Policy Australia submission to e-cigarette Inquiry.

1. Introduction.

Drug Policy Australia is pleased to provide our submission to the New South Wales Parliament Legislative Assembly, Committee on Law and Safety, Inquiry into E-cigarette Regulation and Compliance in New South Wales. We are making our submissions pursuant to Term (a) of the Terms of Reference, *the current situation in NSW*, Term (b), *NSW's current regulatory framework* and Term (d), *any other related matter*.

Drug Policy Australia is a Health Promotion Charity established in May 2014 that aims to focus public attention, and that of government policymakers, on the scientific evidence supporting a health focused, harm minimisation approach to dealing with psychoactive substance use in Australia.

Drug Policy Australia acknowledges the importance of taking further action to protect people from the harms associated with tobacco products and the unregulated (illicit) tobacco trade. However, a punitive and prohibitive response will have catastrophic outcomes for individuals and the community in years to come.

“The goal of abstinence and abolition of all smoking is unrealistic and doomed to fail”¹

¹Michael Russell, “Realistic Goals For Smoking And Health A Case For Safer Smoking,” *The Lancet* 303, no. 7851 (February 1974). [https://doi.org/10.1016/S0140-6736\(74\)92558-6](https://doi.org/10.1016/S0140-6736(74)92558-6). 254.

This quote from addiction researcher Michael Russel in 1974 remains relevant today, in a political climate that continues to impose incommensurate regulation on psychoactive substances. A prohibitive policy approach to e-cigarettes, commonly referred to as vapes, is not effective at minimising the harms associated with their use.

Alarmist news reports and the resulting moral panic about young people vaping has unduly influenced current e-cigarette legislation. While the use of e-cigarettes amongst young Australians is a valid concern, the current prohibitive response is disproportionate and will exacerbate harm through punishment.² The strict ban on e-cigarettes will be detrimental to public health and social justice. The consequences of the ‘war on drugs’ provide a cautionary tale against using criminal law to control personal behaviour. Rather than reducing drug use and addiction, prohibition drives these activities underground and into the control of criminals. History shows that the effects of this are likely to produce more harm than the intended good.

In short, Drug Policy Australia argues that the New South Wales government and policymakers should consider the legal regulation of e-cigarettes and introduce a health-focused system of regulatory control for their production, sale, possession, and use.

2. The Current Regulatory Framework.

Australia was the first country in the world to impose a federal ban on the importation of e-cigarette devices without a licence.³ Under the NSW Public Health (Tobacco) Act 2008, it is illegal to sell e-cigarettes or e-cigarette accessories to a person under 18 years of age. Notwithstanding the current bans, research has found that these restrictions are frequently circumvented by young Australians. In Australia, 14% of

²Colin Mendelsohn, Alex Wodak, and Wayne Hall, “How Should Nicotine Vaping Be Regulated in Australia?”, *Drug and Alcohol Review* 42, no. 5 (July 2023): 1288–94. <https://doi.org/10.1111/dar.13663>.

³“WHO Report on the Global Tobacco Epidemic 2021: Addressing New and Emerging Products,” 2021.

young people are current users and 33% have tried vaping at least once.⁴ The figures are higher in New South Wales, where 41% of people aged between 18 and 39 use or have tried vaping.⁵ A very small proportion of these people accessed e-cigarettes via prescription, and respondents highlighted the high availability of contraband devices.⁶ This evidence alone highlights the futility of current attempts to ban vaping.

“People smoke for the nicotine, but die from the tar”⁷

According to the Australian National Drug Strategy Household Survey, e-cigarettes are an effective and the most popular tool used for smoking cessation in Australia.⁸ While there are health risks posed by vaping, research suggests that they are less harmful than traditional tobacco cigarettes.⁹ The harms of the repeated inhalation of smoke emitted by traditional cigarettes cannot be conflated with the harms of nicotine. The exaggeration of the dangers of e-cigarette use has resulted in over regulation relative to the harms of e-cigarette use.

