

40TH PARLIAMENT



COMMUNITY SAFETY: FOR THE GREATER GOOD, BUT AT WHAT COST?

*Final Report of the Select Committee on Personal Choice and
Community Safety*

Presented by
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May 2020

Select Committee on Personal Choice and Community Safety

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Government response

This report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

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EXECUTIVE SUMMARY

- 1 The Select Committee on Personal Choice and Community Safety (Committee) was established by motion in the Legislative Council on 29 August 2018 with a 12-month reporting timeframe. The Legislative Council granted the Committee an extension of time to report until 5 December 2019. Due to unavoidable operational considerations, another extension, until 25 June 2020, was granted.
- 2 The Committee's task during this inquiry was to investigate the economic and social impact of measures that restrict personal choice 'for the individual's own good', with particular reference to e-cigarettes and restrictions on cycling and aquatic leisure. The Committee's terms of reference were sufficiently broad to allow it to investigate other measures where personal freedoms were curtailed for the greater good of the community's safety.
- 3 The Committee learned that many people in the Western Australian community have strong views on measures that seek to restrict the personal freedoms of individuals for their own good. Submissions to the inquiry focused on perceived over-regulation in the area of public health and safety, and the Committee has chosen to focus on five main issues: mandatory bicycle helmet laws (MHL), the current regulation of e-cigarettes, vehicle modifications, lifejacket use and pool fencing.

Mandatory bicycle helmet laws

- 4 Almost half of the submissions raised this topic with the Committee, suggesting the obligation to wear bicycle helmets remains a contentious issue in the community. The Committee has learned that most cycling in Western Australia is for recreation. Cycling as a mere mode of transport is much less common. Bicycle helmets must be worn by all cyclists in every Australian jurisdiction except the Northern Territory, where bicycle helmets are not mandatory for adults cycling on paths or other off-road public places.
- 5 Some submitters, usually cycling enthusiasts, hold the view that MHL discourage cycling. Western Australia's weekly cycling rate is comparable to the national average (15.6 per cent compared to 13.8 per cent), but significantly lower than the Northern Territory (21.3 per cent), which has the second highest rates of cycling participation in the Australian jurisdictions. The highest levels of cycling participation occur in the Australian Capital Territory, despite helmets being compulsory for all its cyclists.
- 6 Arguments for and against MHL often raise different concerns with a focus on differing results. For example, those who focus on the risk of head injuries to cyclists support MHL, while stakeholders who are concerned about public fitness and rising obesity levels advocate for increasing cycling participation as a priority. Evidence suggests that, on average, the risk of head injuries during cycling is relatively low and, in fact, the most common injuries that cyclists sustain (upper limb injuries) cannot be prevented by wearing a helmet. However, head injuries tend to have more life-threatening results.
- 7 As a way forward, the Committee has recommended that consideration be given to trialling a segmented approach to MHL and that the Government also undertake a cost-benefit analysis of the economic and social cost of imposing bicycle helmets on the Western Australian community.

E-cigarettes

- 8 E-cigarettes are a relatively new product in Australia, but over a third of submissions raised concerns about the regulation (or lack thereof, in this jurisdiction) of e-cigarettes and related products. The Committee has learned that e-cigarettes are only one type of electronic

nicotine delivery system. E-cigarettes are portable, battery-operated devices which heat liquid ('e-liquid', that may or may not contain nicotine) within the device to produce a vapour which is inhaled by the user (also known as 'vaping').

- 9 Some countries around the world currently permit the sale and use of e-cigarettes (whether or not they contain nicotine) under various conditions. These countries include the United States of America, United Kingdom, Canada, the European Union and our closest neighbours, New Zealand.
- 10 In Australia, e-cigarettes are primarily regulated by the states and territories. E-cigarette devices and e-liquids containing nicotine are regulated differently from those that are non-nicotine, so this report discusses the two categories in turn.
- 11 With respect to e-cigarette devices and e-liquids containing nicotine, there is a general prohibition on the commercial supply of these products in every Australian jurisdiction. Other dealings with nicotine (such as possession, manufacturing and use) may also be prohibited and each state and territory has its own set of nicotine-related offences.
- 12 There are a few exceptions to the general prohibition on the supply, possession, use or manufacturing of nicotine, including the following two which are particularly relevant for people wishing to vape with nicotine:
 - Importing nicotine for human therapeutic use under the Personal Importation Scheme. This requires the importer to hold a valid medical prescription for the nicotine.
 - Having a medical prescription for nicotine (for human therapeutic use) filled by a registered pharmacist.
- 13 Western Australian legislation is unique because:
 - it prohibits the sale of e-cigarette devices, whether or not they contain nicotine
 - it does not place any restrictions on the sale, possession or use of non-nicotine e-liquids.
- 14 The ban on the sale of e-cigarette devices in Western Australia creates an inconsistent and confusing regulatory regime where consumers are able to obtain certain e-liquids legally but are unable to purchase the devices necessary to vape that liquid.
- 15 In all other Australian jurisdictions, e-cigarette devices and e-liquids that do not contain nicotine can generally be sold legally. However, these jurisdictions have amended their tobacco control laws to treat the advertising, sale and use of these products in a manner similar to the regulation of conventional tobacco products.
- 16 The Committee notes that there continues to be research into the health effects of e-cigarettes, both benefits and risks. While there is a body of evidence that states vaping is less harmful than smoking combustible cigarettes, and supports the disruptive potential of e-cigarettes for current smokers, the Committee has also heard evidence that e-cigarettes may not be an effective aid for quitting. They may also pose health risks to users and bystanders that may only become apparent in the long term. If vaping is to be promoted as a means of reducing the number of smokers in the community, care must be taken to avoid exposing children and young people to a habit that may have long-lasting adverse health effects.
- 17 New Zealand has recently endorsed the use of e-cigarettes as a means for adult smokers of combustible (traditional) cigarettes to switch to an alternative, less harmful, product in order to, ultimately, quit their smoking habit. Despite recognising that the full extent of e-cigarettes' health harms is as yet unknown, the New Zealand Government has taken the view that vaping is a viable way to reduce the rate of smoking in the country.
- 18 Three Members on the Committee are of the view that retailers in Western Australia should be allowed to sell e-cigarette devices and that the sale of the devices should be regulated in

a manner that is proportionate to the resulting risks. In addition, the availability of nicotine should be reviewed.

- 19 The remaining two Members are of the view that the Government should continue to take a precautionary approach to e-cigarettes and actively monitor current research to ascertain whether there is evidence to promote the use of e-cigarettes for smoking cessation. If such evidence emerges, the sale and availability of e-cigarette products should be brought into line with the smoking-cessation products currently lawfully available for sale in Western Australia.

Vehicle modifications in Western Australia

- 20 As a result of submissions from members of the community, the Committee also investigated the legislative regime in which car owners can modify their vehicles by applying to the Department of Transport. The Committee learned that applications for vehicle modifications are often refused based on apparently inconsistent and arbitrary policies within the Department of Transport. Furthermore, these policies appear to be inconsistent with the relevant legislation or guidelines (the *National Code of Practice for Light Vehicle Construction and Modification—Vehicle Standard Bulletin 14*).
- 21 The Committee has found that Department of Transport decisions on vehicle modification applications are:
- perceived by applicants to be haphazard, arbitrary, capricious and lacking in procedural fairness
 - not open to external scrutiny by appeal to a court or tribunal.
- 22 The Committee recommends that vehicle modification applicants be granted a right of external review and that various administrative changes be implemented within the Department of Transport.

Safety in water

- 23 The mandatory use of lifejackets was raised by several submissions to the inquiry and the Committee has investigated the applicable legislation. Currently, lifejackets are required to be worn by users of personal water craft (such as jet skis) and slalom skiers regardless of distance from shore. Sailboarders must only wear a lifejacket in unprotected waters beyond 400 metres from shore and lifejackets are not required to be worn on motorboats, sailboats, dinghies or paddle craft. Different requirements apply for the carriage of lifejackets on these vessels.
- 24 The Department of Transport is currently reviewing these requirements. The suggestion currently being considered as part of the review process is that lifejackets be made mandatory for smaller vessels and vessels carrying children, and only while they are operated in unprotected waters more than 400 metres from shore. The Committee notes that, at the time of finalising this report, the review was in its final stages.
- 25 The Committee has outlined the current requirements for pool fencing and some submitters' thoughts on those requirements. The Committee also took note of the Ombudsman's investigation into child drownings in 2017 and supports the position taken by that office, that parental supervision should be the first and most important way to prevent child drownings.

Assessment and scrutiny of regulatory reform

- 26 The Committee has taken the opportunity during this inquiry to consider the current frameworks for the Parliament and the Government to assess how the regulatory actions of legislators and policy makers impact on individuals. The Committee recommends ways in

which these frameworks may be modified to ensure that matters of personal choice and responsibility are adequately considered.

- 27 The concept of stewardship in public health policy has been a key issue for the Committee: the basic premise is that a state has a duty to look after the wellbeing of its citizens, both collectively and individually. Stewardship requires governments to balance the collective needs of a community against the freedoms that individuals are entitled to protect.
- 28 Stewardship has also emerged as a means for regulators and the Parliament to be mindful of the impact of paternalism on the personal choice of individuals. The Nuffield Council of Bioethics' (Nuffield) ladder of intervention, outlining the practical application of the stewardship model, is one tool by which policy makers can ensure that regulation does not unduly interfere in people's lives. The Committee endorses the approach outlined in the ladder of intervention on the basis that it can be an effective framework for regulators to create policy that is appropriate for the circumstances in question.
- 29 The Department of Treasury's Regulatory Impact Assessment process can also be improved by increasing its transparency: the Committee recommends that, where appropriate, finalised assessments (decision regulatory impact statements) be made public so that the community is made aware of the reasons behind new regulation that may affect their lives.
- 30 The Committee learned that the Department of Treasury is now developing principles to guide the making of new regulation. The Committee suggests that this may be an opportune time to introduce a requirement, when making new regulation, to consider the potential adverse impact of that regulation on personal choice and responsibility.
- 31 The Committee has also considered the Fundamental Legislative Principles used by scrutiny of legislation committees in the Western Australian Parliament. The Committee has recommended that these useful principles be codified in the Standing Orders of the Legislative Council.

Committee's final thoughts

- 32 Throughout this inquiry, the Committee has focused on several areas where individual freedoms are currently being restricted by regulatory involvement. The Committee hopes that this report provides more information to the community on those specific matters which emerged as particular concerns during the inquiry, such as mandatory bicycle helmet laws and e-cigarettes.
- 33 This report is also intended to serve as a starting point for the Government of Western Australia to improve and clarify its policy making process so that interference in people's lives is accompanied by adequate justification.
- 34 It is the Committee's view that government intervention in the lives of individuals should sit on a spectrum of regulatory responses: one size does not fit all. The Committee also recognises that individual freedom is not absolute. Nuffield's ladder of intervention is a helpful tool for decision makers to use when developing policies or practices that restrict or regulate the personal choices of individuals.
- 35 The Committee observes that the high level of public interest in this inquiry and plentiful academic research into some of the issues explored by the Committee demonstrate that matters which limit personal choice and curb individual liberty are key issues of concern in the community. The Committee believes these concerns can be addressed by ensuring that the:
 - need for government regulation is established and can be seen to be in the public interest

- objectives of regulation are clear
- regulation is proportionate to the risks it seeks to address
- regulation is fair and equitable
- regulation is perceived to achieve its objectives with as little adverse impact on personal choice and responsibility as possible
- regulation is subject to regular review and scrutiny.

Findings and recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

FINDING 1

Page 21

Mandatory bicycle helmet laws may deter some people from cycling but they are not the main reason why people choose not to ride a bicycle.

FINDING 2

Page 25

Measures such as improved road infrastructure, lower speed limits and greater driver awareness and education are effective tools to increase cycling participation in Western Australia.

FINDING 3

Page 25

Head and neck injuries accounted for 25.9 per cent of the cycling injuries between 1999-00 and 2015-16 (and 48 per cent between 2013-14 and 2015-16). Bicycle helmets are an effective safety measure to decrease the risk of such injuries when cycling.

FINDING 4

Page 25

While bicycle helmets are effective for reducing the risk of serious or fatal head injuries, they cannot be relied upon as the only method of protecting cyclists. Governments must also ensure that effective bicycle infrastructure, such as separate shared paths or dedicated bicycle lanes, are part of any cycling policy.

FINDING 5

Page 31

While the current legislative regime, that mandates the wearing of bicycle helmets while cycling, restricts personal choice for individuals, this regime is clearly an effective safety measure for the prevention of head and brain injuries.

FINDING 6

Page 31

The public health benefits of increased cardiovascular activity and physical movement associated with an increase in cycling participation is a worthwhile objective. The Government should consider analysing and continuing to monitor the costs and benefits of mandatory bicycle helmet laws.

RECOMMENDATION 1

Page 31

The Government investigate the potential for a trial exemption from mandatory bicycle helmet laws in low risk, segregated areas, for example, Rottnest Island.

RECOMMENDATION 2

Page 31

The Government investigate undertaking a cost-benefit analysis on the effectiveness of mandatory bicycle helmet laws in Western Australia.

FINDING 7

Page 36

While the national daily smoking rate among adults has reduced significantly, the Council of Australian Governments' goal of a 10 per cent rate by 2018 has not been achieved.

FINDING 8

Page 45

Evidence suggests that very few members of the general public would be aware of the legal option to obtain nicotine for human therapeutic use (Schedule 4 nicotine) from an Australian compounding pharmacist by presenting a valid prescription.

FINDING 9

Page 45

Evidence suggests that people who import nicotine under the Therapeutic Goods Administration's Personal Importation Scheme are not necessarily aware of the legal requirement to hold a valid prescription for that nicotine.

FINDING 10

Page 45

Evidence suggests that Western Australian vapers are more likely to purchase and possess nicotine from an overseas online source (whether legally or otherwise) than a local source, such as a pharmacy.

FINDING 11

Page 49

Under current Western Australian legislation, people wishing to use e-liquid containing nicotine may obtain it legally if their doctor prescribes it but the sale of e-cigarette devices is prohibited. This creates a difficulty for people who wish to use e-liquid containing nicotine as an aid for quitting smoking.

FINDING 12

Page 54

With the exception of liquid nicotine for human therapeutic use (Schedule 4 nicotine) which has been compounded by, and purchased from, a pharmacy in Australia, the e-liquids currently available to Western Australian vapers may not be required to be packaged or labelled safely.

FINDING 13

Page 54

The relevant Acts should be reviewed to examine the regulation of e-liquids, particularly those containing nicotine, including the imposition of child-safe packaging and labelling requirements.

FINDING 14

Page 54

The relevant Acts should be reviewed to determine whether the safety standards of e-cigarette devices could be improved by regulation.

FINDING 15

Page 56

The inhalation of e-cigarette vapour is not without risk. However, the magnitude of that risk, and how it compares to the risks associated with inhaling smoke from combustible cigarettes, is currently contested.

FINDING 16

Page 61

There is no legal impediment to submitting e-cigarette products for Therapeutic Goods Administration approval.

FINDING 17

Page 67

A lack of understanding about the current scheduling of nicotine and the banning of the sale of e-cigarette devices in Western Australia has resulted in Western Australian vapers relying on an overseas black market for liquid nicotine and e-cigarette devices, exposing them to greater risk.

FINDING 18

Page 67

A number of overseas jurisdictions have adopted protocols which acknowledge that e-cigarettes may be an effective way of assisting people to quit smoking.

FINDING 19

Page 67

While vaping is often considered to be less harmful than combustible cigarettes, evidence of the harm is still emerging and the long-term effects are still unknown. The Government should continue the practice of dissuading non-smokers from taking up smoking and vaping.

FINDING 20

Page 68

There is some evidence that e-cigarettes can be a gateway to children becoming smokers of combustible cigarettes and children should be dissuaded from taking up vaping.

The Committee, comprised of a majority, makes the following recommendation:

RECOMMENDATION 3

Page 68

The *Tobacco Products Control Act 2006* be amended to lift the prohibition on the sale of e-cigarette devices and provide for regulation proportionate to the risk; for example, banning the sale of e-cigarette devices to children.

Hons Dr Sally Talbot and Pierre Yang MLCs prefer their alternative to Recommendation 3. Refer to paragraph 3.140.

The Committee, comprised of a majority, makes the following recommendation:

RECOMMENDATION 4

Page 68

The Government formally request the Therapeutic Goods Administration to review the scheduling of liquid nicotine.

Hons Dr Sally Talbot and Pierre Yang MLCs prefer their alternative to Recommendation 4. Refer to paragraph 3.142.

RECOMMENDATION 5

Page 68

The Government investigate the safety and harm-reduction benefits of increasing awareness about the legal requirement to obtain a medical prescription before importing e-liquid or e-cigarettes containing nicotine under the Personal Importation Scheme.

RECOMMENDATION 6

Page 68

The relevant Acts be reviewed to examine the regulation of e-liquids, particularly those containing nicotine, including the imposition of child-safe packaging and labelling requirements.

FINDING 21

Page 79

The process within the Department of Transport for determining applications for vehicle modifications is haphazard, arbitrary and is perceived by applicants to be capricious and lacking in procedural fairness.

FINDING 22

Page 79

The lack of a right of review to the State Administrative Tribunal for decisions made under regulation 235 of the *Road Traffic (Vehicles) Regulations 2014* is inconsistent with community expectations of procedural fairness.

FINDING 23

Page 79

The Department of Transport does not adequately inform applicants of their rights to lodge a review with the Ombudsman of Western Australia for decisions made under regulation 235 of the *Road Traffic (Vehicles) Regulations 2014*.

RECOMMENDATION 7

Page 79

The Government legislate a right of review to the State Administrative Tribunal for decisions made pursuant to regulation 235 of the *Road Traffic (Vehicles) Regulations 2014*.

RECOMMENDATION 8

Page 79

The Government update the Department of Transport's publicly available information regarding the standards applied by the Department when assessing vehicle modification applications.

RECOMMENDATION 9

Page 79

The Government ensure that the Department of Transport's decision records and correspondence sent to applicants for vehicle modifications in Western Australia provide clear information about:

- (a) the role of the Parliamentary Commissioner for Administrative Investigations (Ombudsman)
- (b) applicants' right of review under the *Parliamentary Commissioner Act 1971*.

RECOMMENDATION 10

Page 85

The requirements for carrying and wearing lifejackets in the *Navigable Waters Regulations 1958* should be changed only if there is compelling evidence provided by the Recreational Vessel Safety Equipment Review to do so.

FINDING 24

Page 85

Mandatory lifejackets may be an appropriate safety measure for areas identified as 'black spots', subject to the outcomes of the trial at Salmon Holes.

RECOMMENDATION 11

Page 91

The Government:

- (a) always consider the merits of publishing Decision Regulatory Impact Statements
- (b) publish Decision Regulatory Impact Statements where appropriate.

RECOMMENDATION 12

Page 99

Government agencies have regard to the Nuffield Council on Bioethics' intervention ladder when developing policies and regulation.

RECOMMENDATION 13

Page 99

The Government develop regulatory principles which:

- (a) are based on international best practice
- (b) require the consideration of the potential adverse impact of regulation on personal choice and responsibility.

FINDING 25

Page 102

When scrutinising legislation, fundamental legislative principles provide a point of reference that may aid in the consideration of matters of personal choice and community safety.

FINDING 26

Page 103

Fundamental legislative principles are a useful tool for legislators when scrutinising legislation. However:

- (a) they are absent from the terms of reference of the Standing Committee on Legislation and the Standing Committee on Uniform Legislation and Statutes Review
- (b) only a selection of the principles are captured in the terms of reference of the Joint Standing Committee on Delegated Legislation.

RECOMMENDATION 14

Page 103

The Standing Committee on Procedure and Privileges inquire into amending the *Standing Orders of the Legislative Council* to include fundamental legislative principles in the terms of reference for the Standing Committee on Legislation, the Standing Committee on Uniform Legislation and Statutes Review and, where appropriate, the Joint Standing Committee on Delegated Legislation.

