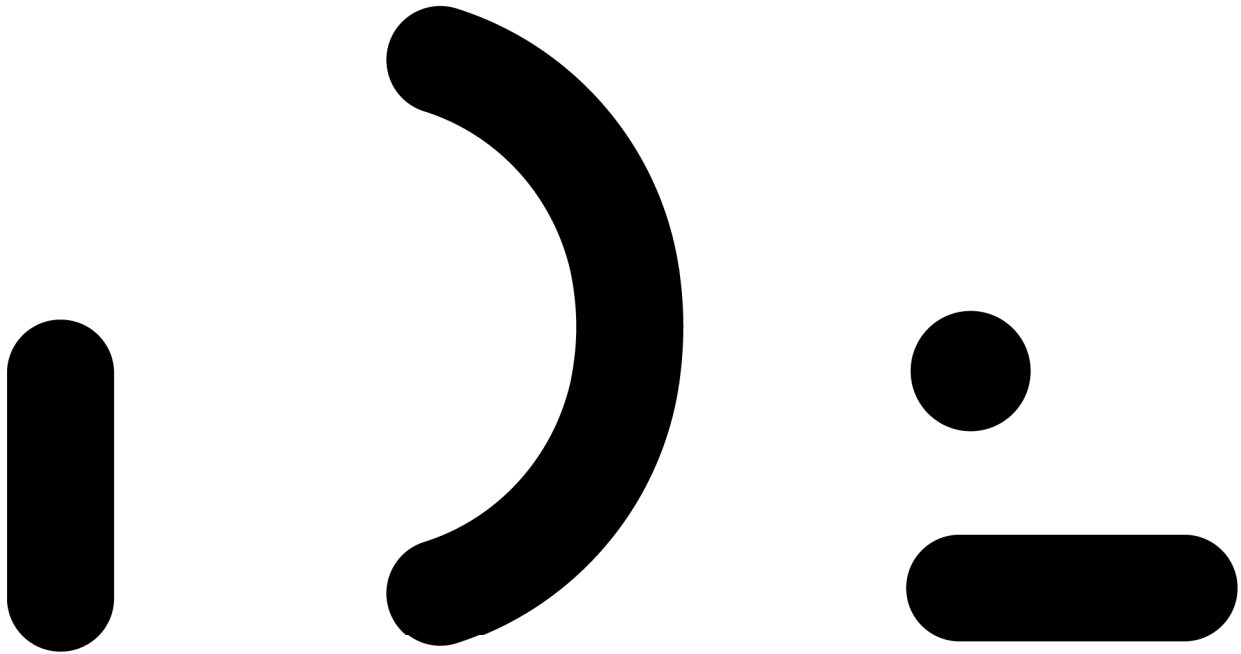


E-CIGARETTE REGULATION AND COMPLIANCE IN NEW SOUTH WALES

Organisation: Alcohol and Drug Foundation

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E-cigarette regulation and compliance in New South Wales

Alcohol and Drug
Foundation Submission

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About the Alcohol and Drug Foundation

The Alcohol and Drug Foundation (ADF) delivers evidence-based approaches to minimise alcohol and other drug harm. We recognise the power of strong communities and the important role they play in preventing problems occurring in the first place. A community-centric approach is at the heart of everything we do.

Executive Summary

The ADF welcomes the opportunity to contribute to this inquiry into the regulation of e-cigarette usage in NSW. The rapid proliferation of vaping in Australia has arisen through international trends of greater e-cigarette use globally, and a regulatory regime that has failed to stop the growth of an illicit market.

The supply of vaping products in Australia is currently structured around a licit supply of nicotine vaping products (NVPs) available legally via prescription from a pharmacy or via importation through the Personal Importation Scheme, and a supply of non-nicotine vaping products (non-NVPs) that are being imported and sold in retail. The supply of unregulated non-NVPs are of significant concern, as a large majority have been found to contain nicotine, and sellers are operating with effective impunity.¹ This submission will refer to 'vaping products' when referring to both NVPs and non-NVPs.

The retail sale of non-NVPs containing nicotine to young people has emerged as a key public health and regulatory challenge. These regulatory issues are federal issues, and outside of the jurisdiction of the states. However, any federal changes to these regulations may have a large impact on the supply of vaping products in NSW. The federal government has announced planned changes to legislation following a TGA inquiry, banning of the import of all vaping products – NVPs and non-NVPs, as well as the end of the Personal Importation Scheme, as well as the introduction of further regulation on licit NVPs including restrictions on nicotine content, flavouring, and packaging. Detail concerning these changes has been recently consulted by a further TGA inquiry.

