



Government of **Western Australia**
Department of **Health**

Review of the *Tobacco Products Control Act 2006*

Consultation Report
February 2021

Contents

Background	2
Overview of the <i>Tobacco Products Control Act 2006</i>	2
Legislative context	2
2020 review and consultation	2
Key themes	5
Summary of responses	7
What is working well with the legislation	7
Suggestions on how the legislation could be improved	8
Studies to support suggested improvements	18
Next steps	18

Background

Overview of the *Tobacco Products Control Act 2006*

The Western Australian *Tobacco Products Control Act 2006* (the Act) and its regulations, the *Tobacco Products Control Regulations 2006* (the Regulations) are Western Australia's primary pieces of tobacco legislation. The legislation was most recently amended with passage of the *Tobacco Products Control Amendment Act 2018* (the 2018 Amendment Act), with the final provisions from that Act coming into effect on 18 September 2020.

The purposes of the Act are:

To reduce the incidence of illness and death related to the use of tobacco products –

- a) by prohibiting the supply of tobacco products and smoking implements to young persons; and
- b) by discouraging the use of tobacco products; and
- c) by restricting the promotion of tobacco products and smoking generally; and
- d) by reducing the exposure of people to tobacco smoke from tobacco products that are smoked by other people.

The Act and Regulations include provisions that cover how and where tobacco can be sold; advertising and promotion of tobacco products; requirements for tobacco retailers and wholesalers to obtain a licence; how compliance with the legislation is to be monitored and enforced; and where tobacco products cannot be used.

Legislative context

Section 127 of the Act requires that a review of the operation and effectiveness of the Act is conducted at 4 yearly intervals. The last review of the Act was undertaken in 2011, and the final report of that review was tabled in Parliament in 2012. A subsequent review has not taken place previously due to the processes associated with passage and implementation of new provisions introduced by the 2018 Amendment Act.

2020 review and consultation

On 25 September 2020, the Department of Health (the Department) launched the statutory review of the Act and commenced the public consultation process on the Department's online Consultation Hub.

Stakeholders and members of the public were invited to provide comment. A print advertisement to inform the public about the review and to invite submissions was placed in *The West Australian*, regional and metropolitan community newspapers, and key stakeholders were contacted directly to invite submissions.

A discussion paper was prepared by the Department and placed on the consultation hub to facilitate the consultation. Submissions could be made by completing an online questionnaire on the consultation hub, or alternatively emailed or posted to the Department. The consultation period was open for 6 weeks from 25 September to 6 November 2020.

Views on any or all parts of the Act and Regulations were invited. The following questions were provided as a guide on the consultation hub and in the discussion paper. Participants were not required to respond to all questions.

Sale and supply (sections 6–30 of the Act, and Part 6 of the Regulations)

1. What is working well with this legislation?
2. Do you have suggestions on how it could be improved?
3. Are there any studies that would support the measures that you are suggesting?

Advertising and promotion (sections 31–35 of the Act)

4. What is working well with this legislation?
5. Do you have suggestions on how it could be improved?
6. Are there any studies that would support the measures that you are suggesting?

Licensing (sections 36–58 of the Act, and Part 5 of the Regulations)

7. What is working well with this legislation?
8. Do you have suggestions on how it could be improved?
9. Are there any studies that would support the measures that you are suggesting?

Administration (sections 74-75 of the Act)

Includes provisions enabling the CEO to delegate, and for the CEO to carry out research, including a compliance survey.

10. What is working well with this legislation?
11. Do you have suggestions on how it could be improved?
12. Are there any studies that would support the measures that you are suggesting?

Investigations (sections 76–97 of the Act)

13. What is working well with this legislation?
14. Do you have suggestions on how it could be improved?
15. Are there any studies that would support the measures that you are suggesting?

Enforcement (Sections 98–120 of the Act)

Related provisions concerning smoking in enclosed public places and smoking in outdoor public places are included in Parts 3 and 4a of the Regulations.

16. What is working well with this legislation?
17. Do you have suggestions on how it could be improved?
18. Are there any studies that would support the measures that you are suggesting?

Miscellaneous (sections 121–127 of the Act)

Includes provisions that provide protection from liability for wrongdoing and ensure confidentiality; that set out how a police officer may report alleged offences of smoking near children; that provide for the power to make regulations; and for review of the Act.

19. What is working well with this legislation?
20. Do you have suggestions on how it could be improved?
21. Are there any studies that would support the measures that you are suggesting?

Other measures for consideration

22. Are there any other measures to improve the operation and effectiveness of Western Australian tobacco control regulation that should be considered and prioritised?
23. Are there any studies that would support the measures that you are suggesting?