CHAPTER 1

Introduction

Establishment of the Committee and this inquiry

- 1.1 Hon Aaron Stonehouse MLC moved a Notice of Motion in the Legislative Council on 15 August 2017 to establish a select committee to inquire into the economic and social impact of measures introduced in Western Australia to restrict personal choice 'for the individual's own good'. The motion contained reference to the impact of measures introduced to restrict personal choice for individuals as a means of preventing harm to themselves, with particular reference to the use of tobacco risk-reduction products and outdoor recreation.
- 1.2 The Legislative Council established the Select Committee on Personal Choice and Community Safety (Committee) by motion on 29 August 2018 to inquire into activities which restrict personal choice, with a broad remit as set out in the terms of reference:

The Select Committee is to inquire into and report on the economic and social impact of measures introduced in Western Australia to restrict personal choice 'for the individual's own good', with particular reference to —

- (1) risk-reduction products such as e-cigarettes, e-liquids and heat-not-burn tobacco products, including any impact on the wellbeing, enjoyment and finances of users and non-users;
- (2) outdoor recreation such as cycling and aquatic leisure, including any impact on the wellbeing, enjoyment and finances of users and non-users; and
- (3) any other measures introduced to restrict personal choice for individuals as a means of preventing harm to themselves.

The Select Committee is to report by no later than 12 months after the Committee has been established.

By order of the Legislative Council on Wednesday 29 August 2018, membership of the Select Committee on Personal Choice and Community Safety shall be:

- Hon Aaron Stonehouse (Chair)
- Hon Dr Sally Talbot (Deputy Chair)
- Hon Dr Steve Thomas
- Hon Rick Mazza
- Hon Pierre Yang.¹

- 1.3 As indicated in the terms of reference, the Legislative Council elected Hon Aaron Stonehouse as Chair and Hon Dr Sally Talbot MLC as Deputy Chair.
- 1.4 On 13 August 2019, the Legislative Council granted the Committee an extension of time in which to report until 5 December 2019. On 21 November 2019, due to unavoidable operational considerations, the House granted a further extension, until 25 June 2020.

¹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 August 2018, pp 5355–62.

- 1.5 According to the Standing Orders of the Legislative Council, the Committee will dissolve upon the tabling of its final report to the Legislative Council.

Committee procedure

- 1.6 The Committee heard from stakeholders and the community through written submissions and oral evidence at public hearings. The Committee invited 49 stakeholders to provide a submission to the inquiry and received 107 submissions, including from individuals who requested to remain anonymous. The Committee received further submissions throughout the inquiry and supplementary information from stakeholders who had submitted previously.
- 1.7 All public submissions are available on the Committee's website. Appendix 1 contains details of stakeholders invited to make a submission, submissions received and public hearings held during the inquiry. Appendix 2 contains a graph which groups the topics raised by submitters according to the number of submissions received. For those topics that were discussed by individual submitters, refer to information also outlined in Appendix 2.
- 1.8 The Committee advertised its inquiry through social media and in *The West Australian* newspaper and regularly publicised its upcoming public hearings on its webpage and to the media during the inquiry.
- 1.9 The Committee held 13.7 hours of public hearings during the inquiry.
- 1.10 The Committee thanks all those who provided a submission or who attended a hearing to give evidence before the Committee.

Structure of the report

- 1.11 The Committee received submissions on a wide variety of topics and has chosen to focus on five main issues of concern in this report: mandatory bicycle helmet laws, e-cigarettes, vehicle modifications, lifejackets and pool fencing.
- 1.12 This introductory chapter outlines similar inquiries undertaken by parliaments around the world and will touch on the main theoretical concepts central to an understanding of personal choice and the role of government in the lives of individuals.
- 1.13 Chapter 2 discusses the issue that has emerged as the most discussed during the Committee's inquiry: mandatory bicycle helmet laws. The Committee has investigated current research into the efficacy of helmets and their impact on cycling safety, and the effects of mandatory bicycle helmet laws on cycling participation in Western Australia.
- 1.14 Chapter 3 outlines the evidence both for and against e-cigarettes and related products and examines how these products are regulated in overseas jurisdictions.
- 1.15 Chapter 4 examines the vehicle modification regime currently in place in Western Australia and the impacts on personal choice of the relevant legislation and the Department of Transport's interpretation thereof.
- 1.16 Chapter 5 deals with the overarching theme of water safety, which includes the Committee's views on mandatory lifejackets (also known as personal flotation devices) and comments about residential pool fencing.
- 1.17 Chapter 6 discusses the methods which are, and may be, used to assess and scrutinise regulatory reform. Recommendations are made to modify current methods to ensure that matters of personal choice and responsibility are adequately considered.
- 1.18 Chapter 7 presents the Committee's conclusions on the appropriate balance between personal choice and measures that protect the safety of the community.

Important concepts when discussing personal choice

- 1.19 There are a number of important concepts and terms used in this report that relate to personal choice and public policy decisions. Some of these key concepts are defined below.
- 1.20 The interaction between a government and its citizens is a subject that has occupied the minds of modern political philosophers since the time of John Stuart Mill. The contemporary relevance of the social contract that citizens enter into with their government (and its limits²) lies at the heart of the Committee's current inquiry into measures that restrict personal freedoms 'for the individual's own good.'
- 1.21 The harm principle, first proposed by John Stuart Mill and described in the quote below, refers to the idea that individuals should be free to act as they wish, unless their actions will cause harm to another:

[The] ... sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right ... The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.³

- 1.22 Mill's concept of individual sovereignty includes the position that government interference should only be permitted where it can be demonstrated that an individual is harming (or will harm) someone else. In those cases, state intervention can be justified, but only to the extent that it will prevent or minimise harm to others. Any further involvement, according to the harm principle, strays into the realm of paternalism (see paragraph 1.28) and should be avoided.
- 1.23 Stewardship is the 'careful and responsible management of the well-being of [a] population' and has been described as the 'very essence of good government'.⁴

The concept of stewardship means that liberal states have responsibilities to look after important needs of people both individually and collectively. Therefore, they are stewards both to individual people, taking account of different needs arising from factors such as age, gender, ethnic background or socio-economic status, and to the population as whole, including both citizens of the state, and those that do not have citizen status, but fall under its jurisdiction.⁵

² See, for example, Jean-Jacques Rousseau's *The Social Contract*, 1762, Chapter 6: 'Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.'

³ John Stuart Mill, *On Liberty*, Penguin Books, London, 1974, pp 68–9. The quote refers only to the masculine pronoun. However, the Committee notes that the passage should be taken to refer to both men and women.

⁴ Phyllida Travis, Dominique Egger, Phillip Davies, Abdelhay Mechbal, 'Towards better stewardship: concepts and critical issues', *Evidence and Information for Policy: World Health Organization*, 2002, p 1.

⁵ Nuffield Council on Bioethics, *Public health: ethical issues*, London, 2007, p 25.

- 1.24 Public health policies can be a means of addressing the differences in health across a population that can emerge because of socio-economic factors in a community, because:
governments are responsible for regulatory measures to protect and promote health for all members of the community, regardless of social, economic or cultural background.⁶
- 1.25 In other words, measures that focus on public health have been described as ‘stopping the healthy becoming sick, rather than treating the sick’.⁷
- 1.26 The precautionary principle is a concept often discussed in relation to environmental management and policy, but has core components which are also applicable to the public health sphere. The World Health Organization defines the precautionary principle as where:
in cases of serious or irreversible threats to the health of humans or ecosystems, acknowledged scientific uncertainty should not be used as a reason to postpone preventative measures.⁸
- 1.27 In a public health context, the School of Public Health, Curtin University submitted that the:
trigger to invoke a precautionary principle is based upon the desire to protect a population from a level of risk, and the acknowledgement that there may be a gap in the evaluation of the level of risk due to insufficient data ... There should be a reversed burden of proof by requiring that the substances be deemed hazardous until proved otherwise ... The decision to act is a political decision with decision makers having to determine the level of risk that is acceptable to the society on which the risk will be imposed.⁹
- 1.28 In the context of this inquiry, paternalism is understood to mean the:
interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm ...¹⁰
- 1.29 In discussions of political structures or philosophy, two contrasting concepts of paternalism often arise: ‘soft’ or ‘hard’ paternalism.¹¹ Soft paternalism justifies state intervention only where an individual is making decisions that are either involuntary or ill-informed: intervention is only justifiable to the extent that the person is protected from harm or to inform them of the harm. Hard paternalism, by contrast, justifies state intervention even when a person is acting voluntarily and knowledgeably.¹²
- 1.30 The colloquial term ‘nanny state’ is often mentioned in debates on measures introduced to restrict personal choice ‘for the individual’s own good’. In this regard, the Committee notes the conflicting evidence received by the Senate Economics References Committee in 2016,

⁶ Submission 62 from Department of Health, 4 October 2018, p 2.

⁷ Nuffield Council on Bioethics, *Public health: ethical issues*, London, 2007, p xv.

⁸ Marco Martuzzi & Joel A Tickner (eds), *The precautionary principle: protecting public health, the environment and the future of our children*, World Health Organization, Denmark, 2004, p 7.

⁹ Submission 63 from School of Public Health, Curtin University, 5 October 2018, p 2.

¹⁰ Nuffield Council on Bioethics, *Public health: ethical issues*, London, 2007, p 23.

¹¹ The Committee notes that there are other terms that relate to discussions of paternalism, including weak/strong paternalism or impure/pure paternalism, but for the purposes of this inquiry the discussion is restricted to hard/soft paternalism. For further information, refer to footnote 12.

¹² Parliament of Australia Library, *Paternalism in social policy: when is it justifiable?*, research paper prepared by Matthew Thomas and Luke Buckmaster, Research Paper No. 8 2010-11, 15 December 2010. See: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11r_p08. Viewed 30 May 2019.

whose inquiry into matters affecting personal choice had very similar terms of reference to this inquiry:

The term 'nanny state' has a contested history, as evidenced by submissions. The PHAA [Public Health Association of Australia], for example, asserted the following:

It is notable that "Nanny State" is a term that was coined in 1965 by a British columnist writing in *The Spectator* ... The whole concept of the "Nanny State" was to point to 'interference' by governments. It was a term usually used in a pejorative way to discourage governments from introducing legislation or regulation that might undermine the power or actions of industry or individuals. It is invariably presented as an interference with the choices of ordinary people. It is rarely if ever used to criticise action by governments to protect the community in areas such as policing and law enforcement, or to oppose public health measures ranging from safe food and water to quarantine.

The Institute of Public Affairs pointed out that this is historically in error:

Opposition to government paternalism wasn't always a conservative or libertarian thing. Indeed, the use of the word 'nanny' to describe state interference in individual choices originally came from the left.

In a 1960 article in the *New Statesman*, the magazine set up by members of the Fabian Society, nanny was deployed to attack the British Board of Film Censors. 'Novels and the Press get along, not too calamitously, without this Nanny; why shouldn't films?' asked a *New Statesman* columnist William Whitebait. Nanny 'exercises a crippling drag on the growth of a serious and healthy British cinema'.¹³

- 1.31 In the Committee's view, policy and law makers need to be aware of the risk that the over-regulation of many aspects of our lives 'for the individual's own good' may lead to bad laws and unintended consequences for the broader community. The Committee has taken the opportunity during this inquiry to listen to the Western Australian community and investigate those matters where there are claims of regulatory overreach adversely impacting personal freedoms.

Recent inquiries into personal choice and community safety issues

- 1.32 There have been many inquiries in Australia and overseas that have considered the issues raised in the Committee's current inquiry, including mandatory bicycle helmet laws and the regulation of e-cigarettes. Recent work in other jurisdictions includes:

- United Kingdom, House of Commons, Science and Technology Committee, 2018 (e-cigarettes)¹⁴
- Commonwealth of Australia, House of Representatives, Standing Committee on Health, Aged Care and Sport, 2018 (e-cigarettes)¹⁵

¹³ Commonwealth of Australia, Senate, Economics References Committee, *Personal choice and community impacts: interim report*, May 2016, p 4.

¹⁴ United Kingdom, House of Commons, Science and Technology Committee, *E-cigarettes: Seventh Report of Session 2017-19*, 16 July 2018.

¹⁵ Commonwealth Parliament, House of Representatives, Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia*, March 2018.

- United States of America, National Academies of Sciences, Engineering, Medicine, 2018 (e-cigarettes)¹⁶
- Western Australian, Legislative Assembly, Education and Health Standing Committee, 2017 (e-cigarettes)¹⁷
- Commonwealth of Australia, Senate, Economics References Committee, 2016 (e-cigarettes, mandatory bicycle helmets, classified material, Sydney lockout laws)¹⁸
- South Australia, House of Assembly, Select Committee on E-cigarettes, 2016 (e-cigarettes)¹⁹
- Canada, House of Commons, Standing Committee on Health, 2015 (e-cigarettes)²⁰
- United Kingdom, Public Health England, 2015 (e-cigarettes)²¹
- Queensland Parliament, Transport, Housing and Local Government Committee, 2013 (mandatory bicycle helmets)²²
- Queensland, Centre for Accident Research & Road Safety, Queensland University of Technology, 2010 (mandatory bicycle helmets)²³
- Western Australia, Legislative Assembly, Select Committee on Road Safety, 1994 (mandatory bicycle helmets).²⁴

1.33 The Committee observes that the ongoing interest and academic research demonstrates that matters that affect personal choice and curb individual liberty are key issues of concern in the community. Public health or community safety matters must be measured against their potential impact on personal choice and governments have a duty to consider how policies may impact society beyond what is intended.

A note on the purpose of this report

1.34 The Committee notes that there is an abundance of data available on two of the most controversial topics covered in this report: mandatory bicycle helmet laws and the regulation of e-cigarettes. New studies which provide evidence that either supports or opposes both of these issues are published on an almost-daily basis and the Committee expects that the ongoing academic interest in public health will ensure that this continues into the future.

¹⁶ United States of America, National Academies of Sciences, Engineering and Medicine, *Public Health Consequences of E-cigarettes*, 2018.

¹⁷ Western Australia, Legislative Assembly, Education and Health Standing Committee, Report 1, *Clearing the air on e-cigarettes: Factors regarding regulation that require consideration*, June 2017.

¹⁸ Commonwealth Parliament, Senate, Economics References Committee, Interim Reports, *Personal choice and community impacts* and *Interim report: bicycle helmet laws (term of reference d)*, May 2016.

¹⁹ South Australia, House of Assembly, Select Committee on E-cigarettes, *Final Report of the Select Committee on E-cigarettes*, 24 February 2016.

²⁰ Canada, House of Commons/Chambre des Comunes, Standing Committee on Health, *Vaping: towards a regulatory framework for e-cigarettes*, March 2015.

²¹ Ann McNeill, Leonie S Brose, Robert Calder, Linda Bauld & Debbie Robson, *Evidence review of e-cigarettes and heated tobacco products 2018: a report commissioned by Public Health England*, February 2018.

²² Queensland Parliament, Transport, Housing and Local Government Committee, Report 39, *Inquiry into Cycling Issues*, November 2013.

²³ Narelle Haworth, Amy Schramm, Mark King & Dale Steinhardt, 'Bicycle Helmet Research', *Queensland Centre for Accident Research & Road Safety*, 2010, Monograph 5.

²⁴ Western Australia, Legislative Assembly, Select Committee on Road Safety, Report 1, *Report on compulsory helmet wearing for bicyclists and other bicycling issues*, 12 May 1994.

- 1.35 This report is intended to investigate and analyse the evidence that the Committee has received from the Western Australian community during the inquiry and present the views of the Committee on the terms of reference. To this end, the report is not intended to be a comprehensive literature review on each topic discussed, nor is it intended to make findings on the credibility of data published by researchers. The Committee has relied on the recent peer-reviewed scientific research, academic discussion of the topics covered in this report and on the submissions and evidence heard during the inquiry.
- 1.36 The Committee anticipates significant public interest in its final report and hopes that the government and community stakeholders who participated in this inquiry gain from its findings and recommendations a better understanding of the complexities that exist when considering matters that affect personal choice.

CHAPTER 2

Mandatory bicycle helmet laws

History of mandatory bicycle helmet laws in Australia

- 2.1 Australia was the first country in the world to make wearing a helmet mandatory for all bicycle riders, regardless of age or purpose of trip. The decision to enact mandatory bicycle helmet laws (MHL) arose from a 1985 House of Representatives Standing Committee on Transport Safety's final report that found that bicycle helmets would reduce the likelihood and severity of head injuries for cyclists.²⁵ That committee referred to research published over the previous 20 years that highlighted 'the extremely high incidence of head injuries among cyclists involved in accidents', particularly accidents involving children.²⁶
- 2.2 The Committee notes that the House of Representatives Standing Committee on Transport Safety turned its mind to the adverse effects on personal choice that recommending MHL would cause:

The Committee acknowledges that the area of personal freedom is one that needs sensitive consideration involving as it does people's feelings and attitudes. It is in this area that educational and promotional campaigns will have the greatest impact but over the longest period of time. People should be encouraged to see helmet use not as an infringement of their freedom but as an opportunity to increase the pleasure of their cycling by dramatically raising its safety.²⁷
- 2.3 Victoria was the first State in Australia to enact its MHL in July 1990, with other States and Territories following suit during 1990 and 1991.
- 2.4 In Western Australia, the *Road Traffic Code Amendment Regulations 1991* introduced MHL into our (now repealed)²⁸ *Road Traffic Code 1975* on 24 December 1991, with effect from 1 January 1992. The amendment regulations were drafted to include a six-month moratorium on enforcement (until 1 July 1992), to allow for community education and advertising campaigns to be rolled out across the State.
- 2.5 A select committee was established by the Legislative Assembly in 1993 to investigate road safety issues. That committee devoted its first interim report to the issue of MHL due to it being 'the subject of considerable community debate both prior to and since its introduction' and 79 per cent of submissions referred to MHL.²⁹ The Committee notes that in 1994, approximately three years after the introduction of MHL, 42 per cent of submitters (205 out of a total of 487 submissions) opposed MHL applying to adults (see Figure 1).

²⁵ Commonwealth Parliament, House of Representatives, Standing Committee on Transport Safety, Final Report, *Final Report on the Motorcycle and Bicycle Helmet Safety Inquiry*, 25 November 1985, p 10.

²⁶ *ibid.*, p 5.

²⁷ *ibid.*, p 47.

²⁸ And replaced by the *Road Traffic Code 2000*.

²⁹ Western Australia, Legislative Assembly, Select Committee on Road Safety, Report 1, *Report on compulsory helmet wearing for bicyclists and other bicycling issues*, 12 May 1994, pp 1–2.

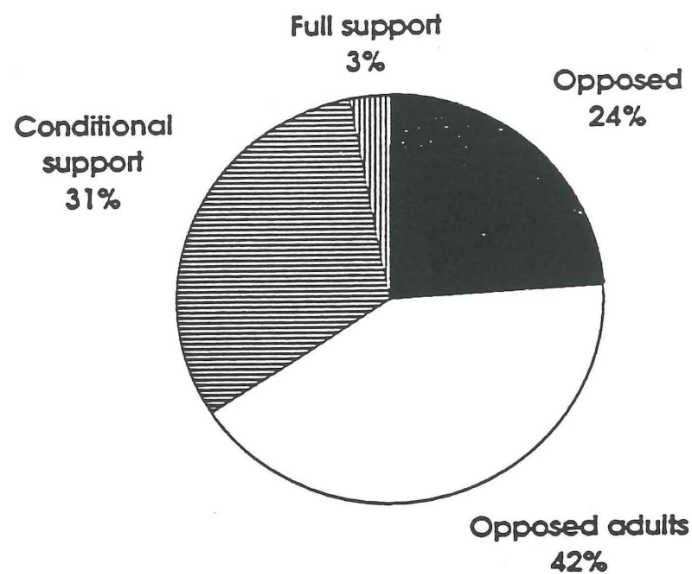


Figure 1. *Categories of bicycle helmet submissions in 1994*
 [Source: Select Committee on Road Safety, Legislative Assembly, 1994]

2.6 The 1994 select committee report suggested that:

[The] ... reasons why the greatest proportion of road safety submissions relate to helmet wearing and that most oppose the requirement are surmised to be: that it is a relatively new initiative and therefore topical; that many people see it as a genuine reduction of 'individual rights'; that personal and community fitness/health is diminished because fewer people now cycle and have returned to polluting motorised transport ... It may also be that those who are satisfied with the status quo are less likely to make a submission than those who are opposed.³⁰

2.7 During this current inquiry, 50 submissions raised the issue of MHL and 38 of those did not support MHL: a total of 76 per cent opposing. In its analysis of submissions received, the Committee notes that there are similarities in the reasons raised by submitters for their opposition to MHL, including the:

- effect on obesity and fitness levels
- impact of mandatory legislation on personal freedom
- safety issues from less cyclists being on the road.