Due to these announced changes, the supply of vaping products in NSW may dramatically shift in the next 12 months, though the extent to which the changes will be effective are unknown. Specifically, changes to import regulations may see a significant reduction in the availability of non-NVPs, particularly the disposable products that are being sold at convenience stores and are of most concern with young people. This may make regulation of the supply of NVPs more effective, as they will be accessed only via therapeutic pathways. This reform will require additional investment and enforcement from the states, particularly in addressing the retail sales of non-NVPs, and presents a challenge to compliance and enforcement.

It is possible that people who use vaping products regularly and who may be dependent on nicotine may find themselves suddenly unable to access these products and may face rapid withdrawal. This may be further compounded by the fact that many people using non-NVPs are not aware whether or not their devices have nicotine in them, and that they may not be expecting to experience withdrawal.

Responses to individual vaping product use should be non-punitive and non-stigmatising, particularly for young people. It is currently a criminal offence in NSW to possess a NVP without a script, as thousands of young people do every day. The maximum penalty for possession of a schedule 4 substance without a script under the *Drug Misuse and Trafficking Act 1985* s. 18(b)-2, is up to \$5,500 fine, 12 months' imprisonment, or both. While this is not currently being enforced, the

threat of criminalisation remains. If the supply of vaping products changes significantly, those who continue to access products illicitly may be at greater risk of criminal penalty as the behaviour becomes less normalised.

The ADF makes the following recommendations:

1. The NSW government support the federal government's announced reforms to the supply of vaping products by comprehensive enforcement of the ban of retail sales of vaping products, with access to NVPs via therapeutic pathways
2. The NSW government invest in targeted public messaging campaigns about upcoming changes to the supply of vaping products addressed at people who use NVPs, as well those retailing them
3. Possession of NVPs should be decriminalised, so that people do not face disproportionate criminal penalties for a health issue
4. Support is provided to people who will be impacted by the change in supply of vaping products, including information about nicotine dependence and withdrawal, as well as evidence-based supports like nicotine-replacement therapies and psychosocial support
5. Behaviour change programs for young people regarding vaping are developed using evidence, and are designed to be non-stigmatising
6. Support and information provided to parents, teachers, and others who may be supporting those with nicotine dependence to understand dependence, withdrawal, and non-stigmatising modes of support

The current situation in New South Wales

i) **Prevalence of e-cigarette use amongst children and young people**

Given the proposed changes by the federal government, it is likely that we will see further change to patterns of use as the reforms are rolled out in the new year.

Limited data and baselines

Data regarding the prevalence of e-cigarette usage in Australia, particularly among young people, is limited. The highest quality data sets that capture young people's smoking and e-cigarette use behaviours, the National Drug Strategy Household Survey (NDSHS), and the Australian Secondary School Students Alcohol and Drug Survey (ASSAD), have both been delayed by the COVID pandemic and are not likely to report until 2024. The NDSHS last reported in 2019, while ASSAD reported in 2018 using 2017 data. Additionally, both of these surveys reported prior to the significant expansion of vaping products in Australia. They do provide some baseline, however with which to assess the expansion in use. Both are limited by the fact that they do not ask questions about the nicotine content of e-cigarette use.

ASSAD data from 2017 records that 14% of 12- to 17-year-old students had ever used an e-cigarette. There is no data recorded about whether users expected, or were aware, of whether the product had nicotine content. NDSHS data from 2019 reports 9.6% lifetime usage in 14- to 17-year-olds, though notes a small sample size for this population. Whilst the samples have differences, this compares to a national lifetime usage rate of around 47% from data collected in late 2021².

Data sources

Data from four pieces of research will be presented. Each of these studies has asked different questions of different demographics, though all focus on vaping product use prevalence amongst young people. Limited representative data for individual jurisdictions is available.

