



Senator Marielle Smith
Chair, Community Affairs Legislation Committee
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12 April 2024

Dear Senator Smith

Thank you for the opportunity to make a submission to the Community Affairs Legislation Committee in relation to the *Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024 [Provisions]* ('the Bill') inquiry.

The Australian Alcohol and other Drugs Council (AADC) supports a holistic response to e-cigarette use and vaping-related harm that includes health promotion, preventative health and harm reduction actions and treatment models that are evidence-informed, funded to meet need and avoid sensationalising risks and harms.

AADC believes that the law and policy regarding the use of e-cigarettes and vaping products should be informed by the best available evidence and treated as a health issue rather than a criminal matter. As such, AADC is concerned that the draft Bill does not provide adequate legal protections for individuals found to be in possession of vaping devices and vaping accessories for personal use, the result of which will be foreseeable negative impacts on health and wellbeing. AADC has consistently highlighted concerns about the criminalisation of possession of vaping devices and products for personal use in previous submissions to the Therapeutic Goods Administration consultation processes and in our position statement on nicotine vaping products.¹

AADC acknowledges statements made by The Hon Mark Butler MP, Minister for Health and Aged Care, which emphasise that the intent of the Bill is to prevent the importation, manufacture and supply of vaping devices and products in Australia, rather than targeting individual users with punitive measures. However, the limited personal use exemptions and significant criminal and civil penalties for possession of vaping goods currently contained within the draft Bill risk a range of unintended adverse consequences for people who use e-cigarettes who consequently become engaged with law enforcement and justice systems. AADC also believes the criminalisation of personal possession of vaping goods is inconsistent with the philosophy underpinning Australia's successful and extensive experience in using harm reduction approaches to reduce harms associated with alcohol and other drug use, and broader moves across the country towards decriminalisation of illicit drug possession and related diversion initiatives. The draft Bill is also inconsistent with existing tobacco control legislation across Australia and may have the effect of encouraging existing users of e-cigarettes to transition – or return - to use of traditional tobacco products.

¹ See AADC submissions to the Therapeutic Goods Administration [Proposed reforms to nicotine vaping products consultation process](#) (January 2023) and [Reforms to the Regulation of Vapes survey](#) (September 2023), and [AADC's Position Statement of Nicotine Vaping Products](#).





As such, AADC recommends that:

- Threshold amounts which define possession for personal use be removed and replaced with broader personal use exemptions that are not contingent on the quantity of vaping devices or products a person possesses. Section 128.2(a) and (b) of the Public Health (Tobacco and Other Products) Act 2023 provide examples of broader personal use exemptions for banned tobacco products
- The Minister for Health and Ageing, through the newly established national E-cigarette Working Group, work with relevant State and Territory Ministers to remove penalties associated with the individual possession of vaping devices and accessories for personal use to ensure consistency across jurisdictions.

About the AADC

AADC is the national peak body representing the alcohol and other drug (AOD) sector. We work to advance health and public welfare through the lowest possible levels of AOD related harm by promoting effective, efficient and evidence-informed prevention, treatment and harm reduction policies, programs and research at the national level. AADC's founding members comprise each state and territory peak body for the AOD sector, other national peak bodies relating to the AOD sector, and professional bodies for those working in the AOD sector.

The current membership of AADC is:

Alcohol, Tobacco and Other Drug Association ACT (ATODA)	Alcohol, Tobacco and Other Drugs Council Tasmania (ATDC)	Association of Alcohol and Other Drug Agencies NT (AADANT)
Australasian Therapeutic Communities Association (ATCA)	Australian Injecting and Illicit Drug Users League (AIVL)	Drug and Alcohol Nurses of Australasia (DANA)
Family Drug Support (FDS)	National Indigenous Drug and Alcohol Committee (NIDAC)	Network of Alcohol and Other Drug Agencies (NADA)
Queensland Network of Alcohol and Other Drug Agencies (QNADA)	South Australian Network of Drug and Alcohol Services (SANDAS)	The Australasian Professional Society on Alcohol and other Drugs (APSAD)
Victorian Alcohol and Drug Association Inc (VAADA)	Western Australian Network of Alcohol and other Drug Agencies (WANADA)	Drug Policy Modelling Program* <i>*AADC associate member</i>

Current provisions within the draft Bill risk criminalising people who use e-cigarettes

Section 41QC and 41QD of the draft Bill outline the range of offences and penalties related to the unauthorised possession of vaping devices and products of commercial and below commercial quantities. Penalties begin at 12 months prison and a fine of \$18,780 and rise significantly where a person possess larger quantities of vaping goods. The Bill does, however, provide a personal use exception in a case where a person possesses less than a commercial quantity of vaping goods (Section 41QD-9(a)). This personal use exception is not applicable where a person possesses a commercial quantity of vaping goods.

A 'commercial quantity' of vaping goods is not defined in the draft Bill and is instead apparently defined within related regulations. AADC was not able to find a publicly available copy of these regulations and is concerned that threshold quantities may not reflect the number of vaping devices or products that an average user of vaping goods may possess. If a less-than-commercial quantity of vaping goods is to reflect



current provisions for travellers to Australia, for example, this is an allocation of two vaping devices, 20 vaping products and 200mL of vaping liquid. This is a small volume of vaping goods and one that could be easily exceeded even by moderate users.