2.8 The Committee also notes, however, the decrease in the number of submissions on MHL compared to submissions received 25 years ago on the same topic. This suggests that, while MHL remains a controversial issue in some parts of the community, having the legislation in place for 28 years has contributed to broader community acceptance.

Cycling participation in Australia

2.9 The Committee notes that data on cycling participation rates is often limited and difficult to quantify. According to research by the Australian Institute of Health and Welfare (AIHW)³¹, there are three main population surveys which estimate the number of cyclists in Australia:

³⁰ *ibid.*, p 4.

³¹ Australian Government, Australian Institute of Health and Welfare, *Pedal cyclist deaths and hospitalisations 1999-00 to 2015-16*, Injury Research and Statistics Series No. 123, 8 May 2019, Appendix B.

- Participation in Sport and Physical Recreation Survey (PSPRA), done by the Australian Bureau of Statistics
 - Participation in Exercise, Recreation and Sport Survey (ERASS), done by the Australian Sports Commission until the end of 2010
 - National Cycling Participation Survey (NCPS), done by Austroads.
- 2.10 In 2012, 9.8 per cent of men and 5.4 per cent of women in Australia participated in cycling.³² According to the PSPRA and ERASS data, cycling participation in Australia has increased overall for people aged 15 years and over since 2005, with a significant increase in adults aged 45 years and over.
- 2.11 The data in both the PSPRA and ERASS demonstrate the huge increase in adult cyclists aged 45 years and over: increases of 56 per cent between 2005-6 and 2013-14 and 109 per cent between 2000 and 2010, respectively.³³
- 2.12 The two separate surveys above also report different quanta for the increases: PSPRA reports an increase of 250 000 people cycling between 2005-06 and 2013-14, while the ERASS data shows an increase of 640 000 cyclists in the decade since 2001.³⁴
- 2.13 NCPS data, however, reports a drop of around five per cent in cycling participation between 2011 and 2019 when measured over the longer term. All the data available records consistently higher participation rates for males, across all years and age groups (except for children aged under 10).³⁵
- 2.14 Data for children's participation in cycling is available from the Australian Bureau of Statistics and suggests that participation levels have remained fairly stable over time (data from 2000 to 2012).³⁶
- 2.15 Professor Chris Rissel from the University of Sydney submitted that:
- there were fewer cycling trips in Australia in 2011 than in 1985 despite population increases.³⁷
- 2.16 Western Australian data from the 2017 NCPS shows that the rate of participation in cycling in our State has remained largely consistent since 2013 and is significantly higher than Australia-wide NCPS data (see also Figure 2):
- 18.5 per cent of residents ride a bicycle in a typical week, with almost 42 per cent doing so in the past year.
 - Males are significantly more likely than females to cycle.
 - The highest rate of cycling in the State is among children under 10.

³² Australian Government, Australian Bureau of Statistics, *Participation in selected sports and physical recreation activities*, 4156.0 – Sports and Physical Recreation: A Statistics Overview, Australia, 2012.

³³ Australian Government, Australian Institute of Health and Welfare, *Pedal cyclist deaths and hospitalisations 1999-00 to 2015-16*, Injury Research and Statistics Series No. 123, 8 May 2019, pp 42–3.

³⁴ *ibid.*, p 1.

³⁵ Austroads, *2019 National Cycling Participation Survey: Western Australia*, Austroads Publication No. AP-C91-19, September 2019, pp 3 and 9.

³⁶ Australian Government, Australian Institute of Health and Welfare, *Pedal cyclist deaths and hospitalisations 1999-00 to 2015-16*, Injury Research and Statistics Series No. 123, 8 May 2019, p 44.

³⁷ Submission 4 from Professor Chris Rissel, 17 September 2019, p 2, citing C Gillham and C Rissel, 'The growth of cycling has not matched population growth in Australia: a comparison of 1985/86 and 2011', *World Transport Policy and Practice*, 2012, vol. 18, issue no. 3, pp 5–12.

- Of the adults who were regular cyclists, 35 per cent indicated that they were riding less often and 18 per cent were cycling more often.
- Cycling in Western Australia is done more for recreation (85 per cent) than transport or utility (35 per cent).³⁸

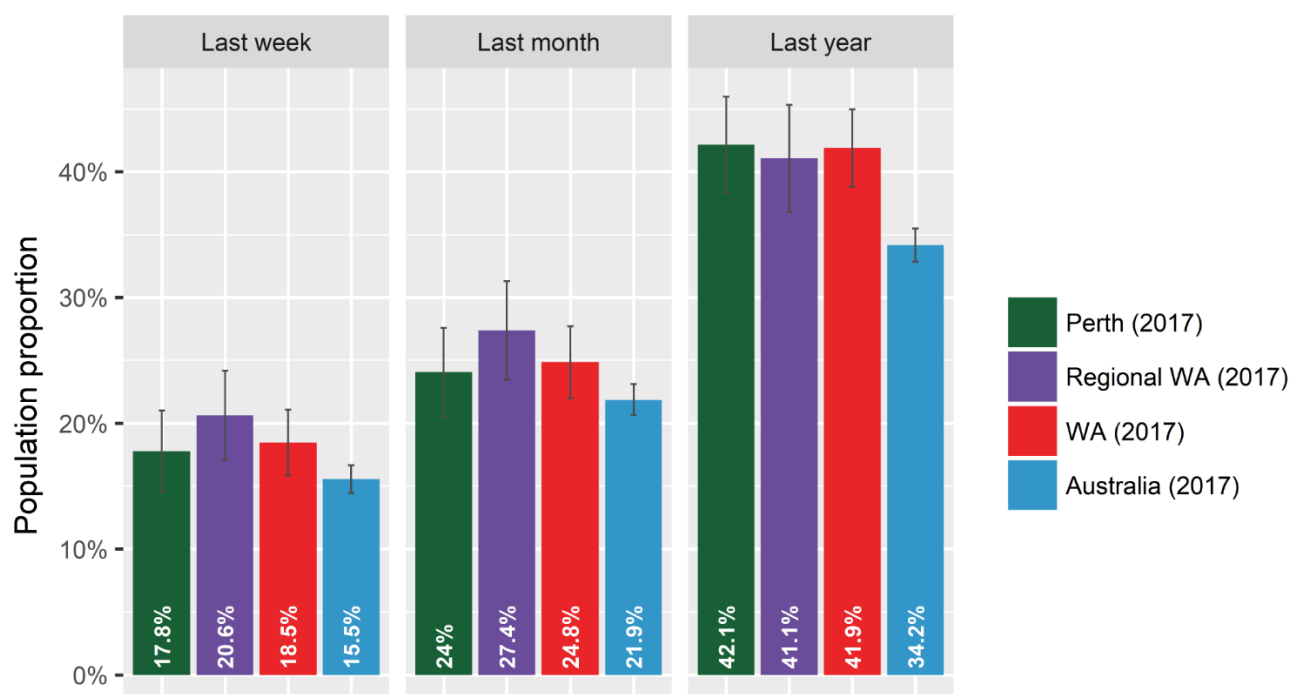


Figure 2. *Cycling participation as a proportion of resident population in 2017: WA and Australia*
 [Source: Western Australian Cycling Participation summary sheet, 2017 National Cycling Participation Survey]

2.17 In comparison, the Western Australian data from the 2019 NCPS shows that:

- the rate of cycling participation in our State remains higher than the Australia-wide rate, although the gap has narrowed since 2017 (see also Figure 3 below)
- 15.6 per cent of residents ride a bicycle in a typical week (a fall from 2017), while 40.8 per cent had done so in the past year (similar to the figure in 2017)
- males are still significantly more likely than females to cycle, although the gap had narrowed since 2017
- the highest rate of cycling in the State is still among children aged under 10
- of the adults who were regular cyclists, 31 per cent indicated that they were riding less often (lower than in 2017) and 26 per cent were cycling more often (higher than in 2017)
- cycling in Western Australia is still done more for recreation (81 per cent) than transport or utility (38 per cent).
- cycling participation in regional Western Australia is much higher than it is in Perth.³⁹

³⁸ Austroads, *2017 National Cycling Participation Survey: Western Australia*, Austroads Publication No. AP-C91-17, June 2017, pp 3–7 and 15–16.

³⁹ Austroads, *2019 National Cycling Participation Survey: Western Australia*, Austroads Publication No. AP-C91-19, September 2019, pp 3–6 and 15–16.

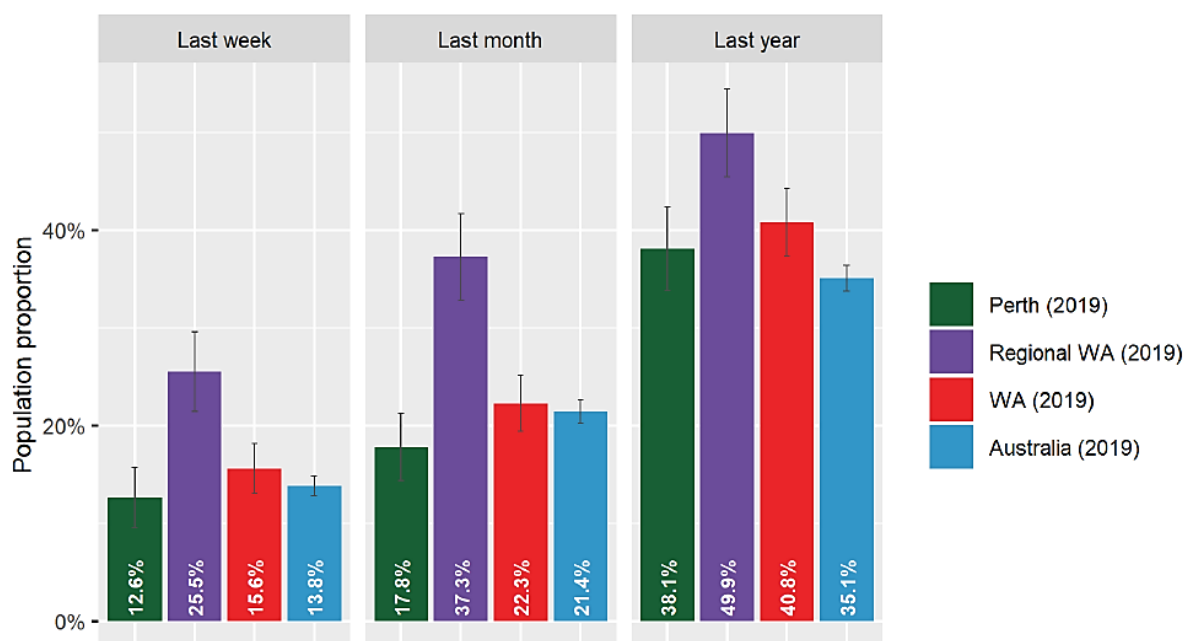


Figure 3. *Cycling participation as a proportion of resident population in 2019: WA and Australia*
[Source: Western Australian Cycling Participation summary sheet, 2019 National Cycling Participation Survey]

2.18 The Committee notes that there are obvious health benefits to cycling, including cardiovascular activity and physical movement. Professor Rissel submitted that a number of international studies of the health benefits and injury costs of cycling have concluded that the health benefits outweigh the injury costs, irrespective of helmet wearing.⁴⁰

How are bicycle helmets regulated in other jurisdictions?

Internationally

2.19 The Committee has heard that, in addition to being the first country in the world to introduce MHL, Australia is one of the few countries that continues to require cyclists and passengers to wear helmets while riding.

2.20 Only New Zealand has similar MHL to ours and other countries around the world have either repealed or modified their MHL to permit adults to cycle without wearing a helmet in some circumstances.⁴¹ The Committee notes the information in the Bicycle Network's 2018 position paper regarding worldwide MHL (see also Figure 4):

- Bicycle helmets are required by law in Dubai (as are reflective jackets) but are not required in the rest of the United Arab Emirates.
- In Canada, bicycle helmets are mandatory for everyone in five provinces, for young people only in three provinces and are not mandatory for anyone in five other provinces.
- France introduced MHL in 2017 for all children 12 years and under, whether they are pedalling on a bicycle or riding as a passenger.
- Malta, Russia, Singapore and Portugal have MHL in place for users of electric bicycles.

⁴⁰ Submission 4 from Professor Chris Rissel, 17 September 2019, p 2.

⁴¹ For example: Mexico City enacted mandatory bicycle helmet laws that lasted one year from 2009-2010; Israel removed the requirement for adults to wear a helmet in urban areas in 2011: 'Helmet laws repealed or reduced in scope', Bicycle Helmet Research Foundation. See: <https://www.cyclehelmets.org/1214.html>. Viewed 19 December 2018.

- Hungary has MHL for high-speed environments.
- Spain requires cyclists to wear helmets unless the following circumstances apply: cycling in urban areas, cycling uphill, if exempted for medical conditions, or cycling in extreme hot weather.⁴²

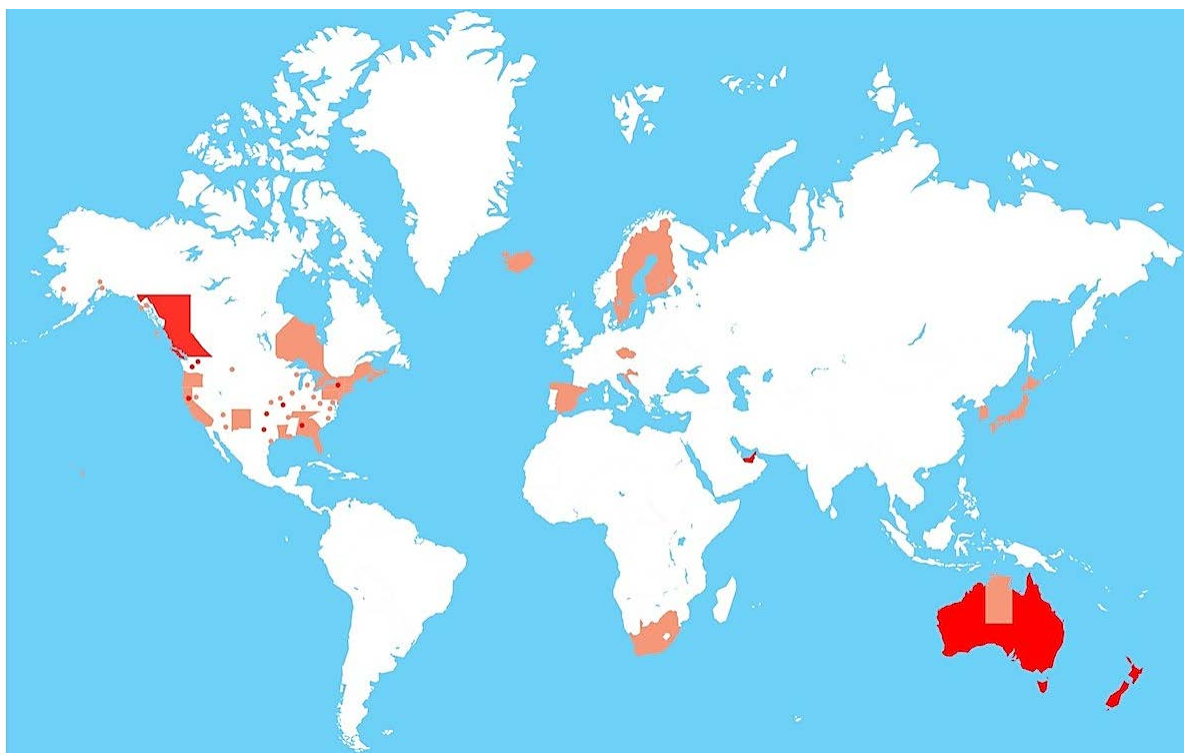


Figure 4. World map of mandatory bicycle helmet laws.
Places in red have full MHL and those in light brown have partial MHL
[Source: Bicycle Network position paper, 2018, p 5]

Northern Territory

- 2.21 The Northern Territory introduced MHL into its legislation in 1992, but then amended its laws two years later to apply mainly to children.⁴³ The *Traffic Regulations 1999* (NT) provide that people over 17 years of age who ride or are being carried on a bicycle are exempt from wearing a helmet if they are 'on a public place',⁴⁴ a 'bicycle path' or a 'shared path'.⁴⁵
- 2.22 Children who are 17 years or younger are still required to wear an approved bicycle helmet (that complies with Australian Standards) whenever they ride a bicycle or are passengers on a bicycle. The penalty for not wearing a helmet where required or not having the helmet securely fastened is \$25.⁴⁶

⁴² Bicycle Network, *Australia's mandatory helmet laws—Bicycle Network position paper*, October 2018, p 5.

⁴³ Bicycle Helmet Research Foundation, *Helmet laws: Northern Territory*. See: <https://www.cyclehelmets.org/1114.html>. Viewed 4 March 2020. Commonwealth of Australia, Senate, Economics References Committee, *Personal choice and community impacts: interim report*, May 2016, p 5.

⁴⁴ '**public place** means a place (other than a road) open to or used by the public or to which the public is permitted to have access whether on payment of a fee or otherwise, but does not include a track in an enclosed area used for motor vehicle or bicycle racing or speed trials': *Traffic Regulations 1999* (NT) reg 3(1).

⁴⁵ *Traffic Regulations 1999* (NT) reg 86(1).

⁴⁶ *ibid.*, Schedule 1, item 7.

2.23 Cycling participation rates in the Northern Territory are the second highest in Australia, just behind those in the Australian Capital Territory.⁴⁷ Figures from the 2017 and 2019 NCPS reveal the following:

- In 2017, 25.6 per cent of the Northern Territory's residents rode a bicycle every week and almost half (46.1 per cent) had done so in the past year. In 2019, the rates were 21.3 and 43.7 per cent, respectively.
- In both 2017 and 2019, cycling participation rates in Darwin and regional Northern Territory were similar and, in both cases, significantly higher than the national average (see Figure 5 and Figure 6).
- In both years, the highest participation rate in the Northern Territory was for children aged under 10 years and the rate for adults aged under 50 years were higher than the national average.
- In both years, around 70 per cent of Northern Territory households had access to at least one bicycle, which was much higher than the national average.
- In 2017, of the people who cycled in the last month, 76 per cent cycled for recreation and 36 per cent cycled for transport; these figures are similar to the national average. In 2019, the rates were 80 and 40 per cent, respectively; again, these figures were similar to the national ones, although regional Northern Territorians utilised cycling for transport at much higher rates than the national average.⁴⁸

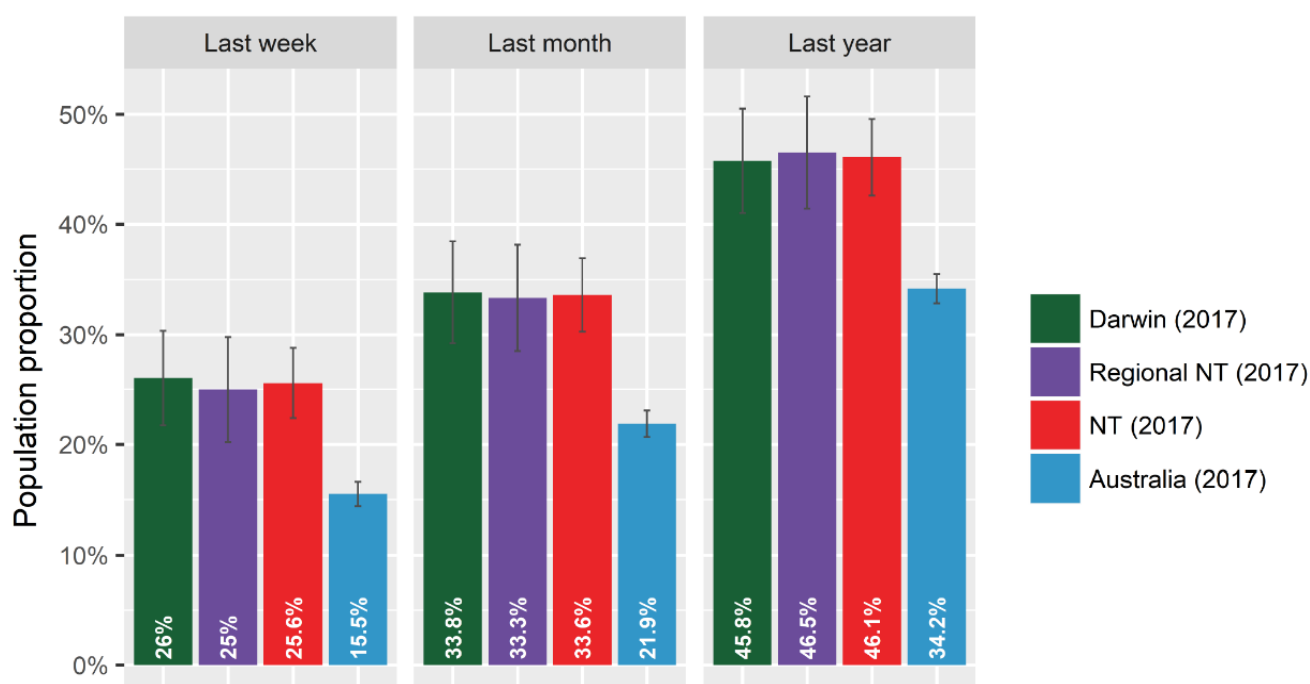


Figure 5. Cycling participation as a proportion of resident population in 2017: NT and Australia
[Source: Northern Territory Cycling Participation summary sheet, 2017 National Cycling Participation Survey]

⁴⁷ Austroads, *2017 National Cycling Participation Survey*, Austroads Publication No. AP-C91-17, June 2017, p 4 and Austroads, *2019 National Cycling Participation Survey*, Austroads Publication No. AP-C91-19, September 2019, p 4.