Cancer Council Victoria, Wakefield et al. 2023

The federal Department of Health and Aged Care commissioned Cancer Council Victoria to complete a report based on 6 years of monthly survey data regarding smoking and vaping rates amongst Australians aged 14+. Results clearly showed 6-monthly prevalence of vaping increasing since the beginning of the data set, from 1.4% in early 2018, to 8.9% in early 2023. This study reported prevalence amongst 18-24 year olds reaching as high as 22% in late 2022, 17.4% for 25-34 year olds, and 14.5% for 14-17 year olds in early 2023.

Generation Vape NSW³

Cancer Council NSW conducted a study of 721 young people aged 14-17 in 2021. This occurred prior to the scheduling of nicotine vaping devices as therapeutic goods. Respondents were asked about their awareness of vapes, whether they had used them, their frequency of use, and similar questions about tobacco. They were also asked about product characteristics and how they accessed products.

Of the sample, 32% reported having ever used a vaping product, with 5% reporting having used a vaping product within the last 30 days. Of those who had vaped, 54% reported having never smoked before vaping.

52% of the sample reported using a disposable vape, while 34% did not specify the details. Only a small number (3%) reported using a refillable vape, or one that could be reused with pods (3%). Regarding nicotine content, 53% reported having knowingly used a nicotine vape, while 20% stated that they had not used a nicotine vape, while 27% were uncertain.

30% of respondents reported purchasing their last vape. Of these 49% purchased from a friend, 31% from a retailer, 9% from social media, and 7% from a website. Of the 70% who did not purchase their last vape, 80% reported accessing from friends, and 8% from siblings.

SA Commissioner for Children and Young People Vaping Survey⁴

The SA CCYP commissioned a report into vaping use amongst teenagers in South Australia in June 2022. A total of 960 young people aged 13-19 responded to the survey.

Of the respondents, 2 in 3 reported having tried vaping. Of those who had tried vaping, 1 in 4 described themselves as a regular vaper (vaping most days), which equates to roughly 16.6% of the sample. A further 1 in 5 described themselves as a social vaper. Young people reported learning either "nothing at all" (48.5%) about vaping at school, "not much" (34.7%), "a fair bit" (13.1%), or "a lot" (3.7%).

Pettigrew et al. 2023²

A nationally representative sample of 1,006 young people aged 15-30 completed an online survey, answering questions about e-cigarette use, access, and perceptions. Nationally, the study found 14% of the sample reporting being a current user of e-cigarettes, and a further 33% had used them but were not current users, meaning 47% of the sample had ever tried them. For respondents aged 15-17, 10% of the sample reported being current e-cigarette users, and another 10% had tried them, meaning 20% of that age range had ever used an e-cigarette. A higher proportion of

younger users reported using disposable devices (80% of 15–21-year-olds), compared to 19% of 22–30-year-olds. Only 7% of respondents who vaped accessed vapes via prescription.

Nicotine content

Due to the regulatory situation in Australia, the nicotine content of many illicitly purchased vaping products is unknown to researchers and users. This is particularly true for younger people who are more likely to acquire vaping products from peers and are more likely to use disposable vaping products that are illicitly imported. Some research attempts to address this but is limited to asking individuals whether they believe that the product has nicotine in it, with the study finding that 53% believed their products contained nicotine, 27% did not know, and 20% believed the product they used hadn't contained nicotine.³ The TGA has tested a large quantity of illicit disposable vaping products for nicotine content, and 264 of the 314 products tested contained nicotine¹.

ii) Health risks associated with e-cigarette products

There is much debate about the health risks of using e-cigarettes, though there is consensus that long-term evidence about the health risks is currently lacking. The health risks relate to the effects of vapour on the lungs and other tissues, as well as the effects of specific chemicals.

Risks to the individual of vaping

Evidence concerning the impacts of vaping to the individual is mixed. In 2022 a review by Public Health England stated that NVPs 'pose a small fraction of the risk of smoking', however this has been widely challenged by public health actors⁵. Public health and tobacco control advocates argue that vaping poses risks through damage to the lungs due to inhalation of harmful chemicals, the risk of nicotine dependence, dual use of NVPs and cigarettes, and the risks of initiation into smoking for young people using vapes. Long term health impact data is not yet available for NVPs, making quantifying their health risks challenging. A January 2022 Cochrane review found moderate-certainty evidence that NVPs expose users to less toxicants/carcinogens compared to tobacco products, and a further review in November 2022 identified high-certainty evidence that NVPs increase smoking quit rates compared to NRT.^{6, 7} In February 2022 the NHMRC stated that NVPs are not proven safe or effective smoking cessation aids, and further research is needed to establish harms and benefits.⁸ There is evidence to suggest people who use NVPs are three times more likely to smoke in their lifetime, though these findings have limitations and the effect size may be smaller.^{9, 10}