Australia was also the first country to adopt a medical/prescription model of e-cigarette regulation.¹⁰ The current legislation allows the medical prescription of nicotine e-cigarettes, both federally and in NSW. By allowing the prescription of e-cigarettes, existing legislation acknowledges that e-cigarette products are a less hazardous alternative to smoking and may be beneficial for some users.

⁴Simone Pettigrew et al., “E-Cigarette Attitudes and Use in a Sample of Australians Aged 15–30 Years,” *Australian and New Zealand Journal of Public Health* 47, no. 2 (April 2023): 100035. <https://doi.org/10.1016/j.anzjph.2023.100035>.

⁵Pettigrew et al., “E-Cigarette Attitudes and Use in a Sample of Australians Aged 15–30 Years.”

⁶Pettigrew et al., “E-Cigarette Attitudes and Use in a Sample of Australians Aged 15–30 Years,”

⁷Daniel Eisenkraft Klein, Benjamin Hawkins, and Robert Schwartz. “Understanding Experts’ Conflicting Perspectives on Tobacco Harm Reduction and e-Cigarettes: An Interpretive Policy Analysis.” *SSM - Qualitative Research in Health* 2 (December 2022). 2. <https://doi.org/10.1016/j.ssmqr.2022.100197>.

⁸Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2019* (Commonwealth of Australia, 2020). <https://doi.org/10.25816/E42P-A447>.

⁹Mendelsohn, Wodak, and Hall. “How Should Nicotine Vaping Be Regulated in Australia?”

¹⁰World Health Organization, *WHO Report on the Global Tobacco Epidemic 2021: Addressing New and Emerging Products* (Geneva: World Health Organisation, 2021).

However, there have been significant limitations in the implementation of this prescription model, the Therapeutic Goods Administration (TGA) has acknowledged that it has not achieved its intended purpose.¹¹ Due to a disconnect between policymakers and health authorities, it is not common for doctors to issue prescriptions. Therefore, people who have legitimate reasons for accessing nicotine vapes, under current law, are still pursuing the illegal market. This diversion of users back to the black market has negative health implications, due to mislabelled ingredients and contaminants.¹² These health outcomes are contradictory to the aims of e-cigarette regulations.

3. The Dangers of Prohibition.

Heavy handed law enforcement responses to substance use increase the harm to consumers and the community. Drug policing strategies, or harsher sentencing guidelines for drug offences, have no evidence base as deterrents. These same outcomes are to be expected if enforcement of an e-cigarette ban increases.

The “war on drugs” exemplifies the dangers of proscribing drugs with harsh criminal sanctions. The Office of the High Commissioner for Human Rights (OHCHR) asserts that a punitive approach to drug policy creates human rights challenges.¹³ The strict prohibition of e-cigarettes will replicate these challenges and will unjustly criminalise otherwise law-abiding Australians. As we know from this history, as enforcement becomes ineffective, penalties tend to increase disproportionately, creating more inequality.

Failed enforcement begets harsher enforcement, increased policing, and eventually over-incarceration. Since vaping is popular among young people, harsh penalties will result in more young Australians entering the justice system. This is especially

¹¹Therapeutic Goods Administration, *Potential reforms to the regulation of nicotine vaping products. Consultation paper* (Commonwealth of Australia: Department of Health and Aged Care, 2022), 8. [Consultation: \(tga.gov.au\)](https://www.tga.gov.au/consultation).

¹²Pettigrew et al., “E-Cigarette Attitudes and Use in a Sample of Australians Aged 15–30 Years,”

¹³Office of the High Commissioner of Human Rights. *Human Rights Challenges in Addressing and Countering all Aspects of the World Drug Problem* (Geneva: United Nations, 2023).

problematic as early contact with the criminal justice system is associated with ongoing contact and adverse outcomes, these harms perversely outweigh the dangers of e-cigarette use.¹⁴

The OHCHR report also referred to prohibition as a “tool of racial control” evidenced by the over-representation of racial minorities in drug arrests and sentences.¹⁵ This racial bias is evident in Australia, with Indigenous young people over-represented in the criminal justice system. A punitive approach to e-cigarette regulation will further contribute to this over-representation.

