

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

Re: Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024 [Provisions]

The Alcohol and Drug Foundation (ADF) thanks the committee for the opportunity to comment on this piece of legislation. The 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.

Australia's current approach to the regulation of vaping products has been unsuccessful to date. The supply of unregulated vaping products in retail outlets is of significant concern, as a large majority have been found to contain nicotine, and sellers are operating with effective impunity.¹ The sale of these products to young people has emerged as a key public health and regulatory issue. Although further regulation and enforcement is needed to address this issue, it is the ADF's position that such efforts should not impede those using vaping products as a tobacco smoking cessation tool. While there is still a lack of data about the long-term health effects of vaping, a 2022 Cochrane review found that NVPs are a more effective smoking cessation aid than traditional nicotine replacement therapy (NRT) products.²

The ADF is supportive of a systemic response to vaping that takes a holistic approach to minimising harm. This includes ensuring that the supply of unregulated vapes is brought under control, and appropriate support is put in place for those who may be dependent on nicotine vapes. We are supportive of the proposed restrictions in this Bill on advertising of vaping products, particularly in the context of products that appeal to young people. Additionally, we support the aims of the legislation to strengthen the controls on the supply of unregulated vaping products. This approach should not, however, preclude ensuring that adults who are wanting to access nicotine products are able to do so via a straightforward pathway that does not incur additional barriers, harms, or undue costs. While some of the components of a harm minimisation approach to vaping are the responsibility of the states and territories, it is vital that the federal government shows leadership in

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ensuring a comprehensive health-based response. This submission responds to specific elements of the legislation below.

Possession

Criminalisation of personal possession of vaping products must be avoided. Punitive responses to health behaviours like vaping or illicit drug use have been proven to be ineffective at preventing or reducing use and harm and lead to further harm for individuals affected. The ADF acknowledges that the Bill includes an exemption for the possession of vaping products below a commercial quantity for personal use. However, lack of clear definitions of commercial and personal use quantities can impact how this is enforced, which may lead to certain communities being disproportionately affected by criminal sanctions. As such, the ADF recommends that possession of quantities below the commercial quantity is not criminalised, to ensure that people found with these products outside of licit channels are offered support, rather than punished.

Outside of this current Bill, the personal possession of vaping products containing nicotine remains criminalised in the states and territories, often with significant penalties attached (for example, in Queensland possession of a schedule 4 substance without a script is punishable by up to a \$30,000 fine). The federal government has the opportunity to show leadership and a commitment to a health-based response to vaping by entirely removing the criminal penalty for possession below a commercial quantity and encouraging other jurisdictions to follow suit.

Determining a commercial quantity

Experience with illicit drug legislation has shown that using threshold quantities to determine levels of liability are fraught. Thresholds between personal use and supply amounts are often not evidence-informed, which can increase the risk of disproportionate sanctioning, such as by incorrectly convicting people who may be in possession of a personal use amount as liable for a supply or trafficking offence.³ Ideally, determining whether someone is engaging in commercial supply or trafficking should be determined by other evidence. If this Bill proceeds using a threshold approach, the ADF recommends that a rigorous and evidence-based approach to defining personal use and commercial quantities is taken. In the past, similar work has been undertaken to determine appropriate evidence-based thresholds for illicit drug supply charges by the Drug Policy Modelling Program at the University of New South Wales.⁴ This work is best informed directly by people who may be in possession of vapes for personal use.

Evidentiary burden

The ADF is concerned that the evidentiary burden is reversed on people who may be possessing vapes for personal use. We acknowledge that reversal of burden offences is established practice but note that this approach goes against the fundamental principle of presumption of innocence by placing the onus on the defendant to prove their innocence. Shifting the burden of proof to consumers may increase the risk of wrongful convictions, as individuals may struggle to provide evidence to prove their innocence. We therefore recommend that this reversal of evidentiary burden is removed from the Bill to ensure that people detected with vapes for personal use are not inadvertently criminalised. This would not need to be replaced with a different procedure, as police would simply need to follow the usual process of needing to prove (following the presumption of

innocence and the required burdens of proof) that a vape is being possessed for non-personal use reasons, rather than the individual.

Prescribing and access

The ADF supports an approach to regulation that balances the accessibility of nicotine vaping products for individuals wishing to access them, while ensuring that access is appropriately limited to minimise harm in the community. Experience with illicit drugs has shown that 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.^{5,6} Recent changes to border laws concerning the importation of vaping products may be insufficient to prevent an illicit supply - the head of the Australian Border Force has told Parliament that they expect they will not be able to stop the supply of illicit vaping products entering Australia.⁷ It is therefore essential that pathways to access nicotine vaping products legally are not restrictive to prevent pushing consumers toward the illicit market, where they may be at greater risk of harm from unregulated products in an unregulated market.

Individuals accessing nicotine vaping products legally should have access to quality and well-regulated products that are not overly expensive. The ADF acknowledges the recent expansion of the Special Access Scheme to allow prescribing of nicotine vaping products under Category C, as well as the inclusion of nurse practitioners as part of the Authorised Prescriber scheme. We also note that the recent updated guidelines for the prescribing of vaping products from the Royal Australian College of General Practitioners (RACGP) does not recommend them as a first-line treatment for smoking cessation due to lack of available evidence regarding the long-term health effects.⁸ Regardless, expanding available prescribers will facilitate access to legal vaping products, which is particularly important for individuals who may choose to continue using nicotine vaping products as a long-term tobacco harm reduction strategy.

The ADF is committed to providing evidence-based advice to attempt to minimise harm within current framework for regulating vaping products as therapeutic goods in Australia. To support this, the ADF supports ongoing data collection and dissemination on vaping products to improve the evidence-base, informing future policy and regulatory decisions. This may include information on prevalence, enforcement (seizures), and issued prescriptions. While long-term health impact data will not be readily available, medium and short-term evidence should be used to help inform future regulatory decisions.

Sincerely,

Dr. Erin Lalor

CEO

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References

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