Respondents were required to indicate whether the submission was being made by an individual or on behalf of an organisation and were able to indicate a preference for whether their comments should be treated confidentially, noting that submissions may be subject to release under the *Freedom of Information Act 1992*. To help meet obligations under Article 5.3 of the *World Health Organization Framework Convention on Tobacco Control* respondents were also asked to disclose whether they had any direct or indirect links to, or conflicts of interest, or receive funding from the tobacco and/or e-cigarette industry. Anonymous submissions were not accepted.

The purpose of this report is to summarise the key themes and responses made by stakeholders to the Department's request for submissions to the review of the Act. These themes and responses may inform possible areas for further investigation to strengthen the operation and effectiveness of the Act and the Regulations.

This report is not intended to represent a comprehensive account of the content of all submissions; nor does it provide commentary on the viability of changes suggested by respondents.

The views expressed in this report are those of the individuals and organisations who provided the submissions. Inclusion of the views in this report does not imply any acceptance of, or agreement with these views by the Department of Health or the Government of WA.

Key themes

Submissions in response to the discussion paper were received from a wide range of respondents including members of the public, universities, industry stakeholders, non-government organisations and government departments. Submissions highlighted the varying perspectives and expectations that exist among different stakeholders regarding tobacco control legislation in Western Australia (WA).

Most submissions acknowledged the effectiveness of tobacco control legislation to date in reducing the availability of cigarettes and the rate of smoking in WA. Conversely, a small number of submissions reported that the current legislation was restrictive to personal freedoms, had a negative impact on retailers, and led to perverse outcomes.

In summary, the key themes that emerged through the submissions included:

- Amending the purpose and expanding the scope of the *Tobacco Products Control Act 2006*. For example, expanding the scope of the Act to reduce and discourage tobacco use in WA, and reduce the availability and retail supply of tobacco products. In addition, some submissions recommended further clarification that the Act aims to reduce the supply of tobacco, reduce consumption by current smokers, and prevent uptake of tobacco use by young people.
- Further restricting the sale and supply of tobacco products and accessories. For example, prohibiting the sale and supply of novel heated tobacco products, cigarettes in pack sizes other than 20, loose leaf tobacco in packages of less than 30 grams, and products and accessories designed to increase palatability (such as menthol flavouring, filter capsules, flavoured cigarette papers or cigar wraps, filter ventilation and other filter designs). Some submissions also suggested bans on tobacco vending machines.
- Strengthening licencing requirements, including restrictions on licences to sell tobacco in order to reduce the availability of tobacco products. For example, banning licences for indirect sale, licences issued for sales from a vending machine, and the sale of tobacco products at any premise licensed for the sale and immediate consumption of alcohol.
- Introducing additional conditions on applications to obtain a retailer's licence. For example, requiring the applicant to demonstrate knowledge of their legal obligations in relation to the retail sale of tobacco, demonstrate that staff training requirements have been met, and to provide data relating to annual sales volume.
- Powers to suspend, revoke or not renew licences of retailers found to be in breach of the legislation were suggested as supplementary measures to ensure compliance with the Act. In addition, it was recommended that licencing fees be increased to ensure full cost recovery of the licencing scheme, and to fund comprehensive compliance and retailer educational activities.
- Further expansion of smoke-free public places. For example, bus stops, footpaths near schools, universities, childcare and hospitals and health care facilities, pedestrian malls, public swimming pools, skate parks, concerts and children's sporting events were identified as potential settings for smoke-free public places. Moreover, the removal of exemptions permitting smoking at the Crown Casino International Room and in outdoor eating and drinking areas of liquor-licensed premises was suggested. Prohibiting smoking in additional areas not considered public spaces, such as commercial cigar and smoking lounges and private guest rooms of hotels was also proposed.

- Regular inspections to determine retailer compliance (conducted once or twice per year) were supported. However, clarification was sought on the role of restricted investigators, and who may be appointed to the role. It was also recommended that the Act address the ability for retailers to purchase statutory liability insurance to cover the cost of any penalties issued under the Act and the Regulations.
- Other suggestions included holding the tobacco industry accountable for tobacco-related litter, and increasing penalties for breaches of the Act, such as selling or supplying tobacco products to children and for promoting tobacco products through competitions and rewards.
- A range of out of scope issues was discussed, relating to liquid nicotine, lobbying and donations by the tobacco industry, operational enforcement matters, and reducing exemptions and expanding existing requirements for advertising and promotion. Issues were considered out of scope if they related to other pieces of WA legislation, are covered by Australian Government legislation, or are otherwise outside the jurisdiction of the WA Government.