Furthermore, rates of smoking have decreased considerably in Australia since 1991, and they continue to fall.¹⁶ However, these positive outcomes have not been experienced evenly.¹⁷ In areas with lower socio-economic status, smoking rates remain unchanged. This could lead to unfair criminalisation of people from lower socioeconomic backgrounds, a demographic already over-represented in the criminal justice system.

By restricting access to a smoking cessation tool which has proven effective, prohibition policy violates people's right to the “highest standard of health”.¹⁸ As mentioned in the previous section, if existing smokers are purchasing e-cigarettes from the illicit market (due to the refusal of prescription), they will be exposed to an unregulated product. The consumption of unregulated e-cigarettes can have serious unintended health consequences. Moreover, without regulated alternatives, smokers who are struggling to quit will face greater obstacles. Instead of a punitive approach, thoughtful policies should help people quit while preventing youth uptake. The goal should be maximising public health, not eliminating all risks regardless of consequences.

¹⁴Mia Schlicht, “Cost of Prisons Report”, Melbourne: Institute of Public Affairs, 2023.
<http://IPA-Cost-of-Prisons-Report.pdf>.

¹⁵Office of the High Commissioner of Human Rights. *Human Rights Challenges in Addressing and Countering all Aspects of the World Drug Problem*.

¹⁶Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2019*.

¹⁷Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2019*.

¹⁸Office of the High Commissioner of Human Rights. *Human Rights Challenges in Addressing and Countering all Aspects of the World Drug Problem*.

Furthermore, a strict e-cigarette ban will also exponentially increase the costs of law enforcement. This is a gross waste of money and resources as shown by the evidence that proves prohibition to be counterproductive. Instead, we believe that the money spent on banning e-cigarettes should be redirected into educational programs to warn young people about the risks of e-cigarette use. We need a solution that is centred on health and harm-reduction, not criminalising young people.

4. Policy Options.

The Australian policy of criminalising the use of nicotine vapes without prescription is an international outlier. Various jurisdictions around the world have implemented health focused e-cigarette regulations that mitigate the potential harms without criminalising nicotine vaping.¹⁹ For instance, in the United Kingdom, e-cigarettes are freely available for consumption. However, this availability is coupled with strict regulations, including bans on advertising.²⁰ In some Canadian provinces, visible product displays are banned except for inside specific adult-only vape stores.²¹ Furthermore, 39 countries mandate that e-cigarettes have health warnings on the packaging which emphasise the negative health impacts of vaping.²²

A legislative framework which criminalises people for the use of a substance, less harmful than legally regulated cigarettes, will have disastrous outcomes for public health and social justice. To truly minimise harm to young people and the broader community, the New South Wales government should consider these approaches and redirect money spent on criminalisation to health focused regulation.

5. Conclusions.

We believe that the New South Wales e-cigarette regulation needs urgent reform to prevent repeating the disastrous mistakes of the “war on drugs”.

¹⁹Daniel Eisenkraft Klein et al. “A Literature Review on International E-Cigarette Regulatory Policies.” *Current Addiction Reports* 7, no. 4 (December 2020): 509–19. <https://doi.org/10.1007/s40429-020-00332-w>.

²⁰Klein et al. “A Literature Review on International E-Cigarette Regulatory Policies.”

²¹Klein et al. “A Literature Review on International E-Cigarette Regulatory Policies.”

²²Klein et al. “A Literature Review on International E-Cigarette Regulatory Policies.”

A policy landscape that legally regulates e-cigarettes is crucial so that the health risks associated with their use can be properly addressed and mitigated. The continued use of the criminal justice system to deal with public health issues is costly and dangerous and increases the harm to adults who choose to use e-cigarettes.

The adoption of health centred, harm minimisation policies will protect adults who wish to abstain from smoking traditional cigarettes and deter young people from new uptake of e-cigarette products.

If requested, we would be happy to appear in person to assist the inquiry. Please do not hesitate to contact Greg Chipp at [REDACTED] or call [REDACTED].

We thank you for the opportunity to present our submission.

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