Harmful chemicals

The TGA currently regulates the content of NVPs that are available via prescription in Australia under the regulation TGO 110. The ADF is supportive of already banned ingredients listed in TGO 110, particularly a-tocopheryl acetate which has been associated with Acute Parenchymal Lung Injury (APLI). Ongoing surveillance and research are required to identify further potentially harmful ingredients in NVPs. The ADF recommends the TGA consider banning caffeine and taurine from NVPs as has been introduced in the UK, as these substances may increase risk of dependence and don't add to therapeutic benefit.

In the current largely unregulated market, there is no ability for government to control the content of non-NVPs. Testing by the TGA has found many illicit disposable vaping products containing products that are currently banned under TGO 110. The TGA's current proposal to only allow a list of certain chemicals in prescribed NVPs seems to be a sensible regulatory approach to ensure that licit NVPs do not contain potentially harmful chemicals.

Nicotine

The risk of physical harms associated with nicotine itself are less significant than of other harmful chemicals in tobacco and e-cigarettes. Nicotine is a mild central nervous system stimulant that can cause physical symptoms including hypertension, and increased heart rate¹¹. There is a risk of poisoning when significant amounts of nicotine are consumed. Symptoms of poisoning include headache, nausea, and abnormal heart rate. This is a concern as nicotine content can be high in unregulated disposable products preferred by young people². Additionally, this may also be a concern where liquid containing nicotine for reusable vapes is inappropriately packaged or stored where it may be accessible to children.

Notwithstanding, poisoning risks are of less concern than the other harmful chemicals in cigarettes, or those sometimes found in unregulated vaping products. The main relevant risk of nicotine use is the potential for individuals to develop significant dependence on the substance. Nicotine dependence via cigarettes is well documented and understood. Nicotine dependence due to e-cigarette use will parallel much of our understanding of nicotine dependence due to cigarette use, with the difference that the nicotine content of vaping products containing nicotine, particularly in Australia's largely unregulated market, is less consistent. Many unregulated vaping products in fact have a relatively much higher nicotine content than cigarettes¹.

The risk of young people who use vaping products developing a nicotine dependence may therefore be higher than for cigarettes, as the nicotine content of these products can be much higher than in cigarettes, and the frequency of use can also be higher when compared to cigarettes. This means a person using a vaping product may be knowingly or unknowingly exposed to higher levels of nicotine and more at risk of dependence. This is of particular concern if the supply of vaping products is suddenly disrupted, as young people who are dependent may withdraw from significant nicotine dependencies without being fully aware of their dependence or the consequences of such.

iii) The impacts of programs and services aimed at preventing uptake or continuing use of e-cigarettes

It is important to note that existing programs to discourage uptake and use of e-cigarettes in will be significantly impacted by changes to the supply of vaping products. While current programs and approaches are taking place within a context of high availability of vaping products, it may be the case that these products are far less available, if at all, in the future. A such, any responses to vaping in young people will need to respond to the changed context of availability and peer use.

Public data relating to approaches being currently taken to prevent uptake or continued use is limited. Interventions differ between adults and young people, as much of the public health concern regarding NVPs concerns young people accessing illicit NVPs. Reports of disciplinary approaches to NVP use in schools is concerning, as experience in prevention and early intervention for alcohol and other drug use shows that disciplinary responses carry the risk of alienating young people and making them less likely to seek help.

The implementation of vape detectors in school is one such disciplinary approach that carries the risk of causing further harms to young people. Evidence from young people shows that use of vaping products can relate to a range of factors, including socialising with peers, and experimentation³. Disciplinary actions resulting from the presence of vape detectors may serve to lead children away from support. Experience with alcohol and other drugs demonstrates that stigma is a significant barrier to help-seeking, and that treating substance use or vaping through a disciplinary lens can create and reinforce stigma. Stigma has a material impact on individuals' help seeking, and can delay or prevent individuals from seeking assistance for health issues.