E-cigarettes emerged as a contentious issue. This is evidenced by the diverse views presented in the submissions. Respondents suggesting prohibition and stronger regulation of e-cigarettes advocated for explicit prohibition of any sale and supply of e-cigarettes and accessories, as well as complementary bans on advertising and promotion. Respondents also recommended prohibiting the use of e-cigarettes in smoke-free areas. In addition to e-cigarettes, novel and heated tobacco products were also identified by respondents as candidates for such restrictions.

Responses advocating for increased availability of e-cigarettes often suggested that they should be defined as tobacco products, or regulated as consumer products, albeit with bans on advertising, promotion and display, similar to tobacco products. Many respondents advocating for increased availability also expressed support for the introduction of a licensing scheme for e-cigarette retailers. Other suggestions included permitting the sale of e-cigarettes to only those aged 18 or 21 years and over (including with penalties for non-compliance) and permitting the use of e-cigarettes in smoke-free areas.

Summary of responses

A total of 53 submissions were received in response to the discussion paper. Respondents comprised:

- industry stakeholders, comprising tobacco companies, tobacco retailers, and hospitality and entertainment stakeholders (7);
- State Government departments or agencies (3);
- local government authorities (6);
- non-government organisations (8)
- universities (1); and
- members of the public (28).

The majority of submissions (30) were made online using the questionnaire at the consultation hub. The remainder were provided by email (21) or post (2).

Of the total number of respondents 8 were recorded as having a link to, conflict of interest, or that they received funding from the tobacco and/or e-cigarette industry. A small number of respondents failed to explicitly declare a conflict of interest, or incorrectly stated they did not have a conflict of interest to declare. A conflict of interest was nonetheless established due to the respondent being an industry participant.

Some organisations and individuals chose to submit a letter of support of another submission. A total of 14 letters of support were received from 10 non-government organisations, 2 universities, 1 government agency, and 1 individual. Of the letters of support, 2 provided responses to the questions in the discussion paper beyond those in the submission they wrote in support of. These additional responses have been included in the consultation summary.

What is working well with the legislation

The achievements by WA in tobacco control were acknowledged widely across submissions. Many noted that WA has been a national and international leader over many years, and that substantial reductions in the smoking rates have been achieved.

The Act and Regulations were identified as key drivers of these achievements. Many submissions stated that the legislation has been effective in reducing the availability of cigarettes and the rate of smoking, especially among young people.

The need to protect children from tobacco use was widely acknowledged and the prohibition of supply to people under 18 supported as an effective measure.

The following additional measures were also noted as working well by many submissions:

- the ban on confectionary flavoured tobacco products;
- retail display restrictions;
- advertising restrictions;
- single point-of-sale;
- the role of restricted investigators;
- controlled purchase operations and compliance checks; and
- smoke-free areas.

The licencing system was broadly positively remarked upon. It was indicated by many respondents that it was appropriate that sellers of tobacco must be licensed, and that it created opportunities to regulate the supply of tobacco.

Less commonly, submissions also acknowledged the effectiveness of the exclusion of tobacco from loyalty programs, no smoking within 10 metres of a playground, and no smoking in a car with children under 17.

A small number of submissions indicated that the legislation was not working well as it was overly restrictive to personal freedoms, negatively affected retailers, and led to perverse outcomes such as the proliferation of illicit tobacco.

Although outside the scope of WA legislation, some responses also acknowledged the effectiveness of Australian Government legislation, such as tobacco taxation, advertising prohibitions, and plain packaging, in achieving its aims and helping prevent tobacco related harm.

Suggestions on how the legislation could be improved

Preliminary (Sections 1-6 of the Act)

Sections 1 to 6 of the Act were not included in the questions contained in the discussion paper. However, a notable number of submissions made suggestions regarding these Sections of the Act and these are summarised below.

Glossary

Several respondents suggested changes to the definitions contained in the glossary. Some provided specific wording, and others stated what outcome they would like to see a change in definition to achieve. Changes related to definitions included to:

- define e-cigarettes more clearly in the Act;
- include e-cigarettes in the definition of a tobacco product;
- include e-cigarette liquids in the definition of a tobacco product;
- capture new and emerging products, such as heated tobacco, in the definition of a tobacco product;
- explicitly include shisha in the definition of a tobacco product;
- amend the definition of smoking to capture use of shisha, heated tobacco products, and e-cigarettes; and
- amend the definition of advertising to capture vintage smoking posters and similar material.