⁴⁸ Austroads, *2017 National Cycling Participation Survey: Northern Territory*, Austroads Publication No. AP-C91-17, June 2017, pp 3–5, 8, 9 and 16–17 and Austroads, *2019 National Cycling Participation Survey: Northern Territory*, Austroads Publication No. AP-C91-19, September 2019, pp 3–5, 7, 8 and 15–16.

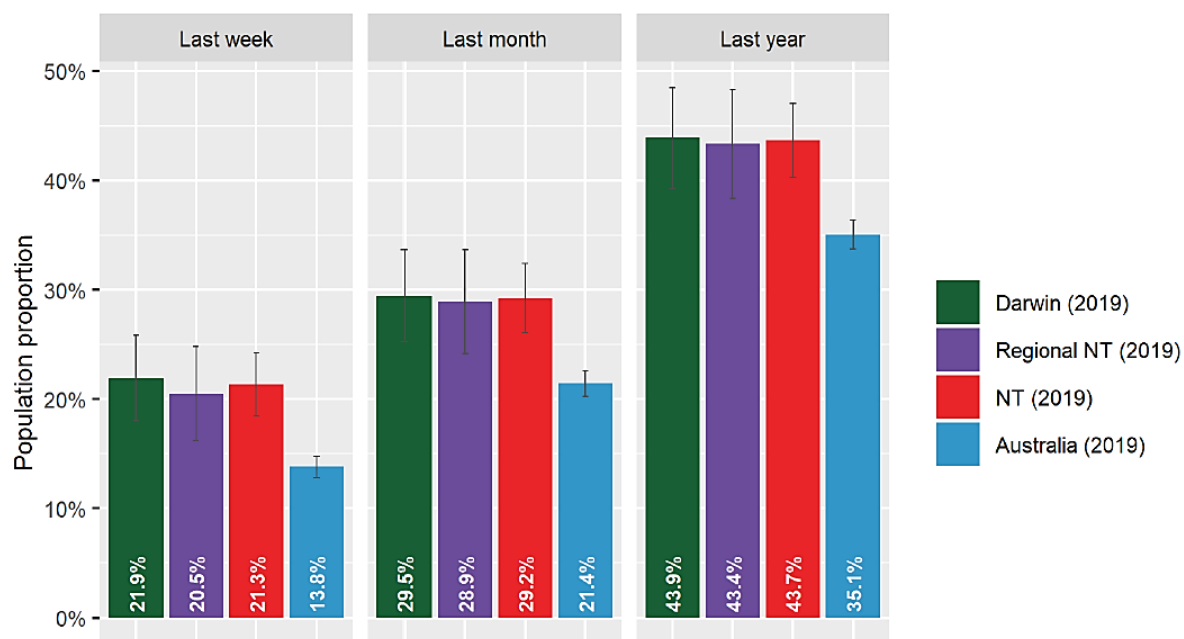


Figure 6. *Cycling participation as a proportion of resident population in 2019: NT and Australia*
 [Source: Northern Territory Cycling Participation summary sheet, 2019 National Cycling Participation Survey]

- 2.24 The Committee notes that some advocates in the Northern Territory continue to push for the re-introduction of MHL in the Territory, with Cycling NT in support of MHL, especially considering the high rate of cycling participation in the NT.⁴⁹
- 2.25 Table 1 below lists the rates of serious cycling injuries on public roads in each Australian jurisdiction from 2003-04 to 2008-09. The Committee notes that this data is of limited value as it shows the injury rates as a fraction of the general population, not the cycling population.

⁴⁹ Lauren Roberts, 'A tough call on cycling helmets from researchers and safety advocates', *NT News*, 9 February 2019.

Table 1. *Rates of serious cycling injury on public roads in each Australian jurisdiction*

Jurisdiction of residence ⁵⁰	Rate of serious ⁵¹ cycling injury on public roads in each jurisdiction (per 100,000 general population)				
	2003-04	2005-06	2006-07	2007-08	2008-09
NSW	18	21	21	19	21
Vic	21	25	29	27	28
Qld	19	21	24	24	25
WA	14	16	16	19	21
SA	17	22	19	23	22
Tas	17	23	21	24	23
ACT	12	30	31	34	49
NT	25	31	23	30	32
National	19	22	23	23	25

[Source: Australian Institute of Health and Welfare, *Serious injury due to land transport accidents, Australia, 2003-04, 2005-06, 2006-07, 2007-08 and 2008-09*]⁵²

How are bicycle helmets regulated in Western Australia?

2.26 Part 15 of the *Road Traffic Code 2000* (Code) regulates the wearing of bicycle helmets in Western Australia. Regulation 222 of the Code mandates helmet use for cyclists and their passengers:

Protective helmets to be worn

...

(2) Except as provided in this regulation, a person shall not ride a bicycle on a road or any path unless—

- (a) that person is wearing a protective helmet securely fastened on his or her head;
- (b) where any other person is being carried on that bicycle, that other person is wearing a protective helmet securely fastened on his or her head.

Modified penalty: 1 PU

⁵⁰ Most people who were seriously injured were hospitalised in the same jurisdiction in which they resided. However, on average over the five reporting years, about 30 per cent of the people hospitalised in the Australian Capital Territory were residents of New South Wales. For patients hospitalised in a jurisdiction other than their jurisdiction of residence, it was not known whether the crash occurred in the other jurisdiction or whether they were transferred to a hospital in the other jurisdiction after crashing in their own jurisdiction: Australian Institute of Health and Welfare, *Serious injury due to land transport accidents, Australia, 2003-04, 2005-06, 2006-07, 2007-08 and 2008-09*, reports prepared by JG Berry and JE Harrison, then G Henley and JE Harrison, Flinders University, Australian Government, Adelaide then Canberra, 2007, 2008, 2009 and 2012, p 23, p 22, p 27, p 24 and p 5, respectively.

⁵¹ 'Serious injury' was defined as an injury which resulted in the person being admitted to hospital, and subsequently discharged alive either on the same day or after one or more nights stay in a hospital bed (that is, deaths in hospital were excluded): *ibid.*, p 1 of each of the five reports.

⁵² *ibid.*, p 25 Table 4.9, p 24 Table 3.9, p 30 Table 3.9, p 26 Table 3.8 and p 25 Table 4.3.8, respectively.

- 2.27 Regulation 223A of the Code essentially repeats the requirement in regulation 222 and applies it to passengers who are being transported on a bicycle:

Passengers to wear protective helmets

...

- (2) A person must wear a protective helmet securely fastened on his or her head when being carried as a passenger on a bicycle.

Modified penalty: 1 PU

- 2.28 Regulation 223 of the Code refers to bicycle trailers and the requirement for passengers being towed in the trailer to also wear a helmet:

Riding with person on bicycle trailer

- (1) The rider of a bicycle shall not tow a bicycle trailer with a person in or on the bicycle trailer, unless —

- (a) the rider is 16 years of age, or older; and
- (b) the person in or on the bicycle trailer is under 10 years of age; and
- (c) the bicycle trailer can safely carry the person; and
- (d) the person in or on the bicycle trailer is wearing a protective helmet securely fitted and fastened on the person's head.

Modified penalty: 1 PU

- 2.29 One penalty unit in the Code is currently equivalent to a \$50 modified penalty.⁵³ The Committee notes that, compared to other Australian jurisdictions, this penalty is relatively low and may not act as an effective deterrent to infringing MHL. For example, the penalty for not wearing a bicycle helmet in New South Wales and in Victoria is a maximum of 20 penalty units (\$2200) and five penalty units (\$826.10), respectively.
- 2.30 Western Australia Police collates data on fines issued to cyclists or passengers who cycle without a helmet: see Table 2.

Table 2. *Number of persons issued an infringement notice for contravening regulations 222, 223A and 223 of the Road Traffic Code 2000: 2013–2018*

Section	Infringement Status	2013	2014	2015	2016	2017	2018
222	Court Elected	15	17	12	5	12	7
	Final Demand Issued	-	-	-	-	-	43
	Paid	463	290	129	159	251	237
	Registered at Fines Enforcement Register	545	391	311	292	431	390
Section 222 Sub Total		1021	694	449	456	689	670
223A	Registered at Fines Enforcement Register	1	-	1	-	2	-
223	N/A	-	-	-	-	-	-
Total Distinct Persons		1022	694	450	456	691	670

[Source: Letter from Chris Dawson, Commissioner of Police, 20 March 2019]

⁵³ *Road Traffic (Administration) Act 2008* s 7(b) as at 24 February 2020.

Evidence heard during the Committee's inquiry

2.31 The issue of MHL was the most discussed topic affecting personal choice and community safety in the submissions received by the Committee. Most submissions opposed the requirement to wear a bicycle helmet while riding, with some submitters expressing concerns such as:

- MHL create a false sense of security and encourage riders/drivers to take more risks on the road⁵⁴
- wearing a helmet is inconvenient and restrictive⁵⁵
- MHL have contributed to obesity and other public health problems because people are discouraged from riding.⁵⁶

2.32 Submissions that supported MHL pointed to the small inconvenience of wearing a helmet compared to the high safety benefits that helmets bring to the cyclist. Catastrophic head injuries cost the community and victims' families millions of dollars. One submitter also referred to people who object to MHL being ambivalent about cycling and using MHL as an excuse not to ride:

Wearing a helmet does not affect a person's ability to ride a bicycle for physical activity and active transport. The most commonly listed reasons in the argument against wearing helmets include discomfort, unattractiveness and the cause of sweating in warm conditions. Each of these reasons is superficial and do not outweigh the safety and protective benefits that a helmet enables. ...

...

Like wearing a seatbelt, it can become second nature to buckle up a helmet before cycling. All that is required is a shift in people's attitudes from what is socially accepted towards what is good preventative and protective health behaviour.⁵⁷

2.33 In relation to comparing MHL with mandatory seatbelt laws, another submitter suggested that:

Seat belt laws should also be assessed on their merits. Importantly, it is unlikely seat belts affect motoring participation or culture in the same ways that MHLs have affected cycling.⁵⁸

2.34 In 2017, the Bicycle Network, Australia's biggest bicycle-riding organisation, conducted a survey of public attitudes towards MHL. Of the survey's 19 327 responses, the Committee notes the following data:

- 41.7 per cent of respondents believe that Australia's MHL should remain.
- 17.6 per cent of respondents believe that bicycle helmets should never be mandatory.
- 40.7 per cent of respondents believe that helmets should only be mandatory in certain circumstances.
- The strongest supporters of MHL are Victorians, Tasmanians, baby boomers, women, those who have had a serious crash and Bicycle Network members.

⁵⁴ Submission 7 from Joanne Dasborough, 20 September 2018.

⁵⁵ Submission 9 from Heinrich Benz, 20 September 2018.

⁵⁶ Submission 18 from Phillippa Vice, 25 September 2018.

⁵⁷ Submission 50 from Katie Cowcher, 4 October 2018, p 2.

⁵⁸ Submission 55 from Jai Cooper, 4 October 2018, p 14.

- The weakest support for MHL comes from Queenslanders, millennials, those who ride once or a few times a year and non-Bicycle Network members.⁵⁹

2.35 The Department of Transport informed the Committee that:

when mandatory helmet laws were first introduced in Western Australia in 1992, there were some objections to the legislation. However, community sentiment has since changed and there is now strong community support in favour of these laws.⁶⁰

2.36 Some submitters suggested that MHL were responsible for a downturn in people cycling to work, pointing to Census data to demonstrate their claim.⁶¹ The Committee charted the following graph (Figure 7) based on reconfigured Census data:



Figure 7. *People in Australia and WA who cycled to work on Census day between 1991 and 2016*
[Source: id Consulting Pty Ltd]⁶²

2.37 MHL were introduced into Australia progressively between mid-1990 and 1992. Figure 7 suggests that after this time, on Census day 1996, the rate of cycling to work decreases before eventually plateauing over the next four Census years. The Committee notes that

⁵⁹ Bicycle Network, *Australia's mandatory helmet laws—Bicycle Network position paper*, October 2018, p 15.

⁶⁰ Michelle Prior, Acting Director, Transport Planning, Major Urban Centres, Department of Transport, Letter, 12 March 2019, p 1.

⁶¹ For example, Submission 2 from Chris Gillham, received 11 September 2018, p 3.

⁶² Using Census data published by the Australian Bureau of Statistics. The denominator used by id Consulting Pty Ltd in calculating the percentages of people cycling was the total number of employed people aged 15 years and over: id Consulting Pty Ltd, *Western Australia: method of travel to work*. See: <https://profile.id.com.au/australia/travel-to-work?WebID=140&BMID=10>. Viewed 18 March 2020.

while the graph indicates a coincidental decrease in cycling to work rates after MHL were introduced, the graph does not establish a causal link between MHL and that decrease. The limitations of the Census data include the following:

- The data provides only snapshots of people's activities on a particular day, once every four years. Their activities may or may not have been consistent in the periods before and after the Census days.
- The data does not record the reasons why people chose a particular mode of transport over others on each Census day. There are a multitude of reasons (other than MHL) why a person may choose not to ride to work; for example, an increased preference for driving due to relative speed, convenience and physical comfort, and increased car traffic making cycling feel 'less safe'.

2.38 The Royal Automobile Club's Cycling Survey 2015 for Western Australia, which received 5657 responses, showed that:

- the respondents thought that the main barrier to cycling more often was a 'fear of sharing the roads with motorists'—43 per cent of respondents
- the second most common barrier was the 'lack of bike routes'—31 per cent of respondents
- the third most common barrier was 'other' reasons, which included safety concerns, health issues, weather and the MHL—26 per cent of respondents.⁶³

2.39 This data is consistent with a 2011 survey of 1000 Australian adults when, amongst other questions, they were asked why they did not ride their bicycles for transport more frequently. A dislike of helmets was the 10th most common reason given (see Table 3).

Table 3. *Reasons for not riding a bicycle for transport more frequently*

No.	Answer	% of respondents
1.	Unsafe road conditions	67.1
2.	Speed/volume of traffic	52.5
3.	Lack of bicycle lanes/trails	48.1
4.	Weather conditions	44.3
5.	Destinations too far away	36.7
6.	No place to park/store bicycle	26.0
7.	Don't feel safe riding	25.3
8.	Too hilly	23.4
9.	No place to change/shower	17.7
10.	Don't like wearing a helmet	16.5
11.	Not enough time	15.2
12.	Not fit enough	11.4

⁶³ Royal Automobile Club of WA (Inc), *Cycling survey 2015*, pp 1 and 2. See: <https://www-cdn.rac.com.au/-/media/files/rac-website/car-and-motoring/survey/cycling-survey-2015.pdf?la=en&modified=20160622120003&hash=68B550A39C10E1032D4AB1846E953651AB01868F>. Viewed 4 September 2019.

No.	Answer	% of respondents
13.	Health problems	5.7
14.	Nowhere to store clothes	5.1
15.	None	5.1
16.	Unsure of best route	4.4
17.	Don't feel confident riding	3.8
18.	Other	3.2

Q: Which of the following, if any, discourage you from riding a bicycle for transport more often? (multiple response)

Base: Respondents who have ridden a bike for transport in the past month (n=158)

[Source: Heart Foundation & Cycling Promotion Fund, *Riding a bike for transport: 2011 survey findings*, p 5]

FINDING 1

Mandatory bicycle helmet laws may deter some people from cycling but they are not the main reason why people choose not to ride a bicycle.

Arguments for MHL

2.40 During its hearings, the Committee explored the concerns raised in submissions that supported MHL. The main arguments in favour of retaining MHL provided by witnesses related to cyclist safety and injury risk. Injury Matters submitted that:

bicycle helmets are of critical importance to reducing road trauma and do not impinge on the individual's personal liberties. Not wearing a bicycle helmet may be the difference between a minor injury or a serious, if not fatal, head injury. In 2017, an Australian literature review of studies assessing bicycle helmet effectiveness to mitigate serious injuries in crash or fall found that bicycle helmet use reduces the odds of head injury by 51 per cent, serious injury by 69 per cent and fatal head injuries by 65 per cent. In 2017, three of the seven cyclists who were killed on WA roads were not wearing a helmet at the time of the crash.⁶⁴

2.41 The Committee also notes the evidence from WestCycle that 'helmets can often be most valuable in those situations where it is a low-impact or low-speed crash' and that:

if you are hit ... by a motor vehicle travelling 40 kilometres an hour or greater, your likelihood of death is far greater. It is likely that [there] could be a number of different circumstances of why you become a fatality. Head injury is only one of those, but there are numerous other ways that you could potentially pass away in that circumstance. When you are below that speed limit [40 km/h] is when the helmet becomes a protective measure and is probably far more relevant because it will prevent a head injury. The research shows that helmets prevent head injuries.⁶⁵

2.42 A recent meta-analysis of international research into the efficacy of bicycle helmets for preventing head injuries analysed 40 studies and found that 'helmet use among cyclists in a crash was associated with reduced odds of head, serious head, face and fatal head injury'.⁶⁶ According to the research:

⁶⁴ Chrisandra Lukjanowski, Chief Executive, Injury Matters, *Transcript of evidence*, 26 November 2018, p 2.

⁶⁵ Matt Fulton, Chief Executive Officer, WestCycle, *Transcript of evidence*, 26 November 2018, p 2.

⁶⁶ Jake Olivier & Prudence Creighton, 'Bicycle injuries and helmet use: a systematic review and meta-analysis', *International Journal of Epidemiology*, 2017, vol. 46, issue 1, p 14.

the results of this review do not support arguments against helmet legislation from an injury prevention perspective ... these results could be used as one source of evidence for the promotion of bicycle helmets for mitigating head, serious head, face and fatal head injuries without increased risk of other injuries.

However, helmets are not a panacea for cycling injury ... they do not offer protection to other body regions. Any comprehensive cycling safety strategy should consider the promotion or legislation of bicycle helmets only in concert with other injury prevention strategies.⁶⁷

(Committee emphasis.)

2.43 The Committee notes that, while bicycle helmets are effective for reducing the risk of serious or fatal head injuries, they cannot be relied upon as the only method of protecting cyclists. Governments must also ensure that effective bicycle infrastructure, such as separate shared paths or dedicated bicycle lanes, are part of any cycling policy.