Further to this, disciplinary action that results in an individual being suspended or removed from school activities may play a role in exacerbating risk factors that a young person may be experiencing. If a young person is experiencing risk factors that are associated with greater likelihood of uptake of vaping or tobacco, suspension from school is likely to exacerbate those risk factors by removing the protective factors of school (e.g., social connection, education, peer and teacher support etc.) and reinforcing risk factors (e.g. isolation, shame, stigma, risk-taking behaviours). Additionally, penalties to young people who are found in possession of nicotine products in contravention of the law may face civil or criminal penalties. These penalties and criminalisation may further exacerbate risk factors for young people by increasing financial strain, stigma, and isolation. It is vital that young people who are found to be vaping are therefore offered non-stigmatising and non-punitive responses that do not lead to further harms.

The ADF instead recommends a comprehensive health approach to NVP use for young people. Some relevant elements of a comprehensive approach are outlined below:

Education in schools

Evidence demonstrates that education for young people around substance use that uses a prohibitionist or abstinence based lens is ineffective.¹² Instead, programs that look holistically at the contexts of substance use amongst young people have been proven to be more effective.¹³ Approaches to behaviour change programs for vaping must use the learnings of these programs in their approach. Messaging that is based around prohibition (e.g., “just say no”) has been found to be not only ineffective but can play a role in increasing stigma around an individual’s substance use. Instead, evidence around school education programs suggests that a combination of social competence programs which teach individuals self-management and personal and social skills to respond in complex situations, including those involving substances, and social influence approaches which provide context to substance use, as well as recognising peer and media influences¹⁴.

Risk and protective factors

School environments have an important role to play in reinforcing protective factors and mitigating risk factors for young people with regards to substance use, including vaping and tobacco use¹⁵. Examples of risk factors include individual factors, such as isolation, difficulties in home life, and trauma, as well as environmental factors like social pressure, social disadvantage, and availability of drugs, alcohol, and tobacco and vaping products. The recently announced federal government reforms therefore play an important role in mitigating some environmental risk factors, but school settings are able to mitigate many of these other factors through positive social environments, and reinforcement of protective factors. Relevant protective factors include social and emotional competence, problem-solving skills, positive family environments, pro-social environments outside of home, and participation and engagement in meaningful activities.

Approaches for parents

A key opportunity in addressing rates of vaping amongst young people is through conversations between children and parents. The ADF has undertaken a process of developing information that is targeted at parents to help them have conversations with their children about drugs and alcohol, as well as specifically targeted at vaping. These resources were developed through an innovative social listening process that used large amounts of data from social media to understand the conversations that were being had about alcohol and other drugs. From this, the ADF used key insights to develop a specific [set of resources for parents about vaping](#) and young people, and also have recently developed and launched a new resource for parents called [Talk About It](#), which is designed to help parents have constructive conversations with their children about substance use.

These resources provide strong examples of the kinds of evidence-based material that can be deployed to assist parents, schools, and young people, particularly as the supply of vaping products changes in the coming months.

Penalties for possession

It is also important that information provided to people includes information about the consequences of use of vaping products containing nicotine, particularly after the changes to supply come into effect. It is important for it to be communicated to people that possession of a schedule 4 substance without a prescription is a criminal offence, and in QLD this is punishable by a fine of up to \$30,000. The ADF does not support the criminalisation of personal use and possession of psychoactive substances, and instead supports people who are detected with psychoactive substances being offered voluntary referrals to health supports. The ADF supports a similar approach to the possession of vaping products containing nicotine. While the criminal penalties are not currently being enforced, this may change when availability of vaping products changes. As such, the ADF supports the decriminalisation of possession of vaping products containing nicotine, to ensure that people found with these products outside of licit channels are offered support, rather than criminalised. A criminal justice approach is an ineffective response to a health issue and will likely cause greater harm.

Holistic approaches

Public health and behaviour change campaigns can have profound impacts on community health and wellbeing. However, advertising campaigns on their own do not work. Effective health promotion initiatives are those that are multi-layered and mutually reinforcing. Campaigns that aim to increase awareness of harms, or to provide public information, must sit alongside other action areas such as community engagement, research, monitoring and evaluation, in addition to necessary regulatory changes.