While it was noted by some respondents that shisha is captured by parts (a) through to (c) of the definition of a tobacco product, it was suggested that explicitly including shisha in the definition of a tobacco product and smoking would provide clarity for enforcement officers and retailers. A very small number of respondents appeared to be unaware that shisha is regulated under the Act and suggested that this be done.

There were opposing intentions among respondents who suggested that the definition of a tobacco product be amended to include e-cigarettes. Many who suggested this change stated that the availability of e-cigarettes should be increased as an alternative to smoking combustible cigarettes. Some respondents appeared to be unaware that the sale of items resembling tobacco products is prohibited in WA, and that e-cigarettes were found to resemble a tobacco product within a WA Supreme Court ruling,¹ and so suggested this change with the apparent intent to decrease the availability of e-cigarettes and enact greater restrictions on these products. Further suggestions regarding e-cigarettes are included in the sections related to Enforcement.

¹ Hawkins -v- van Heerden [2014] WASC 127; Van Heerden -v- Hawkins [2016] WASCA 42.

One suggestion was received that the language in the Act should mirror that in other legislation which affects local government.

Purpose of the Act

To create a wider scope for Government action regarding tobacco, some submissions suggested amending the purpose of the Act. The following were suggested as additions to the existing purpose:

- reduce the consumption of tobacco in WA;
- discourage the consumption of tobacco in WA;
- reduce the retail supply of tobacco products;
- reduce the availability of tobacco products; and
- reduce the incidence of illness and death caused by the use of tobacco products.

Some respondents stated that the current wording of the Act's purpose implied that it only sought to prevent uptake of tobacco use by young people. It was suggested that incorporating these changes would clarify that the Act seeks to reduce consumption by current smokers, as well as better equip Government to address circumvention of the Act by industry and address the supply side of tobacco use.

A related suggestion was to create an additional objective of the Act, 'by reducing the retail supply of tobacco products in the community', as part of an approach to increase controls on the supply of tobacco.

Sale and supply (Sections 6–30 of the Act, and Part 6 of the Regulations)

Submissions relating to sale and supply had a significant focus on prohibiting certain tobacco products and suggested additional means to reduce the supply of tobacco.

The following products or accessories were suggested to be prohibited:

- all flavoured cigarettes (including menthol);
- filter capsules;
- flavoured cigarette papers;
- flavoured cigar wraps;
- novelty products and accessories used for marketing purposes;
- filter ventilation and other filter design features to increase palatability or appeal;
- novel products such as heated tobacco products;
- cigarettes in pack sizes other than 20; and
- loose leaf tobacco in packages of less than 30 grams.

Related discussion included the role of these types of products in creating perceptions of reduced harm, increasing appeal to young people, and their role in marketing.

Some submissions were concerned that there is no legislative barrier to retailers purchasing statutory liability insurance to cover the cost of penalties under the Act and the Regulations. It was suggested that statutory liability insurance for the cost of penalties be prohibited as it undermines the intent and purpose of the Act.

Suggestions regarding the display of price boards were divided. Some submissions advocated for the prohibition of display of price boards, except on customer request to view, claiming price boards are a form of tobacco advertising. Others suggested that price boards should continue to be displayed as they provide consumers with necessary purchase information.

Vending machines were considered by some submissions to be a form of tobacco advertisement and as a means of increased access to tobacco products. It was suggested that tobacco vending machines be prohibited.

Several submissions raised a possible issue relating to multiple points of sale at one retail premises and suggested investigating a means of resolving this issue.

Some suggestions were received that a power should be created to allow for the banning of a tobacco product or class of tobacco products by an authority, similar to existing powers under the *Liquor Control Act 1988*. Some suggested this power sit with the Governor, and others that it sit with the Minister for Health.

Further suggestions relating to sale and supply included:

- prohibit the supply of tobacco to people under 21 years of age;
- create a limit on the quantity of tobacco that can be purchased per sale;
- limit the number of brand variants that are available;
- prohibit the sale of tobacco in supermarkets; and
- remove the requirement to display a Quitline logo at point-of-sale.

A very small number of submissions stated that the prohibition on those aged under 18 selling tobacco was difficult for small businesses. One submission suggested that persons over the age of 16 be permitted to sell tobacco.

Advertising and promotion (sections 31–35 of the Act)

Many submissions indicated that these sections of the Act were working well and made no further suggestions for improvement. Submissions which suggested improvements generally wished to see exceptions reduced and existing requirements expanded.

Australia is a signatory to the World Health Organization Framework Convention on Tobacco Control which provides recommendations to attain a comprehensive ban on advertising and promotion of tobacco products. Some respondents stated that Australia is yet to meet its obligations regarding advertising and promotion, and changes to WA's legislation could help achieve this.