2.44 The Road Safety Council advised the Committee that the position on MHL is indicative that Australia is well regarded internationally for our action on road safety issues:

We are not 'the' leader; we are mid-table in terms of the OECD countries. What Australia is recognised for compared to most other countries is what we have done to educate and encourage our people to undertake safer behaviours.

With our combination of education and enforcement of legislation, not only for helmets but for drink-driving, speeding, wearing seatbelts, Australia is recognised internationally for ... how we have encouraged our road users to act much more safely.⁶⁸

2.45 The Committee also notes the Road Safety Council's view on the difficulties of eliminating road trauma, in that it is:

a cultural problem that can be solved with the community understanding that support for measures which enable a safe road system, that accepts people are fallible, guides safe behaviour and provides protection so the outcomes of road crashes are no longer serious, will further reduce death and injuries.⁶⁹

Cycling injuries and deaths

2.46 The Committee has heard evidence that the cost of cycling injuries to the community can be significant:

Over the five-year period from 2012 to 2016, the cost of crashes where cyclists have been killed or seriously injured was around \$160 million.⁷⁰

2.47 Research by Hendrie et al. presented in 2017 to the Australasian Road Safety Conference examined the financial burden of transport-related injury in Western Australia over a prescribed period.⁷¹

⁶⁷ *ibid.*, p 20.

⁶⁸ Iain Cameron, Chair, Road Safety Council, *Transcript of evidence*, 22 February 2019, p 10.

⁶⁹ Submission 45 from Road Safety Council, 3 October 2018, p 5, quoting from Ian Ronald Johnston, Carlyn Muir & Eric William Howard, *Eliminating Serious Injury and Death from Road Transport: A Crisis of Complacency*, CRC Press, Bota Raton, 2013.

⁷⁰ Submission 90 from Injury Matters, 5 October 2018, p 9.

⁷¹ D Hendrie, S Randall, T Miller, G Lyle, K Brameld & E Davison, 'Incidence and Costs of Transport-Related Injury in Western Australia', Paper presented at the Australasian Road Safety Conference, Perth, 10-12 October 2017.

- 2.48 Based on data from the Department of Health, hospital admissions and the Insurance Commission of Western Australia, Hendrie et al. measured costs related to the health sector, longer term care needs, loss of paid productivity and loss of quality of life, calculated using an incidence-based approach by assessing the lifetime costs of all injury events in 2012. This data was further broken down across age groups and types of transport: motor vehicle, bicycle, motorcycle, pedestrian and other (bus, rail and other transport or injury cases).
- 2.49 The Committee notes the following findings from Hendrie's research:
- In 2012 alone, the cost of bicycle injuries across all age groups (0-65 years and over) was \$50 million, with over half (\$27 million) being attributed to injuries affecting the largest age group: Western Australians aged 25-64 years.
 - The number of bicycle incidents was also the highest for the 25-64 age group: 551 of 3225 reported injuries across all transport modes in 2012. This represents 17 per cent of all 25-64 age group incidents in 2012, while motor vehicle-related injuries were twice that at 37 per cent for that age bracket.⁷²
- 2.50 Recent research undertaken by the AIHW on cycling injury rates and subsequent hospitalisation reveals significant issues which the Committee believes should be taken into account in any discussion of MHL.
- 2.51 The AIHW's 'Pedal cyclist deaths and hospitalisations: 1999-00 to 2015-16' report, published in May 2019, found that the number of Australians injured or killed in bicycle crashes 'is on the rise' and that 'older people are increasingly being admitted to hospital after cycling mishaps'.⁷³
- 2.52 The AIHW data reveals a 'slight downward trend' of one per cent for the number of cyclists killed in crashes between 1999-00 and 2015-16 (see Figure 8 below), but also that:
- many hospitalised pedal cyclists are aged 45 and over
 - the severity of pedal cyclist injury cases tends to worsen with increasing age
 - population-based rates of hospitalised pedal cyclist cases have risen over time.⁷⁴

⁷² *ibid.*, p 6.

⁷³ Australian Institute of Health and Welfare, *Rising rates of injury and death among cyclists over 40*, Media statement, 8 May 2019.

⁷⁴ Australian Government, Australian Institute of Health and Welfare, *Pedal cyclist deaths and hospitalisations 1999-00 to 2015-16*, Injury Research and Statistics Series No. 123, 8 May 2019, p 28.

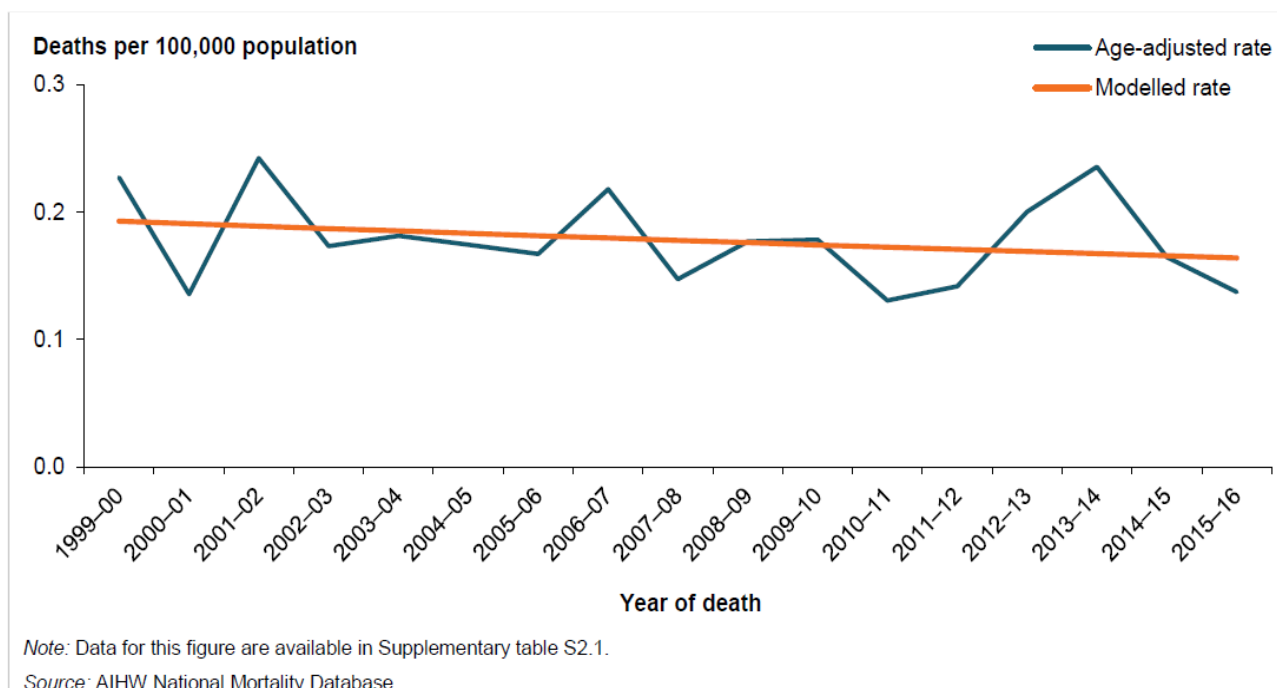


Figure 8. *Age-adjusted and modelled rates of cyclist deaths, 1999-00 to 2015-16*

[Source: Australian Institute for Health and Welfare, *Pedal cyclist deaths and hospitalisations: 1999-00 to 2015-16*, 2019]

2.53 The data extracted in Figure 8 reveals that the exact mortality figures fluctuate over time and the data records, in particular, that:

In the 17 years from 1999-00 to 2015-16, 651 pedal cyclists died in cycling crashes—an average of about 38 deaths per year. Of those fatally injured cyclists:

- nearly 9 in 10 were male
- nearly 8 in 10 were aged 25 or over
- half involved a person aged 45 or over
- 90% were the result of an on-road crash.⁷⁵

2.54 The Committee notes that the profile of cyclists who are injured in crashes has also changed significantly in the 17-year span of AIHW's research. Between 1999-2000 and 2015-16:

The number and proportion of fatally injured cyclists aged 45 years and over nearly doubled, from 35% of deaths for the first 3 years to 61% in the last 3 years. By contrast, the proportion of deaths involving cyclists under the age of 25 fell substantially, from 39% in the first 3 years to 12% in the last 3 years.

...

During the 3 years from 2013-14 to 2015-16, in nearly half of cyclist deaths (48%), the head and neck was the main area injured. In about 4 in 10 deaths, the cyclist had sustained injuries to multiple parts of their body (38%).⁷⁶

⁷⁵ *ibid.*, p 6.

⁷⁶ *ibid.*, pp 6–7.

- 2.55 The Committee notes that the seriousness of injuries that cyclists usually sustain can be interpreted as supporting both arguments for repealing MHL and for retaining helmet laws, depending on which aspect of the data is analysed:
- AIHW data shows that, compared with other road users (motorcyclists, pedestrians, motor vehicle occupants/drivers), cyclists 'had the lowest proportion of cases in which their injuries posed a high threat to life'.⁷⁷ Most cyclists who were hospitalised between 1999-00 and 2015-16 received injuries to their upper limbs (43 per cent), injuries which cannot be prevented by wearing a helmet.
 - Examining other aspects of the data set, however, can indicate that helmets are in fact useful in preventing more serious injury, as the second most common injury received by cyclists was to the head and neck: 25.9 per cent. Further, the two oldest age groups studied (45-64 years and 65 years and older) had very high rates of life-threatening injuries and more negative post-injury outcomes.⁷⁸ Analysing these two figures together can lead to the conclusion that retaining MHL is the best way to protect vulnerable, older cyclists from serious or even fatal injury.
- 2.56 The Committee notes that the issue of MHL is complex and opinion is guided by the objective of stakeholders. If the end goal is to increase cycling participation and address broader public health issues around obesity and cardiovascular health, then mandating helmet use is not an effective way to combat the problem. If, however, the objective of policy makers and legislators is to prevent head injuries and protect vulnerable road users, then MHL can be a useful tool (amongst others, such as improving road infrastructure) to achieve this. Stakeholders may, in practice, be guided by both objectives.

FINDING 2

Measures such as improved road infrastructure, lower speed limits and greater driver awareness and education are effective tools to increase cycling participation in Western Australia.

FINDING 3

Head and neck injuries accounted for 25.9 per cent of the cycling injuries between 1999-00 and 2015-16 (and 48 per cent between 2013-14 and 2015-16). Bicycle helmets are an effective safety measure to decrease the risk of such injuries when cycling.

FINDING 4

While bicycle helmets are effective for reducing the risk of serious or fatal head injuries, they cannot be relied upon as the only method of protecting cyclists. Governments must also ensure that effective bicycle infrastructure, such as separate shared paths or dedicated bicycle lanes, are part of any cycling policy.

Arguments against MHL

- 2.57 The Committee has heard evidence against MHL, some of which is referred to at paragraphs 2.31 and 2.36–2.39⁷⁹ (essentially, the claim that MHL discourage cycling), and some of which is discussed below, at paragraphs 2.58–2.65.

⁷⁷ The AIHW defines 'threat to life' with reference to the length of stay in hospital after being injured and/or being transferred to another acute care facility, which suggests severe injuries: *ibid.*, p 12.

⁷⁸ *ibid.*, pp 23–5.

⁷⁹ In paragraph 2.38, see bullet point three.

- 2.58 Apart from the impact on personal choice, the Committee has also heard that MHL may not be effective as a safety measure for preventing all injury. It may, in fact, increase the risk of injury to cyclists on a population basis because the disincentives associated with MHL may result in lower cycling participation and therefore an inability to capitalise on the 'safety in numbers' effect.
- 2.59 European research in the late 1990s and early 2000s first began to explore the idea that the rate of collisions between pedestrians/cyclists and vehicles could be affected by the number of people walking or cycling.⁸⁰ A study in 2003 further confirmed the safety in numbers principle as it applies on public roads when it observed that:
- Where, or when, more people walk or bicycle, the less likely any of them are to be injured by motorists. There is safety in numbers.
- Motorist behaviour evidently largely controls the likelihood of collisions with people walking and bicycling.
- ...
- Policies that increase walking and bicycling appear to be an effective route to improving the safety of people walking and bicycling.⁸¹
- 2.60 The Committee explored the safety in numbers concept further at a hearing with Professor Chris Rissel who offered this explanation of the relationship between increasing cycling participation in the community and the rate of injury amongst cyclists:
- as the numbers [of cyclists] increase, the relative rate of injuries starts to go down, and that is because there are more people on the road – or more people around – and the drivers and other road users learn to accommodate and adjust to the changing level of what they find before them, so with more people cycling.
- Then what happens is governments introduce better infrastructure and improvements to manage that situation better, with more people cycling, and so the net effect is that the more and more people cycle, the better conditions become for cycling, the better the other road users deal with cycling, and so the rate of injury actually falls even though the number of injuries might sort of creep up. But because there are so many more people cycling, the proportion of injuries to cyclists is actually smaller. It is a subtle difference between there might be a few more injuries, but because there are so many more people cycling, the rate of injuries is actually going down.⁸²
- 2.61 Data from a recent Canadian study of the relationship between bicycle helmets and rates of hospitalisation following incidents also supports the safety in numbers argument.⁸³ Teschke et al. investigated several jurisdictions within Canada with differing helmet legislation and bicycling mode shares to examine whether hospitalisation rates for cyclists were related to these differences.⁸⁴

⁸⁰ Research by Ekman (1996) and Leden (2000), cited in PL Jacobsen, 'Safety in numbers: more walkers and bicyclists, safer walking and cycling', *Injury Prevention*, 2003, vol. 9, pp 205–9.

⁸¹ PL Jacobsen, 'Safety in numbers: more walkers and bicyclists, safer walking and cycling', *Injury Prevention*, 2003, vol. 9, p 209.

⁸² Professor Chris Rissel, Professor, University of Sydney, *Transcript of evidence*, 10 May 2019, p 5.

⁸³ Kay Teschke, Mieke Koehoorn, Hui Shen & Jessica Dennis, 'Bicycling injury hospitalisation rates in Canadian jurisdictions: analyses examining associations with helmet legislation and mode share', *BMJ Open*, 2015, vol. 5.

⁸⁴ The Canadian provinces with no mandatory bicycle helmet laws for all ages were Manitoba, Newfoundland and Labrador, Quebec, Saskatchewan, the Northwest Territories, Yukon, Nunavut. The provinces with mandatory

- 2.62 The six-year study found that for traffic-related injury, a higher cycling rate was consistently associated with lower hospitalisation rates (the safety in numbers theory). Researchers also found a surprising result in that:

Helmet legislation was not associated with hospitalisation rates for all injury or traffic-related injury causes. ... We ... also examined the relationship between hospitalisation rates and helmet use proportions in the strata, and again did not find the expected protective effect. ...

... The fact that we did not find an effect of helmet *legislation* for injuries to any body region is not surprising, since most injuries were not head injuries. Even studies of helmet *use* have not found an effect for serious injuries to any body region. After a crash, injuries to the torso, extremities and neck cannot be mitigated by a helmet, and injuries to these body regions were incurred by 87% of the hospitalisations in this study. The lack of a protective effect of [helmet] legislation [as opposed to helmet use] on brain and head injury rates is more unexpected. ...

In our view, the most important implication of our results is that factors other than helmet legislation influenced bicycling hospitalisation rates, whereas helmet legislation did not.⁸⁵

(Committee emphasis.)

- 2.63 In the Committee's view, these findings from Canada undermine the argument put forward by MHL advocates that helmets are essential to avoid head injuries during collisions. The data also showed that most cycling injuries that resulted in hospitalisation were to the body, where helmets have no protective effect.
- 2.64 Professor Rissel advised the Committee that some helmets may even cause more injury during an accident, where the design of many bicycle helmets may exacerbate the risk of injury:

what is called a rotational axonal injury where the brain perhaps is twisted in the instance of a fall and, potentially, the helmet catches on the road and it twists the neck, the head spins ... the light foam bicycle helmets that are the law, that are the standard in Australia, often have ventilations that catch on the road that potentially make that situation worse. It is possible that the helmets we actually have may increase that internal brain injury ... because of those centrifugal forces.⁸⁶

- 2.65 Dr Sundance Bilson-Thompson also states that 'the lower the chance of being involved in a crash is, the less safety benefit one gains from wearing a helmet'.⁸⁷

Alternatives raised: the segmented approach

- 2.66 The Committee notes that there is an alternative to a complete repeal of MHL: a segmented approach to helmet wearing that may provide the benefits of increasing cycling participation while still ensuring that cyclist safety is a priority.
- 2.67 The segmented approach to MHL consists of amending legislation so that it applies only to specific segments of the community and/or in specific circumstances. In the most commonly

bicycle helmet laws for all ages were British Columbia, New Brunswick, Nova Scotia, Prince Edward Island; provinces with mandatory bicycle helmet laws for youth only: Alberta and Ontario: *ibid.*, p 4.

⁸⁵ *ibid.*, pp 9–10.

⁸⁶ Professor Chris Rissel, Professor, University of Sydney, *Transcript of evidence*, 10 May 2019, p 4.

⁸⁷ Submission 92 from Dr Sundance Bilson-Thompson, 5 October 2018, p 7.

cited segmented approach, MHL apply only to children under 18 years (or similar ages, such as 16 or 17 years of age) and on roads above a set speed limit, for example 40 or 50 kilometres per hour.⁸⁸

- 2.68 In its 2018 position paper, the Bicycle Network in Victoria recommended a five-year trial of a segmented approach 'permitting people over the age of 17 to ride on footpaths and cycle paths without a helmet'.⁸⁹

- 2.69 The City of Fremantle raised the option of a segmented approach being trialled within its local government boundaries:

There has been a strong support within the Fremantle community over recent years for a sensible relaxation of the rules around the mandatory use of bicycle helmets within central Fremantle.

...

First and simplest, would be an approach just focusing on riding on footpaths or off-road cycle path that is in line with Australia's Bicycle Network recently updated position on Australia's mandatory helmet laws

Second, the pilot scheme could be expanded further to also exempt mandatory helmets for adults on roads with speeds 40kmh or under. This is the whole of the Fremantle CBD

Third, the scheme could be even expanded further to also exempt mandatory helmets for adults on roads with speeds 50kmh or under. This would include all local roads within Fremantle with the exemption of major arterial roads like High St (East)/Leach Hwy and South Street.⁹⁰

- 2.70 The Committee investigated the segmented approach at hearings and has found that there is some support for the relaxation of MHL to apply only to particular segments of the community. For example, one witness said:

I think that a segmented approach is probably the most sensible policy move at this point in the Australian context I think it would be highly desirable to trial a segmented, staged approach and evaluate that really carefully to demonstrate what does actually happen in terms of cycling participation and also injury and head injury rates.⁹¹

- 2.71 However, the Road Safety Council expressed concern with the possibility of implementing a segmented approach:

if we began to segment [MHL], it would give us, I think, confusion. It would probably also undermine the general culture that we have established over a long period of time now.⁹²

- 2.72 WestCycle was also hesitant when questioned about the viability of trialling a segmented approach and noted that confusion could ensue:

If we were to conduct a trial on, say, bike paths or footpaths ... it is likely that a cyclist would have to change environments multiple times – go on roads, go in

⁸⁸ For example, in the Northern Territory (see paragraphs 2.21–2.22).

⁸⁹ Bicycle Network, *Australia's mandatory helmet laws—Bicycle Network position paper*, October 2018, p 2.

⁹⁰ Submission 103 from City of Fremantle, 26 November 2018, pp 1–2.

⁹¹ Professor Chris Rissel, University of Sydney, *Transcript of evidence*, 10 May 2019, p 6.

⁹² Iain Cameron, Chair, Road Safety Council, *Transcript of evidence*, 22 February 2019, p 15.

different circumstances. A trial, in certain situations, therefore would become incredibly complex in that if a rider goes from a shared path onto a road that is a 60-kilometre environment, they will be in a position of having to not wear a helmet then wear a helmet then not wear a helmet again, depending on the route they are taking. I think it is too complex to do a trial as suggested.⁹³

2.73 The Department of Transport had similar reservations about a segmented approach to helmet laws.⁹⁴

2.74 The Committee notes data compiled by the Centre for Accident Research and Road Safety (CARRS) in Queensland that investigated the direct and indirect safety effects of a segmented approach. CARRS found that implementing a segmented approach could influence behaviour in unexpected ways:

bicycle helmet legislation applying only to riders aged under 18 would have the direct effect of increasing helmet wearing among that group but not the older group.