The use of threshold quantities to distinguish between possession for the purpose of personal use and possession for the purpose of supply of illicit substances is problematic as they frequently do not reflect usage patterns in the community or account for factors such as an individual's desire to minimise contact with illicit markets and reduce risk of engagement with law enforcement.² Without applicable personal use exceptions for larger quantities – nor an onus for there to be evidence that a person has intent to supply vaping goods – the draft Bill risks placing significant criminal penalties and long lasting, negative impacts on people who use vaping goods.

The risk of criminalisation will also likely produce negative health and wellbeing outcomes, discouraging people from seeking support for vaping-related harms for fear of prosecution, and through the stigma of engaging in a criminalised activity. This reduces the potential harm reduction and smoking cessation value of vaping goods and may have the effect of encouraging existing users of e-cigarettes to transition to use of traditional tobacco products.

Criminalising possession of vaping goods is out of step with existing tobacco control legislation and broader trends in illicit drug policy in Australia

Possession-related offences in the draft Bill appear to be out of step with similar provisions in recently introduced tobacco control legislation. Possession of banned tobacco products for personal use is not an offence within the new [Public Health \(Tobacco and Other Products\) Act 2023](#). Sections 128.2(a) and (b) of the *Public Health (Tobacco and Other Products) Act 2023* ('the Act') allow the individual possession of banned tobacco products, such as chewing tobacco and 'snuff', for personal use and importantly, there are no threshold amounts which define personal use. As such, the draft Bill appears to be inconsistent with similar legislation related to traditional tobacco products.

Additionally, States and Territories are increasingly moving towards de-penalisation of illicit substances. Most jurisdictions have implemented a program of diversion out of the justice system in cases of possession of small amounts of illicit substances. While these have been in place for cannabis for almost three decades, these decriminalisation and diversion programs have gradually expanded with the Australian Capital Territory, New South Wales and Queensland in particular widening their respective programs in the past 12 months to include a broader range of illicit substances. These decriminalisation and diversionary programs are implemented in recognition of the significant harms associated with both the risks and realities of criminal justice system engagement for low level illicit drug offences. By criminalising the possession of vaping goods, the draft Bill is out of alignment with the broader direction of illicit drug policy in Australia.

Outside of the provisions contained within the Bill, the Therapeutic Goods Administration (TGA) scheduling of vaping goods as a prescription medication creates an associated possession-related offence within State and Territory legislation. As noted in AADC's previous submissions³, each jurisdiction has offences related to the unauthorised possession of prescription medications and these range from a fine of \$1,810 in Tasmania through to a \$32,000 fine and up to two years custodial sentence in the Australian Capital Territory.

These provisions are similarly out of step with broader directions of illicit drug policy and in response, Queensland has expanded its diversion provisions to include prescription medications and the Australian

² Hughes, C., Ritter, A., Cowdrey, N., & Phillips, N. (2014). *Australian threshold quantities for 'drug trafficking': Are they placing drug users at risk of unjustified sanction? Trends & issues in crime and criminal justice no. 467*. Canberra: Australian Institute of Criminology.

³ See AADC submissions to the Therapeutic Goods Administration [Proposed reforms to nicotine vaping products consultation process](#) (January 2023) and [Reforms to the Regulation of Vapes survey](#) (September 2023)



Capital Territory has signalled an intention to make similar changes.⁴ The potential criminalisation of vaping good possession in Commonwealth legislation - alongside the consequences of TGA scheduling – will maintain this significant legal variation across Australia; variation that is likely to continue where jurisdictions have more limited diversion programs and opt not to expand programs to include vaping goods. This is aside from the foreseeable potentially problematic necessity of including vaping goods in diversion programs, which would see people diverted into AOD treatment services that are not funded to meet current need and demand, and a reliance on law enforcement where similar banned tobacco products attract no policing response or criminal penalty.

Recommendations and conclusion

AADC is supportive of responses to e-cigarette use and vaping-related harms that are holistic and inclusive of health promotion, preventative health and harm reduction actions and treatment models that are evidence-informed, funded to meet need and avoid sensationalising risks and harms.

AADC is concerned that provisions within the current draft Bill, and its interaction with existing State and Territory legislation related to authorised possession of prescription medications, risk creating a criminalised environment for individuals who use vaping goods. This will foreseeably lead to a range of adverse outcomes, including discouraging those in need of support for vaping-related harms from seeking treatment.

AADC acknowledges the intent of the draft Bill to avoid targeting individual users of vaping goods and as such recommends that the Bill be strengthened by:

- Removing threshold amounts which define possession for personal use and replacing these with broader personal use exemptions that are not contingent on the quantity of vaping devices or products a person possesses. Section 128.2(a) and (b) of the Public Health (Tobacco and Other Products) Act 2023 provide examples of broader personal use exemptions for banned tobacco products
- The Minister for Health and Ageing, through the recently established national E-cigarette Working Group, working with relevant State and Territory Ministers to remove penalties associated with the individual possession of vaping goods for personal use and ensure consistency across jurisdictions.

Thank you for the opportunity to provide input to this inquiry. If you have any queries or require any further information in relation to this submission, please do not hesitate to contact me directly on or via email at

Yours sincerely

—
Melanie Walker
Chief Executive Officer
Australian Alcohol and other Drugs Council (AADC)

⁴ Bladen, L. (2024, April 7). "Laws to remove penalties for nicotine-containing vapes in ACT on cards", *The Canberra Times*. Accessed 8 April 2024 at <https://www.canberratimes.com.au/story/8581355/emma-davidson-keen-to-decriminalise-personal-possession-of-vaping/?cs=14329>