Several respondents brought attention to remaining forms of advertisements. Specific suggestions were:

- that the current exemption to tobacco advertisement restrictions available for incidental advertisements not be available to a person who received a direct or indirect benefit for displaying or broadcasting an incidental tobacco advertisement;
- remove the exemption which allows a tobacco advertisement on a package; and
- prohibit the advertising and promotion of e-cigarettes and e-cigarette accessories.

Some respondents suggested that provisions be added to the Act to prevent tobacco advertising to retailers through incentive programs. Examples provided of advertising to retailers and incentive programs included 'price promotions, cash payments, rebates or "buy-downs", access to exclusive parties, events, "once-in-a-lifetime" experiences, all-expenses-paid vacations, loyalty programs and direct retailer "product education" activities.' It was also suggested that targeted marketing and education to retailers by tobacco manufacturers be prohibited.

One submission stated that all tobacco advertising has already been banned in Australia, and that a ban on communication between suppliers and retailers would risk being a *de facto* ban on the industry.

Suggestions were also made to prohibit advertising and promotion of e-cigarettes, e-cigarette accessories, and all other novel tobacco products. These measures were suggested by a number of respondents, but the intent differed significantly among respondents in proposing them. Some respondents proposed prohibiting the advertisement and promotion of e-cigarettes as part of a regulatory regime where e-cigarettes were available as consumer products. This would regulate these products similarly to tobacco products. Other respondents suggested that promotion and advertising should be banned to complement an explicit prohibition on the sale of these products. This would make it unequivocally clear that an e-cigarette, e-cigarette accessory, or other novel tobacco products could not be promoted.

Licensing (sections 36–58 of the Act, and Part 5 of the Regulations)

A significant volume of suggestions was received regarding licensing. The vast majority of those who responded to these sections wished to see increased restrictions on licences; a small number suggested no changes be made to the licencing system.

Several submissions recommended that the issue of a licence be prohibited:

- in relation to vehicle premises;
- to sell tobacco products by way of indirect sale;
- in relation to vending machines;
- in relation to healthcare and community service premises;
- in relation to educational facilities;
- in relation to premises licensed for the sale and immediate consumption of alcohol; and
- for temporary display stands, booths, tents or other mobile structures or enclosures, whether or not they are for the purpose of supplying tobacco products at a sporting, cultural or other event.

Respondents who made these suggestions typically spoke of the importance of reducing the availability and proximity of tobacco outlets to reduce tobacco consumption.

Further suggestions were made that the following become offences under the Act:

- a tobacco manufacturer or wholesaler that induces a person or body corporate to apply for a tobacco retailer licence;
- a tobacco manufacturer or wholesaler that pays a licence fee on behalf of a retailer; and
- for a licensee or approved manager to fail to ensure that their employees do not supply tobacco products to persons less than 18 years of age.

Some respondents made suggestions relating to training, data collection, a limitation on number of licences issued, and expanding powers to restrict the granting of new licences. The main guiding intent for these measures was to reduce the density of retail outlets for tobacco. These suggestions are listed below:

- require licence applicants to nominate a natural person who is responsible for compliance with legal obligations in relation to the sale of tobacco at the premises specified in the licence;
- require licence applicants to demonstrate their knowledge and understanding of the harms of tobacco and of their legal obligations in relation to the sale of tobacco, as a precondition to the grant of a licence;
- prescribe in detail, by regulations, staff training requirements;
- require licence holders to demonstrate that staff training requirements have been met (by way of statutory declaration), as a precondition to the renewal of their licence;
- require holders of a retail licence to provide annual sales volume data for purchases and brand variants, either directly or via a wholesaler or manufacturer on their behalf;

- require holders of a wholesale licence to provide annual sales volume data, information as to the chemical composition of tobacco products sold, and the name and address of any person to whom the licence holder has sold tobacco products;
- limit the number of wholesale and retail licences;
- limit the number of new wholesale and retail licences granted;
- remove the licence of those who breach the legislation;
- do not renew a licence for retailers found to be selling tobacco to children;
- empower the State Administrative Tribunal to suspend a licence for 6 months;
- enable local governments to have some control over tobacco sales outlets within their jurisdiction;
- empower the Governor to make regulations to restrict the grant of new licences according to prescribed criteria;
- improve the functionality and accessibility of the Public Register of Tobacco Sellers Licences;
- require that licence holders who wish to transfer a licence to a different premise must apply for a new licence; and
- empower the Department to revoke a retail or wholesale licence on unambiguous prescribed criteria.