However, it is likely that riders aged under 18 (and their parents and peers) would consider that helmets are not as important or necessary if they are not required by older riders. This may lead to a lower wearing rate by young riders under segmented legislation than under universal legislation. This would be an example of an indirect effect of a segmented approach to helmet legislation.⁹⁵

(Committee emphasis.)

2.75 CARRS undertook research into the potential effects if a segmented approach to MHL were taken in Queensland, with the following findings:

- If MHL applied to children only and the helmet wearing rate for adults fell to zero as a result, CARRS predicted that:

a 56% increase in head injuries to adults would be expected. Assuming that adults comprise 65% of cyclists injured in on-road crashes, this would correspond to an overall 36% increase in head injuries to all cyclists injured in on-road crashes.

Similarly, if the helmet wearing rate for adults fell to half of its current rate (ie to 40%) as a result of requiring helmets only for children, the proportion of head injuries (where 1 is zero wearing) would increase from 0.44 to 0.72, assuming that adults comprise 65% of cyclists in on-road crashes, this would correspond to an overall 18% increase in head injuries to all cyclists injured in on-road crashes.⁹⁶

- If MHL applied only to roads with a speed limit above 40 kilometres per hour and this resulted in a helmet-wearing rate of zero in other speed zones, CARRS predicted that:

a 51% increase in head injuries in the lower speed zones would be expected ...

if, for example, the helmet wearing rate in 50 and 60 km/h zones fell from 73% to 58%, then a 10% increase in head injuries in 50 and 60 km/h zones would be expected. Given that 50 and 60 km/h zones would together comprise 90% of

⁹³ Matt Fulton, Chief Executive Officer, WestCycle, *Transcript of evidence*, 26 November 2018, p 4.

⁹⁴ Michelle Prior, Acting Director, Transport Planning, Major Urban Centres, Department of Transport, *Transcript of evidence*, 27 February 2019, p 10.

⁹⁵ Queensland, Centre for Accident Research and Road Safety, *CAARS-Q Monograph 5 Bicycle Helmet Research*, November 2010, p 47.

⁹⁶ *ibid.*, p 48.

cyclist Police-reported crashes, this would correspond to an overall 9% increase in head injuries to all cyclists injured in on-road crashes.⁹⁷

- 2.76 The Committee has extracted a table outlining CARRS' findings from its report at Figure 9 (note that 'HI' means 'head injuries').

Approach	On road crashes	Off road crashes	All bicycle crashes
Mandatory for under 18 only			
Direct effect			
Halve wearing rate	28% inc in HI adults 18% inc in HI all cyclists	28% inc in HI adults 10% inc in HI all cyclists	28% inc in HI adults 14% inc in HI all cyclists
Zero wearing rate	56% inc in HI adults 36% inc in HI all cyclists	56% inc in HI adults 20% inc in HI all cyclists	56% inc in HI adults 28% inc in HI all cyclists
Indirect effect			
Drop in child wearing rate from 65% to 50%	10% inc in HI children 3% inc in HI all cyclists	10% inc in HI children 6% inc in HI all cyclists	10% inc in HI children 4% inc in HI all cyclists
Mandatory on roads with speed limit greater than 40 km/h			
Direct effect			
Halve wearing rate	26% inc in HI 40 km/h zones 1% inc in HI all cyclists	26% inc in HI	13% inc in HI all cyclists
Zero wearing rate	51% inc in HI 40 km/h zones 3% inc in HI all cyclists	51% inc in HI	27% inc in HI all cyclists
Indirect effect			
Drop in wearing rate on 50 and 60 km/h roads from 73% to 58%	10% inc in HI 50 and 60 km/h zone 9% inc in HI all cyclists		4% inc in HI all cyclists
Mandatory on roads but not off-road			
Direct effect			
Halve wearing rate		26% inc in HI	13% inc in HI all cyclists
Zero wearing rate		51% inc in HI	26% inc in HI all cyclist
Indirect effect			
Drop in wearing rate on roads from 73% to 58%	10% inc in HI		5% inc in HI all cyclists

Figure 9. *Summary of potential effects of different segmentation approaches in Queensland*
[Source: Queensland Centre for Accident Research and Road Safety, *Bicycle Helmet Research*, 2010]

Committee's conclusions on mandatory bicycle helmet laws

- 2.77 The Committee is of the view that MHL is a complex and multi-faceted issue.
- 2.78 Stakeholders and community opinion is divided, raising arguments that both support helmet use as a means to prevent injury but also opposing helmets as a barrier to cycling participation. The Committee has heard evidence from submitters that many people are put off cycling because of the requirement to wear a bicycle helmet. Other submissions, however, have raised the point that helmet use is so widespread that it has become normalised in the community.
- 2.79 In any event, the Committee notes that a clear objective is necessary before setting a policy agenda on MHL: if a government puts greater priority on increasing cycling participation

⁹⁷ *ibid.*, pp 49–50.

(and, by extension, more people on the streets and more participation in exercise) then MHL are not an effective way to achieve this objective. However, if the goal is to protect vulnerable road users such as children who cycle, then MHL can be an effective tool.

- 2.80 The Committee is of the view that the Government should be very clear about its intention in mandating helmet use in Western Australia and this should be communicated to the community in certain terms. The Committee makes the following findings and recommendations:

FINDING 5

While the current legislative regime, that mandates the wearing of bicycle helmets while cycling, restricts personal choice for individuals, this regime is clearly an effective safety measure for the prevention of head and brain injuries.

FINDING 6

The public health benefits of increased cardiovascular activity and physical movement associated with an increase in cycling participation is a worthwhile objective. The Government should consider analysing and continuing to monitor the costs and benefits of mandatory bicycle helmet laws.

RECOMMENDATION 1

The Government investigate the potential for a trial exemption from mandatory bicycle helmet laws in low risk, segregated areas, for example, Rottnest Island.

RECOMMENDATION 2

The Government investigate undertaking a cost-benefit analysis on the effectiveness of mandatory bicycle helmet laws in Western Australia.

CHAPTER 3

E-cigarettes

Introduction

- 3.1 The Committee received 36 submissions that related to the current prohibition on e-cigarettes and related products: 61 per cent of those supported the legalisation of vaping.
- 3.2 Submissions raised the following concerns:
- E-cigarettes can help smokers to reduce their nicotine intake and/or quit smoking completely.⁹⁸
 - There is insufficient evidence about the safety/efficacy of e-cigarettes therefore the precautionary approach should be followed.⁹⁹
 - Current prohibitions on e-cigarettes create a black market for the products.¹⁰⁰
 - E-cigarette products manufactured in an overseas black market are not regulated and can therefore be dangerous to consumers.¹⁰¹
 - Retailers should be allowed to sell e-cigarettes to remain viable in the current economy.¹⁰²
 - E-cigarette use can lead to increased later uptake of combustible cigarettes, especially amongst children/young people.¹⁰³
- 3.3 The Committee notes that the concerns expressed by submitters who identified as current users of e-cigarettes (often known as 'vapers') broadly reflect recent research that investigated the views of e-cigarette users in Australia.¹⁰⁴ Researchers surveyed current users of e-cigarettes and found that their view was that:
- e-cigarettes should be encouraged as an alternative to smoking and that there was a need for more public education around e-cigarettes.¹⁰⁵
- 3.4 The research also revealed a view that:
- In general, support for regulating e-cigarettes and refill solutions was largely focused on the greatest benefit and minimal inconvenience for the current e-cigarette user community, rather than wider society who do not currently use e-cigarettes. Many e-cigarette users wanted the government to ensure the devices are controlled for quality, but did not want restrictions on their ability to access and use the wide variety of e-cigarettes they were accustomed to.¹⁰⁶

⁹⁸ Submission 79 from Dr Joe Kosterich, 5 October 2018.

⁹⁹ Submission 62 from Department of Health, 5 October 2018.

¹⁰⁰ Submission 48 from TSG Franchise Management Pty Ltd, 4 October 2018.

¹⁰¹ Submission 101 from Australian Lottery and Newsagents Association, 31 October 2018.

¹⁰² Submission 61 from Australian Retailers Association, 5 October 2018.

¹⁰³ Submission 83 from School of Population and Global Health, University of Western Australia, 5 October 2018.

¹⁰⁴ Doug Fraser, Megan Weier, Helen Keane and Coral Gartner, 'Vapers' perspective on electronic cigarette regulation in Australia', *International Journal of Drug Policy*, 2015, vol. 26, pp 589–94.

¹⁰⁵ *ibid.*, p 591.

¹⁰⁶ *ibid.*, p 593.

What are e-cigarettes?

- 3.5 Before e-cigarettes were invented, the term 'cigarette' described only those traditional, combustible cigarettes that contain dried tobacco (amongst other things) and that work by burning the contents of the cigarette and inhaling the smoke created. Throughout this report, the Committee will refer to these types of cigarettes as 'combustible cigarettes' to differentiate them from e-cigarettes.
- 3.6 The origin of e-cigarettes can be tracked to the early 2000s in China, where they were developed by a pharmacist as an alternative for smokers of combustible cigarettes.¹⁰⁷ Since they were initially developed, the Committee notes that e-cigarettes have evolved from 'first generation' devices that primarily resembled combustible cigarettes, through to the larger, tank-style devices known as 'third generation' e-cigarettes that have higher liquid and battery capacity: see Figure 10.
- 3.7 The basic premise of an e-cigarette is a device that works by heating liquid ('e-liquid') to create a vapour that is then inhaled by the user. E-cigarettes are portable, usually containing a small replaceable battery or rechargeable facility (often by USB), an airflow sensor to activate the battery and an aerosol generator used to vaporise the liquid within the device into its inhalable state. E-cigarette devices may or may not be refillable.





Product	Description	Some brands
Disposable e-cigarette 	Cigarette-shaped device consisting of a battery and a cartridge containing an atomizer to heat a solution (with or without nicotine). Not rechargeable or refillable and is intended to be discarded after product stops producing vapor. Sometimes called an e-hookah.	NJOY OneJoy, Aer Disposable, Flavorvapes
Rechargeable e-cigarette 	Cigarette-shaped device consisting of a battery that connects to an atomizer used to heat a solution typically containing nicotine. Often contains an element that regulates puff duration and/or how many puffs may be taken consecutively.	Blu, GreenSmoke, EonSmoke
Pen-style, medium-sized rechargeable e-cigarette 	Larger than a cigarette, often with a higher-capacity battery, may contain a prefilled cartridge or a refillable cartridge. Often come with a manual switch allowing the user to regulate length and frequency of puffs.	Vapor King Storm, Totally Wicked Tornado
Tank-style, large-sized rechargeable e-cigarette 	Much larger than a cigarette with a higher-capacity battery and typically contains a large, refillable cartridge. Often contains manual switches and a battery casing for customizing battery capacity. Can be easily modified.	Volcano Lavatube

Figure 10. *Types of e-cigarettes*

[Source: SA Glantz and DW Bareham, 'E-cigarettes: Use, effects on smoking, risks and policy implications', *Annual Review of Public Health*, 2018]

E-liquids

- 3.8 E-liquids (also known as 'e-juice') for e-cigarette use are available in many flavourings, including imitation fruit and confectionery fluids. Some e-liquids also contain nicotine at various strengths, with or without additional flavour to mask the nicotine taste. E-liquid

¹⁰⁷ SA Glantz and DW Bareham, 'E-cigarettes: Use, effects on smoking, risks and policy implications', *Annual Review of Public Health*, 2018, vol. 39, pp 215–35, at p 216. R Grana, N Benowitz and SA Glantz, 'E-cigarettes: A scientific review', *Circulation*, 2014, vol. 129, issue no. 19, pp 1972–86, at p 1972.

containing nicotine will typically consist of a solution of water, nicotine, propylene glycol, vegetable glycerine and some flavouring.¹⁰⁸

3.9 The vapour that is released from an e-cigarette, and inhaled by the user (in a process known as 'vaping'), contains water and the by-products of the ingredients in the e-liquid; for those users who vape with nicotine, this can contain some nicotine vapour.¹⁰⁹

3.10 Flavour and colour additives are often added to e-liquids to make them more palatable to users or as part of the vaping experience. The chemicals added to the e-liquids may be rated as food grade, but some research notes that certification for oral ingestion may not equate to safety for inhalation in an e-cigarette.¹¹⁰

3.11 The Committee heard that some e-liquids available in Western Australia could be contaminated or incorrectly labelled as being nicotine-free, when they do contain amounts of highly addictive nicotine. Some sweet flavourings of e-liquids have been associated with an increased risk of tooth decay.¹¹¹

3.12 Telethon Kids Institute research investigated the ingredients of 10 e-liquids labelled as 'nicotine-free' in a variety of brands and flavours and analysed the fluids in a commercial laboratory.¹¹² Researchers found that nicotine was detected in six of the e-liquids tested, with three at levels 'comparable with those of commonly available low dose nicotine e-liquids'.¹¹³ In addition to this finding:

All electronic cigarette liquids tested in the study also contained traces of 2-chlorophenol, which is a common breakdown product of some insecticides, herbicides and disinfectants, and is known to irritate human airways and skin. Another substance detected was 2-amino-octanoic acid, which is found in blood, urine, and faeces of mammals and may indicate the contamination of the product during manufacture.¹¹⁴

3.13 Some e-liquids have also been found to contain other harmful and widely varying substances, such as heavy metals, volatile organic compounds, cancer-causing chemicals and cannabinoids.¹¹⁵

¹⁰⁸ Tobacco Advisory Group of the Royal College of Physicians, *Nicotine without smoke: tobacco harm reduction*, Royal College of Physicians, London, April 2016, p 74

¹⁰⁹ United Kingdom, Action on Smoking and Health, *Briefing: Electronic Cigarettes*, December 2018, p 3.

¹¹⁰ Peyton A Tierney et al., 'Flavour chemicals in electronic cigarette fluids', *Tobacco Control*, 2016, vol. 25, p 14.

¹¹¹ Shin Ae Kim et al., 'Cariogenic potential of sweet flavours in electronic-cigarette liquids', *PLoS ONE*, 2018, vol. 13(9), p 17.

¹¹² The e-liquids were bought online and over the counter from Australian suppliers. The researchers did not reveal the brands of e-liquid purchased: Emily Chivers et al., 'Nicotine and other potentially harmful compounds in "nicotine-free" e-cigarette liquids in Australia', *Medical Journal of Australia*, 2019, vol. 210(3), pp 127–8.

¹¹³ *ibid.*, p 127.

¹¹⁴ Australian Government, Department of Health, Therapeutic Goods Administration, *A warning to consumers about the serious health risks relating to e-cigarette liquid*, 15 January 2019. See: <https://www.tga.gov.au/media-release/warning-consumers-about-serious-health-risks-relating-e-cigarette-liquid>. Viewed 7 January 2020.

¹¹⁵ Commonwealth, State and Territory Chief Medical Officers, *E-cigarettes linked to severe lung illness*, Media statement, Department of Health (Cth), 13 September 2019. See: <https://www.health.gov.au/news/e-cigarettes-linked-to-severe-lung-illness>. Viewed 24 September 2019.

3.14 Most e-cigarettes are manufactured in China by a few large manufacturers.¹¹⁶ The Committee notes, however, that multinational tobacco companies have recently begun to move into the e-cigarette market by:

- manufacturing competing e-cigarette products, such as 'Blu'
- purchasing existing companies, such as 'JUUL'.¹¹⁷

The tobacco industry's share of the global vaping market is estimated to be less than 20 per cent.¹¹⁸

3.15 Heat-not-burn products are different to e-cigarettes because they contain tobacco, which is then heated to release a tobacco vapour, rather than burned to produce tobacco smoke. According to Philip Morris International, one of the largest manufacturers of heat-not-burn products in the world, its 'IQOS' product 'heats tobacco to much lower temperatures [than combustible cigarettes], up to 350°C, without combustion, fire, ash or smoke.'¹¹⁹

Smoking rates in Australia

3.16 The Australian Bureau of Statistics (ABS) compiles data on smoking rates for Australians, with the most recent data available for 2017-18. The ABS found that 13.8 per cent of adults (2.6 million people) were daily smokers in 2017-18 and a further 1.4 per cent also reported smoking, but on a less than daily basis.¹²⁰

3.17 Since 1995, ABS data notes the proportion of daily smokers in Australia decreasing: from 23.8 per cent to 13.8 per cent. Since 2014-15, however, the decline in the daily smoking rate has slowed, only falling from 14.5 per cent to the current 13.8 per cent rate. Figure 11 below illustrates the decrease in smoking rates over the 18-year period from 2001 to 2018.

¹¹⁶ David Barboza, 'China's E-Cigarette Boom Lacks Oversight for Safety', *The New York Times*, 13 December 2014. See: <https://www.nytimes.com/2014/12/14/business/international/chinas-e-cigarette-boom-lacks-oversight-for-safety-.html?smid=pl-share>. Viewed 3 July 2019.

¹¹⁷ Sophie Alexander, 'Juul Founders Are Crowned Billionaires as Altria Takes a Stake', *Bloomberg*, 20 December 2018. See: <https://www.bloomberg.com/news/articles/2018-12-19/juul-founders-poised-to-be-crowned-billionaires-with-altria-deal>. Viewed 3 July 2019. Note that Altria Group Inc. is the parent company of Philip Morris USA, which operates separately to Philip Morris International.

¹¹⁸ Australian Tobacco Harm Reduction Association, *Is vaping a conspiracy created by Big Tobacco?*, 2 October 2018. See: <https://athra.org.au/blog/2018/10/02/is-vaping-a-conspiracy-created-by-big-tobacco/>. Viewed 15 October 2019.

¹¹⁹ Philip Morris International, Our Tobacco Heating System: IQOS. See: <https://www.pmi.com/smoke-free-products/iqos-our-tobacco-heating-system>. Viewed 1 July 2019.

¹²⁰ Australian Government, Australian Bureau of Statistics, *National Health Survey First Results: Australia 2017-18*, 12 December 2018, p 44.

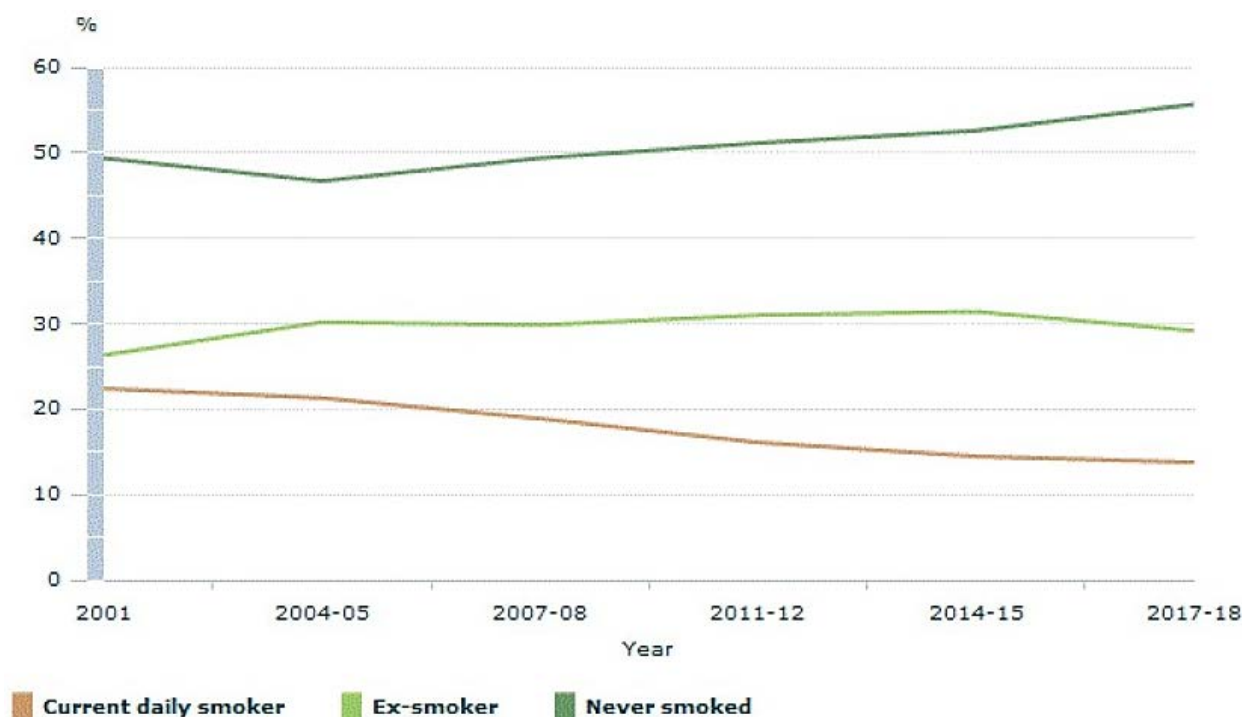


Figure 11. *Persons aged 18 years and over: proportion by current smoker status, 2001 to 2017-18*
[Source: Australian Bureau of Statistics, National Health Survey 2017-18]

- 3.18 Under the Council of Australian Governments' National Healthcare Agreement, Australian governments committed to reducing the national daily smoking rate among adults from 19.1 per cent in 2007-08 to 10 per cent by 2017-18.¹²¹ Based on the figures presented immediately above, while daily smoking rates among adults have reduced significantly, that target has not yet been achieved.