Nicotine dependence

In light of upcoming changes to the supply of vaping products, and ongoing non-prescribed NVP use, serious consideration needs to be given to the population of individuals who are nicotine dependent. The NSW government is well placed to provide services and support to people needing support with nicotine dependency, particularly for young people. The ADF recommends that the NSW government investigate options for supporting young people who may be nicotine dependent. These interventions may include developing resources for parents and teachers, targeted campaigns informing young people of changes, and the subsidisation and provision of nicotine replacement therapies where needed, including in schools. These approaches may need to be relatively radical compared to usual health interventions, in that they will need to be highly targeted, and may have a fixed duration. The ADF encourages the NSW government to be openminded in its approach, and to place an emphasis on reducing the harms associated with nicotine dependence and withdrawal.

NSW's current regulatory framework

i) Effectiveness in reducing harm from e-cigarette use

It is unfortunately difficult to assess the current regulatory framework in NSW as effective in reducing harm from e-cigarette use. NVPs are freely available and in some cases openly advertised across the state. This is consistent with other jurisdictions in Australia, however. The high availability of illicit NVPs which are often sold to young people is a key driver of harm. This submission has outlined above some evidence-based approaches to reducing harm amongst young people. This will need to be coupled with a significant change to the current supply of NVPs.

ii) Effectiveness in preventing illegal supply

The current regulatory framework is clearly inadequate to prevent illegal supply. While the federal government is relying on changes to border laws to prevent the importation of NVPs masked as non-NVPs, the head of the Australian Border Force has told Parliament that they expect they will not be able to stop the supply of illicit NVPs entering Australia. This is consistent with Australia's experience with the prohibition of illicit drugs, that continue to enter the country in greater numbers despite the efforts of law enforcement. It is therefore unclear, what, if any effect the federal government reforms will have on the availability of illicit NVPs in NSW. The NSW government may therefore be required to take on a significant portion of responsibility for minimising the illicit supply.

iii) Challenges to enforcement and compliance and ways to overcome these

Challenges to enforcement and compliance regarding illicit NVPs are evident across Australia. The complexity of NVPs being regulated as therapeutic goods has presented challenges. The growth of the illicit tobacco trade alongside the rise in sales of illicit NVPs has demonstrated that a more comprehensive approach to compliance and enforcement is required. While undoubtedly many stores selling NVPs do so with an awareness of the illegality, anecdotal reports suggest that some store owners are unaware of the legal status of NVPs or are confused about their status. Additionally, the presence of stock may present a barrier to stores wanting to cease the sale of illicit NVPs given the investment. Increased compliance and enforcement activity is clearly required to deter the sale of illicit NVPs, but the ADF recommends that this be accompanied by education for retailers, as well as the potential for armistice approaches to the disposal of illicit stock.

Any other matters

The ADF has contributed to multiple consultations at state and federal levels concerning the regulation of NVPs, and argued for an approach to regulation that balances the accessibility of NVPs for individuals wishing to access them, with ensuring that they are not accessible to those who may be at risk of harm. The ADF's experience with policy concerning the prohibition of harmful products like alcohol and illicit drugs suggests that it is not certain whether the current approach of regulating NVPs as therapeutic goods is the most appropriate method to achieve this balance. Regulation prohibiting substances where there is a demand for them has been unsuccessful in stemming their importation and use. Despite record investment and enforcement, illicit drugs continue to be found to be 'easy' or 'very easy' to access by the vast majority of those who seek them out.^{16, 17}

The prohibition of importation of non-therapeutic vaping products may have similar outcomes. The Commissioner of the Australian Border Force has stated that it is unlikely that vaping products will be able to be entirely stopped from illicit importation.¹⁸ While the proposed introduction of more significant penalties for importation by the federal government may do more to deter illicit importation, the continuing flow of illicit drugs and tobacco indicate that it is possible that a sizeable black market will remain in place. In this circumstance, it is the ADF's concern that those who then access illicit vaping products will be at greater risk of harm from unregulated products in

an unregulated market. An ongoing illicit market may also contribute to stigma towards those who do use illicit NVPs, creating barriers to help-seeking, and potentially worsening health outcomes.

Given, however, the policy direction of government towards tighter regulation of NVPs as therapeutic goods, the ADF is committed to providing evidence-based advice to attempt to minimise harm within this framework. The ADF therefore supports ongoing data collection and dissemination on NVPs to improve the evidence-base, informing future policy and regulatory decisions, including from the NSW government. This may include information on prevalence, enforcement (seizures), and issued prescriptions. While long-term NVP health impact data will not be readily available, medium and short-term evidence should be used to help inform future regulatory decisions.

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