Conflicting suggestions were received regarding the term of wholesale and retail licences. One submission suggested 12 months was an appropriate term, while another suggested 3 to 5 years would benefit businesses.

It was observed by one respondent that the Act requires licence holders to preserve records for a period of 3 years, but the Department of Health Chief Executive Officer (CEO) can request sales data from wholesale licence holders for a period specified by the CEO. It was suggested that the timeframes for record keeping and data requests by the CEO should be aligned. Further, it was proposed that data should be able to be stored in other states and territories if a licence holder has an office in the same jurisdiction. It was observed the move to cloud storage technologies may mean the requirement can be changed to simply be that data is stored in Australia.

The suggestion to increase licencing fees was made by a number of responses in order to ensure full cost recovery of the licencing scheme and thus increase comprehensive compliance activities, undertake improved retailer education, and in some cases prompt retailers to cease selling tobacco. Most suggestions did not have a precise figure but stated the increase should be incremental and 'substantial'. Some suggested that WA's annual fee should be equal to that in Tasmania, which is \$1132.86.

One submission went further and suggested financial incentives should be provided to surrender licences, to decrease the supply of tobacco products.

Some respondents were concerned with illicit tobacco trade in WA and provided suggestions with the intent to address this. These included using emerging technology such as blockchain to enhance the licencing regime and capturing the entire supply chain in the licencing scheme.

Administration (sections 74-75 of the Act)

Only a small number of suggestions were received regarding Administration. Most respondents who commented on these sections indicated they were working well.

It was suggested that amendments to these Sections be made to allow any and all local government officers, not just Environmental Health Officers, to be appointed as restricted investigators. It was also suggested that the powers of restricted investigators should be

clarified as they are unclear, and additional training be provided for restricted investigators. One respondent did not wish for Environmental Health Officers to be responsible for enforcing any provisions under the Act.

One respondent was concerned that the current provisions gave too much power to the CEO of the Department of Health and stated this may result in activities which are not effective or beneficial. It was suggested that the CEO be required to provide evidence and justification for actions under this provision to an independent board.

Investigations (sections 76–97 of the Act)

A small number of suggestions were received for Investigations under the Act. Some of the suggested activities are already undertaken by the Department, but respondents wished to see them become requirements under the Act to ensure their continued operation and consistency in completion.

The suggestions received included:

- any investigations should be conducted/coordinated through a central authority, such as the Department, rather than by local governments to allow for improved data collection and coordination;
- a regular inspection regime should be mandated, with suggested frequency of inspection of each retailer ranging from once to twice a year;
- require a compliance survey be conducted every 2 years to monitor illegal sales to minors; and
- publish the results of all inspections and compliance surveys on the Department website.

Enforcement (Sections 98–120 of the Act)

A significant number of suggestions were received in response to enforcement. The majority of respondents responded to the questions relating to these Sections of the Act.

Smoke-free areas

Several submissions suggested expanding smoke-free requirements to additional public spaces. The additional spaces suggested to be made smoke free included:

- bus stops;
- footpaths in the immediate vicinity of schools, universities, and childcare centres;
- footpaths in the immediate vicinity of hospitals/healthcare facilities;
- retirement villages;
- public swimming pools;
- skate parks;
- within 10 metres of playing and viewing areas at organised junior sports training and events ticketed sporting events and concerts;
- sporting events broadly;
- all parks and reserves, including Crown Land;
- pedestrian malls; and
- the Perth central business district.

Additional areas, which are not considered public spaces, suggested to be made smoke free included:

- private guest rooms of hotels, motels, and resorts; and
- commercial cigar/smoking lounges.

It was suggested by one respondent that smoke-free eating areas be required to be sufficiently isolated or buffered from areas where smoking occurs.

Some respondents did not wish to see local government authorities able to create smoke-free areas or create any smoke free policy which goes beyond State legislation.

One submission proposed that all Government services, agencies and departments be required to implement mandatory smoke free policies in all buildings and grounds including prisons, hospitals, schools, and public buildings.

Currently the offence for persons who smoke within 5 metres of a public entrance to a public building or within 10 metres of an air-conditioning intake is applied to the individual smoking. It was suggested that the building owner or business operator also be subject to an infringement if this occurs.

It was observed by a respondent that the default for most outdoor areas is that smoking is permitted, and legislation or policy is required to make outdoor areas smoke free. It was suggested that this be reversed; with all outdoor areas designated smoke free as default in reflection of the fact that the majority of people do not smoke. Provisions could exist to create smoking areas.

Multiple submissions suggested removing the exemption which allows smoking within the International Room at Crown Casino to be consistent with occupational safety and health requirements.