FINDING 7

While the national daily smoking rate among adults has reduced significantly, the Council of Australian Governments' goal of a 10 per cent rate by 2018 has not been achieved.

- 3.19 The number of adults who have never smoked has increased from 49.4 per cent in 2007-08 to 55.7 per cent in 2017-18.¹²² According to ABS data, young people aged 18-24 are now more likely to never have smoked than a decade ago, a 64 per cent improvement on the figures from 2007-08.¹²³ By comparison, 18.4 per cent of men and 10.5 per cent of women aged 18-24 were current smokers in 2017-18.
- 3.20 Further, the young adult age group was the most likely of all age demographics to have never smoked, with the never-smoked rate having increased over the past decade.¹²⁴

¹²¹ Australian Government, Department of Health, *National Tobacco Strategy*, 24 April 2018. See: <https://www1.health.gov.au/internet/main/publishing.nsf/Content/tobacco-strategy>. Viewed 15 October 2019.

¹²² Australian Government, Australian Bureau of Statistics, *National Health Survey First Results: Australia 2017-18*, 12 December 2018, p 44.

¹²³ *ibid.*, p 7.

¹²⁴ In 2017-18, 69.6 per cent of men and 81.5 per cent of women aged 18-24 had never smoked, while in 2007-08, the never-smoked rate for men aged 18-24 years was 64 per cent and 64.9 per cent for women: *ibid.*, p 44.

- 3.21 The National Health Survey also surveyed 15–17 year olds and found that 1.9 per cent of that age group were daily smokers, while 95.3 per cent reported that they had never smoked.¹²⁵
- 3.22 The Committee has heard that the rate of smoking may be slowing down because ‘older smokers continue to smoke because they are the most addicted’.¹²⁶ This statement can be reconciled with the ABS data above, as the rates of young people who have never smoked indicates that smoking may not be as accepted amongst young adults as for previous generations.
- 3.23 The Committee has found that it is difficult to ascertain with certainty how many people currently use e-cigarettes in Australia. Witnesses have advised that reliable statistics are unavailable due to the confusing legal status of e-cigarettes across states and territories, particularly with regard to e-cigarettes containing nicotine.
- 3.24 Data from the AIHW National Drug Household Strategy Survey conducted in 2016 provides one indication of how many people use e-cigarettes. The Committee notes the following data from the 2016 National Drug Strategy Household Survey in relation to e-cigarette use:
- E-cigarette use was most common among smokers aged 18–24 years (6.8 per cent currently using).
 - In 2016, 31 per cent of current smokers had tried e-cigarettes in their lifetime and 4.4 per cent were currently using e-cigarettes.
 - People aged 50 years or over were more likely to use e-cigarettes as a quit-smoking aid, while people under 30 years of age were more likely to use e-cigarettes out of curiosity.
 - E-cigarettes that contain nicotine are among the least commonly used ‘tobacco products’ for smokers: 4.4 per cent of smokers use them. Eighty-six per cent of smokers use manufactured combustible cigarettes and 36 per cent use roll-your-own cigarettes.¹²⁷
- 3.25 The National Drug Strategy Household Survey also revealed the change over three years of data (from 2013) in the number of people who had ever used e-cigarettes (known as ‘lifetime use’):
- The number of people over 18 years with lifetime use doubled between 2013 and 2016: 4.4 per cent to 8.8 per cent.
 - In the 18–24 year old person demographic, the lifetime use of e-cigarettes increased from 9.5 per cent to 19.2 per cent and for persons aged 25–29, lifetime use increased from 7.9 per cent to 14.8 per cent (a 102 per cent and 87 per cent increase, respectively).
 - In the sub-category of smokers, those aged 18 years or over with lifetime e-cigarette use increased from 17.9 per cent to 30.8 per cent, while non-smokers over 18 who had tried e-cigarettes increased from 1.8 per cent to 4.7 per cent.¹²⁸
- 3.26 Recent research that analysed the 2016 data from the National Drug Strategy Household Survey estimated that 227 000 Australians were current e-cigarette users and 97 000 used

¹²⁵ The data notes that there may be under-reporting among this group of underage smokers due to ‘social pressures, particularly in cases where other household members were present at the interview’: *ibid.*, p 46.

¹²⁶ Ashley Reid, Chief Executive Officer, Cancer Council WA, *Transcript of evidence*, 16 November 2018, p 5.

¹²⁷ Australian Government, Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016: detailed findings*, 28 September 2017, pp 25–8.

¹²⁸ Australian Government, Australian Institute of Health and Welfare, *National Drug Strategy Household Survey: Data Tables Chapter 3 Tobacco*, 28 September 2017, Table 3.16.

them on a daily basis. Being a smoker was the strongest correlate for e-cigarette use and 'those who vaped daily were most likely to be recent quitters' of combustible cigarettes.¹²⁹

- 3.27 Data from the 2017 Australian Secondary School Students' Use of Tobacco, Alcohol, Over-the-Counter Drugs and Illicit Substances report (ASSAD 2017) also provides an indication of how many children use or have used e-cigarettes.¹³⁰
- 3.28 ASSAD 2017 surveyed 19 115 secondary school students aged between 12 and 17 years of age and made the following findings in relation to the number of children who smoke combustible cigarettes:
- 83 per cent of all secondary students had never smoked combustible cigarettes, with 65 per cent of students not having smoked by age 17.
 - The rate of current smokers of combustible cigarettes varied across age groups: 2 per cent of 12 year olds were current smokers, compared with 16 per cent of 17 year olds. The total number of current smokers aged 12–17 years was 79 000 in 2017.
 - Fewer students in general smoked in 2017 than in 2011 and, of those that did, they smoked fewer combustible cigarettes.
 - Since 1996, the prevalence of smoking among students has continued to decline: 2017 had the lowest rate of current students smoking ever observed.¹³¹
- 3.29 The survey also analysed the use of e-cigarettes among 12–17 year olds and data showed that:
- For all 12–17 year olds, around 13 per cent (2485 students) indicated they had used an e-cigarette at least once and experience with e-cigarettes increased with age: 4 per cent of 12 year olds having tried them, compared with 21 per cent of 17 year olds.
 - Almost half (48 per cent, which equates to 1193) of the students who had ever tried an e-cigarette had never smoked a combustible cigarette before vaping. Twenty-five per cent of those students (298 students) then went on to try combustible cigarettes. Of those 298 students, 5 per cent (or 15 students) became current smokers. These 15 students represent 1.25 per cent of the 1193 students who had vaped at least once and had never smoked before vaping. The ASSAD 2017 findings 'suggest that students who experiment with e-cigarettes are more likely to later try tobacco cigarettes than those who have never vaped'.
 - 'It was more common among younger students (64%) than older students to try an e-cigarette without ever having previously smoked more than 10 tobacco [combustible] cigarettes.'¹³²

Which international jurisdictions allow the sale and use of e-cigarettes?

- 3.30 The Committee notes that e-cigarettes are increasingly permitted in countries around the world. The House of Representatives Standing Committee on Health, Aged Care and Sport summarised the international jurisdictions that permit e-cigarettes in its final report and the

¹²⁹ Gary Chan et al., 'Correlates of electronic cigarette use in the general population and among smokers in Australia – Findings from a national representative survey', *Addictive Behaviors*, 2019, vol. 95, August 2019, pp 6–10.

¹³⁰ Nicola Guerin & Victoria White, Cancer Council Victoria, *ASSAD 2017 Statistics & Trends: Australian Secondary Students' Use of Tobacco, Alcohol, Over-the-Counter Drugs and Illicit Substances*, December 2018.

¹³¹ *ibid.*, pp 14–18.

¹³² *ibid.*, p 21.

Committee reproduces it here at Table 4.¹³³ The jurisdictions listed in the table below regulate e-cigarettes as general consumer or tobacco products.

Table 4. *International approaches to regulating e-cigarettes*

Jurisdiction	Are e-cigarettes permitted?
European Union	E-cigarettes are regulated as consumer products under the Tobacco Products Directive, with requirements relating to maximum nicotine concentration, container specifications, warnings and standards for ingredients.
United Kingdom	Currently adheres to the EU's Tobacco Products Directive (see above) through UK regulations (Brexit will affect this). E-cigarettes (both nicotine-containing and non-nicotine) can be bought and sold legally and are regulated under general consumer protection law.
Canada	From May 2018, adults in Canada can buy e-cigarettes containing nicotine and other vaping products legally. All vaping products are now regulated in their own right, separate from tobacco products. Vaping products for which therapeutic claims are made must be authorised by Health Canada before they can be advertised or sold. Where no such claims are made, the vaping products are regulated as consumer goods. Vaping products cannot be promoted or sold to anyone under 18 years of age, which includes promoting vape flavours that appeal to youth. ¹³⁴
United States of America	The Food and Drug Administration (FDA) regulates e-cigarettes containing nicotine in the same way as tobacco products and e-cigarettes that make therapeutic claims are regulated by the Center for Drug Evaluation and Research. State and local jurisdictions regulate e-cigarette use (for example, San Francisco has banned the sale of e-cigarettes). ¹³⁵ E-cigarettes containing nicotine cannot be sold or marketed to minors (see for example, lawsuits against JUUL). The FDA has specific and comprehensive requirements for manufacturers, retailers and those who repack or relabel vaping products (including vape shops that mix their own liquids). ¹³⁶ See paragraphs 3.125–3.133 for recent developments in the US.
New Zealand¹³⁷	Vaping products are regulated as tobacco products in New Zealand if they contain tobacco. Generic product safety standards apply to all vaping products. It is illegal to sell any vaping products while making therapeutic claims about them without approval from Medsafe (Medicines and Medical Devices Safety Authority, run by the Department of Health). ¹³⁸ A New Zealand District Court case in 2018 found that all tobacco products (except chewing tobacco) may be lawfully imported, sold and distributed in New Zealand under current legislation. Minors cannot use/buy e-cigarettes.

[Source: House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia*, March 2018 and other sources as cited]

¹³³ Table 4 also includes updated information on New Zealand and Canada, both countries that have changed their legislation on the use and sale of e-cigarettes since March 2018, when the report was tabled.

¹³⁴ Government of Canada, *Vaping product regulation*, 21 December 2018. See: <https://www.canada.ca/en/health-canada/services/smoking-tobacco/vaping/product-safety-regulation.html>. Viewed 3 January 2019.

¹³⁵ Russell Hotten, 'San Francisco becomes first US city to ban e-cigarettes', *BBC Online*, 25 June 2019.

¹³⁶ US Department of Health and Human Services, US Food & Drug Administration, *Vaporizers, E-Cigarettes and other Electronic Nicotine Delivery Systems (ENDS)*, 17 December 2018. See: <https://www.fda.gov/TobaccoProducts/Labeling/ucm456610.htm>. Viewed 3 January 2019.

¹³⁷ For further information on how New Zealand regulates e-cigarettes, see paragraphs 3.117–3.124.

¹³⁸ New Zealand Government, Ministry of Health, *Vaping and smokeless tobacco—Minister of Health position statement – Vaping products*, 12 September 2018. See: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco>. Viewed 3 January 2019.

- 3.31 Seven countries currently ban the sale of e-cigarettes containing nicotine: Australia, Costa Rica, Jamaica, Japan, Malaysia, Mexico and Switzerland.¹³⁹

How e-cigarettes are regulated across Australia

- 3.32 The legislative framework for e-cigarettes consists of mainly state legislation, with a Commonwealth statute that governs the poisons aspect of nicotine and the work of the Therapeutic Goods Administration (TGA). E-cigarette devices and e-liquids containing nicotine are regulated differently from those that are non-nicotine, so this discussion deals with the two categories in turn.

Regulation of e-cigarette devices and e-liquids containing nicotine—*Poisons Standard* (Cth)

- 3.33 The *Poisons Standard*¹⁴⁰ contains classification decisions of medicines and poisons separated into 10 schedules according to seriousness and information related to containers and labels for storage and use. The *Poisons Standard* is given legal effect through relevant legislation in each state and territory.¹⁴¹
- 3.34 Although each Australian jurisdiction may make its own laws to determine the availability of poisons and medicines, they have, in the majority of cases, classified these substances consistently with the *Poisons Standard*.
- 3.35 Nicotine appears in Schedule 7 of the *Poisons Standard* and is therefore scheduled as a 'dangerous poison'.¹⁴² This scheduling is maintained in each Australian jurisdiction and the commercial supply of nicotine is prohibited by legislation in every state and territory.¹⁴³ Other dealings with nicotine (such as possession, manufacturing and use) may also be prohibited and each state and territory has its own set of nicotine-related offences.¹⁴⁴

Regulation of non-nicotine e-cigarette devices and e-liquids—state/territory legislation

- 3.36 E-cigarette devices and e-liquid refills that do not contain nicotine can generally be sold legally in all Australian states and territories, except for Western Australia. However, these jurisdictions have amended their tobacco control laws to treat the advertising, sale and use of these products in a manner similar to the regulation of conventional tobacco products.¹⁴⁵
- 3.37 Additionally, it is illegal in South Australia for retailers to sell e-cigarette products by mail, telephone, fax, email, Internet or other electronic means.¹⁴⁶

¹³⁹ Commonwealth Parliament, House of Representatives, Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia*, March 2018, p 82.

¹⁴⁰ A legislative instrument made under the *Therapeutic Goods Act 1989* (Cth).

¹⁴¹ Commonwealth Parliament, House of Representatives, Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia*, March 2018, p 25.

¹⁴² *Poisons Standard October 2019* (Cth), pp iv and 239 (Schedule 7).

¹⁴³ Commonwealth Parliament, House of Representatives, Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia*, March 2018, pp 25 and 89.

¹⁴⁴ Refer to paragraphs 3.40–3.57 and 3.61–3.67 for more detail about how nicotine is scheduled in the *Poisons Standard* and how Western Australia deals with e-cigarette products containing nicotine.

¹⁴⁵ Australian Government, Department of Health, Therapeutic Goods Administration, *Electronic cigarettes*, 10 October 2019. See: <https://www.tga.gov.au/community-qa/electronic-cigarettes>. Viewed 22 October 2019. Refer to paragraphs 3.61–3.68 for more detail about how Western Australia deals with non-nicotine e-cigarette products.

¹⁴⁶ *Tobacco and E-Cigarette Products Act 1997* (SA) s 30(2)

This includes sales by retailers based in other jurisdictions who are selling e-cigarettes into South Australia through on-line sales, as well as businesses based in South Australia selling to local or interstate customers.¹⁴⁷

How e-cigarettes are regulated in Western Australia

Framework

- 3.38 The *Tobacco Products Control Act 2006* (TPCA) is the principal statute that regulates the sale or use of tobacco and related products in Western Australia. The TPCA is therefore the statute that also regulates e-cigarette devices in Western Australia.
- 3.39 The nicotine that may be present in e-liquids is regulated under the *Medicines and Poisons Act 2014* (MPA), as the substance is classified as a poison according to statute. This classification of nicotine as a poison is derived from the *Poisons Standard*, which is incorporated into the MPA.¹⁴⁸

Regulation of e-cigarette devices and e-liquids containing nicotine—*Medicines and Poisons Act 2014* (WA)

Schedule 7 nicotine

- 3.40 Nicotine appears in several schedules in the *Poisons Standard*,¹⁴⁹ depending on the concentration of the substance and its intended use. The highest classification in which nicotine appears is Schedule 7 ('Dangerous Poison'), which specifies that nicotine is classified at this level, except:
- (a) when included in Schedule 6 [nicotine at a concentration, and when labelled and packed, for the treatment of animals (see paragraph 3.49 for a discussion of Schedule 6 of the *Poisons Standard*)];
 - (b) in preparations for human therapeutic use [see paragraphs 3.44–3.55 for a discussion of Schedule 4 of the *Poisons Standard*]; or
 - (c) in tobacco prepared and packed for smoking.¹⁵⁰
- 3.41 The MPA defines 'Dangerous Poison' as:
- Substances with a high potential for causing harm at low exposure and which require special precautions during manufacture, handling or use. These poisons should be available only to specialised or authorised users who have the skills necessary to handle them safely. Special regulations restricting their availability, possession, storage or use may apply.¹⁵¹
- 3.42 As to the toxicity of ingested nicotine, refer to paragraphs 3.83–3.86.
- 3.43 There are strict penalties in the MPA for unauthorised dealings with substances that are classified as poisons under the Act. Section 16 of the MPA outlines the offence of

¹⁴⁷ Government of South Australia, SA Health, *New e-cigarette laws and other changes to tobacco laws in South Australia*, 19 September 2019. See: <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/protecting+public+health/tobacco+laws+and+businesses/new+e-cigarette+laws+and+other+changes+to+tobacco+laws+in+south+australia>. Viewed 27 November 2019.

¹⁴⁸ Incorporation is done by regulation in Part 2 of the *Medicines and Poisons Regulations 2016*.

¹⁴⁹ And therefore, in the *Medicines and Poisons Regulations 2016*.

¹⁵⁰ *Poisons Standard October 2019* (Cth) Schedule 7 (p 239). See also, the 'principles of scheduling' on page vi of the *Poisons Standard October 2019* (Cth).

¹⁵¹ *Medicines and Poisons Act 2014* s 4.

manufacturing, supplying, using or possessing a Schedule 7 poison without authorisation: the penalty is a court-imposed fine of up to \$45 000.¹⁵² The maximum penalties for comparable offences committed by individuals across the other Australian jurisdictions range from \$1100 to \$80 000, and may include the possibility of a prison term.

Schedule 4 nicotine

3.44 Nicotine is also relevantly included in Schedule 4 of the *Poisons Standard* ('Prescription only medicines, or Prescription Animal Remedy'), which makes it available for human therapeutic use¹⁵³ under the MPA if a prescription is obtained from an authorised health professional.¹⁵⁴ Nicotine replacement therapies approved by the TGA are an exception to this requirement for a prescription and are therefore not Schedule 4 nicotine products.¹⁵⁵

3.45 Under section 14(1) of the MPA, it is an offence¹⁵⁶ for a person to manufacture or supply a Schedule 4 poison unless the person does so under and in accordance with an 'appropriate licence'¹⁵⁷ or 'professional authority'.¹⁵⁸ Registered pharmacists have 'professional authority' to compound medicines (including Schedule 4 poisons) and therapeutic goods for dispensing.¹⁵⁹

3.46 The Minister for Health informed the Committee that:

Pharmacy businesses are licensed under the *Pharmacy Act 2010*. Under section 9(2) of the ... [MPA] ... the supply of medicine at a pharmacy business is to be taken to be supply by the pharmacist with overall responsibility for the registered pharmacy. A separate licence is not required under this Act by a pharmacy to supply a Schedule 4 medicine, and therefore, no specific licence has been issued by the Department of Health (DOH) to a pharmacy to supply nicotine when included in Schedule 4.¹⁶⁰

3.47 The Minister was unable to advise if any pharmacist in Western Australia had utilised their 'professional authority' to compound and supply nicotine as a Schedule 4 medicine as this data is not reported. The Minister explained that:

Registered pharmacies are not required to provide records of Schedule 4 medicines supplied, including compounded medicines, except as part of investigation and enforcement provisions. For this reason, the DOH does not have routine access to individual patient records on the supply of these medicines by pharmacies.¹⁶¹

¹⁵² *ibid.*, s 115(1)(b).