Suggestions were also made to remove the exemption that allows smoking areas to be created in outdoor eating and drinking areas of liquor-licensed premises. It was stated that this would protect the health of staff and patrons, denormalise smoking, and support those quitting smoking. One stakeholder suggested that this exemption should remain to allow businesses to cater to all patrons. Another commented that the requirements for these areas should be simplified as they can be difficult for enforcement officers to understand.

Some responses chose to express support for expanding smoke-free areas generally, without suggestion on what these areas should be.

Additional suggestions received in relation to these sections included:

- introduce a penalty for tobacco use in private spaces where the smoke drift exposes people on other properties to second-hand smoke;
- prohibit smoking in or on vehicles if a person in or on the vehicle is under 18 years old, or justify why the current legislation only prohibits smoking in or on a vehicle if any other person in or on the vehicle is under 17 years old; and
- those under 18 found in possession of an e-cigarette face a lesser penalty than for underage possession of tobacco, if they are nicotine dependent (it should be noted that under the current Act an underage person found to possess a tobacco product may have that product confiscated but will not face a penalty for possession of a tobacco product).

E-cigarettes

Just over half of all submissions included suggestions relating to e-cigarettes. Views were polarised, with some wanting an explicit prohibition on the sale of e-cigarettes and others wanting them available as a consumer good. Suggested legislative measures did not always align with the intent of the suggestion. Some respondents appeared to be unaware that the sale of items resembling tobacco products is prohibited in WA and that e-cigarettes have been found to resemble a tobacco product (under section 106 of the Act) within a WA Supreme Court

decision.² These respondents suggested that restrictions be implemented on the sale of e-cigarettes, such as restricting sale to those 18 years and older. It appeared that the intended outcome of these measures was a decrease in access to and availability of e-cigarettes.

Several submissions included suggestions related to e-cigarettes that are outside the scope of the Act or may fall within an area under Australian Government authority, such as the scheduling and importation of nicotine.

Many respondents suggested that the sale, or the supply, of e-cigarettes and e-cigarette accessories be explicitly prohibited under the Act. Some of these responses further suggested that an exemption could be made for the supply of e-cigarettes and accessories approved by the Therapeutic Goods Administration as smoking cessation aids or those that are authorised under the *Medicines and Poisons Act 2014*. One response suggested that even where an e-cigarette product has received an approval by the Therapeutic Goods Administration the flavourings and additives should be restricted by the Act. Further suggestions included prohibiting the manufacture of e-cigarettes and sale of these products by any indirect means.

To complement this explicit prohibition, it was also suggested that the use of e-cigarettes be prohibited in enclosed and outdoor public places where tobacco smoking is prohibited by the Act or Regulations. Some of these submissions discussed the potential harms of e-cigarettes and the need to protect youth and the wider community.

Many of the submissions which raised the above suggestions in relation to e-cigarettes also wished to see the same restrictions placed on novel tobacco products such as heated tobacco products.

There were also several submissions which suggested e-cigarettes should be made available as a consumer product. A number of these submissions proposed measures to regulate sale of e-cigarettes, including the following:

- prohibition on sale to those under 18;
- prohibition on sale to those under 21;
- introduce a licensing scheme for e-cigarette retailers;
- develop a register of prohibited chemicals for use in e-cigarette liquids;
- limit print advertising of e-cigarettes;
- prohibit displays of e-cigarettes and accessories that can be seen from outside a business;
- prohibit retailers from allowing entry to a premise selling e-cigarettes for any reason other than purchasing e-cigarettes or other adult only products, excluding cigarettes;
- introduce a penalty of \$50,000 for individuals selling e-cigarettes to underage persons;
- introduce a penalty of \$10,000 for individuals selling e-cigarettes without a licence;
- prohibit the use of cartoon characters on e-cigarette products and in advertising; and
- prohibit the use of brand replicas of candy, sweets, and carbonated drinks.

A submission suggested that if e-cigarettes were to be made available, use of e-cigarettes should be permitted in smoke-free areas.

One submission discussed the benefits to small businesses if e-cigarettes were able to be sold in WA.

² Hawkins -v- van Heerden [2014] WASC 127; Van Heerden -v- Hawkins [2016] WASCA 42.

Miscellaneous (sections 121–127 of the Act)

Only 1 suggestion was received related to these sections; that the provision allowing the Governor to make regulations for the regulation or prohibition of smoking in public places be removed, as this is not aligned to the role of the Governor.

Other measures for consideration

Litter

A very small number of submissions suggested that the tobacco industry be held accountable for the litter stream created by their products. A means of doing this included requiring manufacturers to institute a full product stewardship scheme.

Penalties

The following suggestions were received in relation to penalties:

- increase penalties proportionate to offences;
- increase penalties for selling or supplying tobacco products (including e-cigarettes) to children;
- increase penalties for business promotions to attract smokers;
- increase penalties for promoting tobacco products (including e-cigarettes) through competitions and reward schemes; and
- allow local governments to receive the payments from infringements and prosecutions under the Act.

Other

A small number of submissions were received which suggested phasing out the sale of tobacco. Suggestions to achieve this included implementing a blanket ban on tobacco products, introducing a 'smokers' licence' and making tobacco products available only on prescription.

Some submissions suggested that legislation should be consistent across states and territories.

It was also suggested that the smoke-free environment regulations be consolidated and included in the Act.

Out of scope

A number of issues were raised, and suggestions made, that were outside the scope of this review. These issues and suggestions were related to operational matters, are covered by other pieces of WA legislation, are covered by Australian Government legislation, or are otherwise outside the jurisdiction of the WA Government.

Increased enforcement activities

Several submissions stated that the current legislation is not being adequately enforced and suggested that enforcement activities need to be increased. Some stated that there are occasions where evidence is provided of an offence, but no action is taken by authorities, that licence holders continue to be able to sell tobacco following infractions, and that successful prosecutions are not published. Some respondents made a general comment on the need for better enforcement, while others identified specific requirements which should be better enforced, such as:

- sales to minors;
- no smoking within 5 metres to the entrance of a public building;
- outdoor smoke-free areas; and

- seizure of illicit tobacco.

A very small number suggested that there should be a focus on enforcing current legislation before introducing further amendments to the Act. It was also suggested that the Department establish an anonymous online reporting portal for small businesses to report non-compliance and push for a national approach to tobacco control.

Nicotine

Of the submissions which related to e-cigarettes, many also discussed the availability of liquid nicotine for use in these devices. This subset of respondents wished to see nicotine for use in e-cigarettes be made available as a consumer product. The sale and supply of nicotine in WA is governed by other WA legislation, and the importation of nicotine into Australia is controlled by the Australian Government.

Lobbying and donations

Some submissions noted that the tobacco industry is active in political lobbying, making donations to political parties and elected representatives, and similar public relations activities. It was also submitted that under the World Health Organization *Framework Convention on Tobacco Control* all forms of commercial lobbying by the tobacco industry and/or their affiliates should be banned. Suggestions were made that political lobbying, donations, and similar activities by the tobacco industry should be prohibited. In some cases, this suggestion was also extended to the e-cigarette industry. Many responses acknowledged this would require amendments to electoral legislation.

Illicit tobacco

Illicit tobacco was raised as an issue by a small number of submissions. It was suggested that greater compliance and enforcement activities be taken in regard to existing legislation, in addition to improved state and territory coordination.

Advertising

A number of suggestions were received in regard to advertising of tobacco products, including:

- prohibit the use of images of tobacco in news broadcasts;
- prohibit or limit incidental tobacco product placement in films, television programs, games, and music videos within the jurisdictional limit;
- prohibit or limit incidental tobacco product placement in films, television programs, games, and music videos where the primary audience is intended to be under the age of 18;
- prohibit tobacco brand identification or tobacco brand imagery on television and in movies;
- prohibit text message promotions;
- prohibit subliminal internet-based marketing; and
- restrict online advertisement of tobacco.

Further suggestions

Additional suggestions for improvement that are outside the scope of the Act included:

- adopt a national approach to wholesale and retail licensing, utilising the system used in New South Wales;
- have signage for smoke-free areas available for download on the Department's website;
- re-introduce product information onto packets such as nicotine and tar content;
- remove graphic health warnings;

- increase community awareness of the Act and related penalties; and
- consider smoking or tobacco advertising in media classification ratings.

Studies to support suggested improvements

The evidence provided in support of suggestions was diverse. In addition to providing references to published peer reviewed research studies, respondents also referred to the regulatory regimes of other countries, unpublished research and reports, professional experiences, and personal experiences to support suggested improvements to the Act. A small number of submissions provided tobacco industry funded research as evidence.

Some respondents chose to not provide studies or other evidence. Certain submissions stated that studies or other evidence was available to support a suggested improvement but did not provide further details.

Next steps

Information gathered from this stage of the review will assist in identifying possible areas for further investigation to strengthen the operation and effectiveness of the *WA Tobacco Products Control Act 2006* and the Regulations. Following the development of options for regulatory improvements further consultation will be undertaken to inform the Government's decision-making process.

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