¹⁵³ For example, to quit or reduce smoking.

¹⁵⁴ *Medicines and Poisons Act 2014* ss 14 and 25.

¹⁵⁵ *Poisons Standard October 2019* Schedule 4 (p 113); and Commonwealth Parliament, House of Representatives, Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into the Use and Marketing of Electronic Cigarettes and Personal Vaporisers in Australia*, March 2018, p 89.

¹⁵⁶ The maximum fine which may be imposed by a court is \$45 000: *Medicines and Poisons Act 2014* s 115(1)(b). The maximum penalties for comparable offences committed by individuals across the other Australian jurisdictions range from \$1650 to \$80 000, and may include the possibility of a prison term.

¹⁵⁷ As defined in section 12 of the *Medicines and Poisons Act 2014*.

¹⁵⁸ As defined in section 3 of the *Medicines and Poisons Act 2014*.

¹⁵⁹ *Medicines and Poisons Act 2014* ss 3 and 26.

¹⁶⁰ Hon Roger Cook MLA, Minister for Health, Letter, 14 November 2019, p 1.

¹⁶¹ *ibid.*

3.48 It is also an offence for a person to possess a Schedule 4 poison unless one of nine exceptions applies to that person.¹⁶² One of those exceptions is as follows:

the poison was prescribed for the person by a prescriber who is authorised to prescribe the poison and the person has possession of the poison for the purpose of using it in accordance with the instructions of the prescriber ...¹⁶³

The maximum fine which may be imposed by a court for possessing a Schedule 4 poison without authority or a lawful excuse is \$45 000.¹⁶⁴ The maximum penalties for comparable offences committed by individuals across the other Australian jurisdictions range from \$8007 to \$32 000, and may include the possibility of a prison term.¹⁶⁵ The unauthorised manufacturing or supply of Schedule 4 poisons tend to attract higher maximum penalties.¹⁶⁶

Schedule 6 nicotine

3.49 As mentioned earlier, nicotine is also a Schedule 6 poison when it is to be used for the treatment of animals. The non-compliant manufacturing or supply of a Schedule 6 poison attracts a court-imposed fine of up to \$30 000.¹⁶⁷ It is also an offence to supply a Schedule 6 poison in circumstances where the supplier reasonably suspects, or ought reasonably to suspect, that the recipient intends to use the poison in a way that might reasonably be expected to pose a serious threat to the health, safety and welfare of a person or the public. This offence also attracts a maximum fine of \$30 000.¹⁶⁸

3.50 In the other Australian jurisdictions, offences involving the unauthorised manufacturing, sale or supply of Schedule 6 poisons (if any)¹⁶⁹ attract maximum penalties ranging from \$1680 to \$80 000, and may include the possibility of a prison term.

More about legally obtaining e-liquid containing nicotine in Western Australia

3.51 Despite the nicotine-related offences in the MPA, the Committee notes that nicotine for use in e-cigarettes may be imported legally by Western Australian residents for personal use as a result of the interaction between the Personal Importation Scheme and the Schedule 4 classification of nicotine.

3.52 The Personal Importation Scheme, administered at the national level by the TGA, applies to unapproved therapeutic goods (including in this case, Schedule 4 nicotine for quit smoking purposes), under the following conditions set by the TGA:

- the goods are for your own treatment or the treatment of your immediate family; and
- you do not supply (sell or give) the medicine to any other person; and
- where possible, you keep the medicines or medical devices in their original packaging with any dispensing labels intact; and

¹⁶² *Medicines and Poisons Act 2014* s 14(4).

¹⁶³ *ibid.*, s 14(4)(d).

¹⁶⁴ *ibid.*, s 115(1)(b).

¹⁶⁵ Note that New South Wales and Tasmania do not appear to have an offence for the unauthorised possession of a Schedule 4 poison.

¹⁶⁶ See footnote 156.

¹⁶⁷ *Medicines and Poisons Act 2014* ss 16(1) and 115(2).

¹⁶⁸ *ibid.*, ss 16(2) and 115(2).

¹⁶⁹ Note that New South Wales does not appear to have any offences related to the manufacturing, sale or supply of Schedule 6 poisons.

- the goods are not restricted under Australian Customs controls or quarantine rules and the goods do not contain a controlled substance¹⁷⁰; and
- the goods are not injections that contain material of human or animal origin (except insulin); and
- the total quantity of the goods imported within a 12 month period does not exceed 15 months' supply of the goods (for medicines, at the maximum dose recommended by the manufacturer); and
- if the goods are medicines in Schedule 4 or 8 of the Poisons Standard, a prescription from an Australian-registered medical practitioner is held for the medicines.

You cannot import more than a 3 month supply at the one time under the personal importation scheme.¹⁷¹

3.53 In summary, it is generally illegal to supply, possess, use or manufacture nicotine in this state. However, a person in Western Australia wishing to obtain a Schedule 4 nicotine product legally has the following two options, both of which involve holding a valid prescription¹⁷² for Schedule 4 nicotine for human therapeutic use:

- importing it under the Personal Importation Scheme
- having the prescription filled by a registered pharmacist:

who could [if so trained] compound a product in accordance with the [prescribing] medical practitioner's instructions. This prescription would be valid at any pharmacy throughout Australia. The pharmacist, in compounding this medicine, would need to comply with standards issued by the Pharmacy Board of Australia and any relevant parts of the Commonwealth's Therapeutic Good Legislation.¹⁷³

3.54 Even if vapers are aware of the restrictions on supplying, possessing, using or manufacturing nicotine in Western Australia,¹⁷⁴ the submission evidence received by the Committee suggested that:

- some of them are unaware of the two options to obtain Schedule 4 nicotine legally (outlined in paragraph 3.53) and will, nevertheless, flout the restrictions in order to obtain what they perceive to be cheaper nicotine products from overseas online sources—some submitters used the term 'black market'¹⁷⁵

¹⁷⁰ Nicotine is not a controlled substance: Australian Government, Department of Health, Office of Drug Control, *Controlled substances*, 18 December 2019. See: https://www.odc.gov.au/ws-lps-index?search_api_views_fulltext=&items_per_page=10&page=41. Viewed 8 January 2020.

¹⁷¹ Australian Government, Department of Health, Therapeutic Goods Administration, *Personal importation scheme*, 18 March 2015. See: <https://www.tga.gov.au/personal-importation-scheme>. Viewed 2 January 2019.

¹⁷² According to The McKell Institute, 'the great majority of users do not have a prescription': Associate Professor Colin Mendelsohn & Dr Alex Wodak AM, The McKell Institute, *Legalising vaping in Australia*, March 2019, p 18. See: <https://mckellinstitute.org.au/app/uploads/McKell-Institute-Vaping-in-Australia-1.pdf>. Viewed 26 November 2019.

¹⁷³ Hon Roger Cook MLA, Minister for Health, Letter, 14 November 2019, p 2.

¹⁷⁴ 'the reality is that many West Australians are unaware that nicotine e-liquids are illegal in Australia, and that selling a device that resembles a tobacco product [in Western Australia] is illegal': Submission 101 from Australian Lottery and Newsagents Association, 31 October 2018, p 1.

¹⁷⁵ Submission 77 from New Nicotine Alliance (AU), 5 October 2018, p 2; Submission 78 from British American Tobacco Australia, 5 October 2018, p 2; Submission 84 from Cignall Specialist Tobacconist, 5 October 2018, p 1 and Submission 101 from Australian Lottery and Newsagents Association, 31 October 2018, pp 1 and 3.

- some of them attempt to obtain the nicotine legally through the Personal Importation Scheme, but are unaware of the requirement for a valid prescription for the nicotine¹⁷⁶
- some of them are aware of the option to import nicotine legally through the Personal Importation Scheme, but will not go to the effort of obtaining a valid prescription before importing and/or taking possession of the imported nicotine¹⁷⁷
- very few of them are aware of the option to obtain nicotine from a compounding pharmacist anywhere in Australia.¹⁷⁸

3.55 The Committee noted that its submission evidence indicated that, for the various reasons discussed,¹⁷⁹ Western Australian vapers are more likely to purchase and possess nicotine from an overseas online source (whether legally or otherwise) than a local source, such as a pharmacy.

FINDING 8

Evidence suggests that very few members of the general public would be aware of the legal option to obtain nicotine for human therapeutic use (Schedule 4 nicotine) from an Australian compounding pharmacist by presenting a valid prescription.

FINDING 9

Evidence suggests that people who import nicotine under the Therapeutic Goods Administration's Personal Importation Scheme are not necessarily aware of the legal requirement to hold a valid prescription for that nicotine.

FINDING 10

Evidence suggests that Western Australian vapers are more likely to purchase and possess nicotine from an overseas online source (whether legally or otherwise) than a local source, such as a pharmacy.

Reviewing the scheduling of nicotine

- 3.56 The Committee was advised that it is possible for the State Government, like any other individual or organisation, including a product manufacturer, to request that the TGA review the scheduling of any drug. The application process for changing a schedule listing in the *Poisons Standard* is the same for all applicants. Indeed, the State Government has made applications to amend the *Poisons Standard* in the past.¹⁸⁰
- 3.57 Detailed information about the application process is provided in the 'Scheduling handbook: guidance for amending the Poisons Standard'. Among other things, the application requires suitable information to be provided to address the following matters:
- the risks and benefits associated with the use of a substance
 - the purposes for which a substance is to be used and the extent of that use

¹⁷⁶ Submission 72 from The Eros Association, 5 October 2018, pp 3 and 5 and Submission 77 from New Nicotine Alliance (AU), 5 October 2018, p 1.

¹⁷⁷ Submission 98 from Liberal Democrats WA, 11 October 2018, p 4.

¹⁷⁸ None of the submissions received by the Committee discussed this option.

¹⁷⁹ See paragraphs 3.53—3.54.

¹⁸⁰ Hon Roger Cook MLA, Minister for Health, Letter, 28 August 2019, pp 1 and 2.

- the toxicity of the substance
- the dosage, formulation, labelling, packaging and presentation of the substance
- the potential for misusing or abusing the substance
- other matters relevant to public health.¹⁸¹

Regulation of e-cigarette devices—*Tobacco Products Control Act 2006 (WA)*

3.58 The TPCA regulates the sale, supply, advertising/promotion and licensing of tobacco suppliers and products in Western Australia and sets out offence and enforcement provisions.

3.59 According to section 3 of the TPCA:

The purposes of this 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.

3.60 The Committee notes that the TPCA defines ‘tobacco product’ as any of the following:

- (a) tobacco in a form prepared for human consumption or use; or
- (b) a cigarette^[182] or cigar^[183] or any other product the main, or a substantial, ingredient of which is tobacco and which is designed for human consumption or use; or
- (c) a product prepared for smoking^[184] that contains a herb or other plant matter, whether or not the product also contains tobacco,

but does not include —

- (d) nicotine, or a product that contains nicotine, in a form that is a poison within the meaning of the *Medicines and Poisons Act 2014* section 3; or
- (e) a prohibited plant or a prohibited drug as those terms are defined in the *Misuse of Drugs Act 1981* section 3(1) or a product containing a prohibited plant or a prohibited drug;¹⁸⁵

3.61 Section 106 of the TPCA is also significant as it creates the offence of selling products that resemble tobacco products, as follows:

¹⁸¹ *ibid.*, p 1. See also, *Therapeutic Goods Act 1989* (Cth) s 52E(1).

¹⁸² ‘**cigarette**’ means a roll of cut tobacco for smoking, enclosed in paper’: *Tobacco Products Control Act 2006* Glossary.

¹⁸³ ‘**cigar**’ means a roll of cut tobacco for smoking, enclosed in tobacco leaf or the leaf of another plant’: *ibid.*

¹⁸⁴ ‘**smoke**’ (when used as a verb) means smoke, hold, or otherwise have control over, an ignited tobacco product’: *ibid.*

¹⁸⁵ *ibid.*

A person must not sell any food, toy or other product that is not a tobacco product but is —

(a) designed to resemble a tobacco product or a package;^{186]} or

(b) in packaging that is designed to resemble a tobacco product or package.

3.62 The maximum penalties applicable in section 106 are:

- \$10 000 for individuals for a first offence, and \$20 000 for a second or subsequent offence
- \$40 000 for a body corporate for a first offence, and \$80 000 for a second or subsequent offence.¹⁸⁷

Supreme Court appeal case regarding e-cigarette devices

3.63 The Court of Appeal of the Supreme Court ruled in 2016 that e-cigarettes devices (whether or not they contain e-liquid with nicotine) fall within the definition of section 106(a) of the TPCA.¹⁸⁸ The Court of Appeal decision was based on the successful prosecution¹⁸⁹ of a small business ('Heavenly Vapours' in Duncraig) from where the owner sold e-cigarettes online, including e-cigarette units and nicotine-free e-juice. The business owner appealed his conviction to the Court of Appeal.

3.64 The appellant argued in part, that only products similar to food and toys (the words used in section 106) would be within the prohibition in the section and that the purpose of the TPCA was to prevent children from smoking. These arguments were rejected by the Court of Appeal.¹⁹⁰

3.65 The Committee notes that the appellant also submitted that the products were intended to minimise or reduce smoking, and therefore could not be defined as a 'tobacco product' as per the legislation. In dismissing the appeal, Buss JA observed that:

there is no reason why a product cannot be designed both to reduce tobacco-related harm and to resemble a tobacco product or a package. If a product is designed to resemble a tobacco product or a package, and the other elements of the offence created by s 106(a) are proved, the prohibition will have been infringed and the offence committed even though the product was also designed to reduce tobacco-related harm.¹⁹¹

3.66 In his concurring judgment, Mazza JA also commented that:

Each of the grounds of appeal asserts that the e-cigarettes in question were designed as 'tobacco harm reduction products' as if that was a fact found in the proceedings below. No finding to that effect was made. Moreover, for the sake of clarity, this court should not be understood as having considered whether e-

¹⁸⁶ '**package** means a package containing, or designed to contain, a tobacco product and includes a box, packet, pouch, tin, carton, and a wrapping other than a transparent outer wrapping': *ibid.*

¹⁸⁷ *ibid.*, s 115.

¹⁸⁸ *Van Heerden v Hawkins* [2016] WASCA 42 on appeal from the Supreme Court in *Hawkins v Van Heerden* [2014] WASC 127, which in turn, was an appeal from the Magistrates Court. Mr Van Heerden, the business owner, was initially acquitted by the Magistrates Court in September 2013.

¹⁸⁹ In the Supreme Court: see *Hawkins v Van Heerden* [2014] WASC 127.

¹⁹⁰ *Van Heerden v Hawkins* [2016] WASCA 42 at paragraph 114 per Buss JA and paragraph 172 per Murphy JA, with Mazza JA in agreement.

¹⁹¹ *ibid.*, at paragraph 124 per Buss JA.

cigarettes are therapeutic and ought to be available for sale. These are matters for Parliament.¹⁹²

- 3.67 Due to the ban on the sale of e-cigarette devices in Western Australia, people who wish to vape in this state must purchase their devices online, interstate or overseas. Submission evidence received by the Committee suggests that many Western Australian vapers buy their e-cigarette devices from overseas online sources, particularly if they wish to vape with nicotine.¹⁹³

Regulation of non-nicotine e-liquids

- 3.68 Western Australia does not place any restrictions on the sale, possession or use of e-liquids which do not contain nicotine.

Vaping in smoke-free areas

- 3.69 The legislation prohibiting smoking in various places¹⁹⁴ is silent on vaping because vaping does not meet the statutory definition of the verb 'smoke'.¹⁹⁵ Therefore, it is technically legal for a person in Western Australia to vape in a smoke-free area as long as he or she is using non-nicotine e-liquid.

Interaction between the *Medicines and Poisons Act 2014 (WA)*, *Personal Importation Scheme (Cth)* and *Tobacco Products Control Act 2006 (WA)*

- 3.70 The Committee notes that Western Australian legislation results in inconsistent outcomes for people wishing to use e-liquid containing nicotine. The inconsistency is caused by providing people in this State with two processes to obtain e-liquid containing nicotine legally,¹⁹⁶ but prohibiting the sale of e-cigarette devices.¹⁹⁷
- 3.71 The practical difficulties caused by the existing regulatory regime is demonstrated by the following exchange between the Committee and the Department of Health:

The CHAIR: Current law in WA says you can get liquid nicotine if you have a prescription.

Dr ROBERTSON: Correct.

The CHAIR: Which you would use, presumably, as a quitting aid on some program your doctor puts you on?

Dr ROBERTSON: Yes.

The CHAIR: The delivery method would be an e-cigarette.

Dr ROBERTSON: Yes. Well, there is no other way—I mean, if the doctors wanted to use an alternative method, there are a number of other methods that they can utilise, including sublingual sprays, Nicorette tablets, patches.

¹⁹² *ibid.*, at paragraph 188 per Mazza JA.

¹⁹³ Submission 48 from TSG Franchise Management, 4 October 2018, p 1; Submission 59 from Stephen Humble, 5 October 2018, p 1; Submission 84 from Cignall Specialist Tobacconist, 5 October 2018, p 1; Submission 100 from Just Vapours Australia, 1 November 2018, p 3 and Submission 101 from Australian Lottery and Newsagents Association, 31 October 2018, p 3.

¹⁹⁴ For example, *Tobacco Products Control Act 2006*, *Tobacco Products Control Regulations 2006* and *Occupational Safety and Health Regulations 1996*.

¹⁹⁵ Refer to footnote 184.

¹⁹⁶ See paragraphs 3.44–3.55.

¹⁹⁷ See paragraphs 3.61–3.67.

The CHAIR: So if my doctor gives me a liquid nicotine prescription, which is exempt from the regular prohibition of the import of liquid nicotine, which our law currently allows for, the delivery method would be an e-cigarette?

Dr ROBERTSON: In this circumstance, yes.

The CHAIR: But e-cigarettes are illegal for sale in WA.

Dr ROBERTSON: Correct.

The CHAIR: Okay, so we have a recognition in law that liquid nicotine may have certain uses as a quitting aid perhaps, but no way to legally buy the device, unless you circumvent Western Australian law by driving across state lines and buying it in another state, where it is legal to buy, and bringing it back into Western Australia.

Dr ROBERTSON: That is correct.

The CHAIR: You see the absurdity here, surely—the contradiction here, at least?

Dr ROBERTSON: The issue here is that there is an assumption that lots of these scripts are being written and that there is a demand out there for it to be done that way. It is very hard to gauge how many scripts are being written, but the numbers are likely to be small and they still have to import it as well, to bring in the nicotine.

The CHAIR: I assume you are right about very few scripts being written; anecdotally, I have heard the same. However, there are a lot of people still relying on a black market to access their liquid nicotine and their vaping products who may be, for all we know, self-medicating or self-treating, to wean themselves off cigarettes or to get to a less expensive, less harmful alternative. Does it not stand to reason that if the sale of e-cigarettes were legalised, you would then have more prescriptions for liquid nicotine?

Dr ROBERTSON: The problem is that the focus there is on making a whole area legal to deal with a very small issue, which is people wanting to be able to use e-cigarettes as a tobacco cessation device. If it was really just tobacco cessation, there are processes within the Therapeutic Goods Administration that can be used to do that. No tobacco company, no e-cigarette company, has taken those steps. The reality is that they have very different interests, I would have thought, in using it as a tobacco cessation device.

The CHAIR: I would not say it is legalising to address a minor issue, considering we have not met our national tobacco strategy target of a 10 per cent decrease and our rate of smoking decline has certainly slowed.¹⁹⁸

FINDING 11

Under current Western Australian legislation, people wishing to use e-liquid containing nicotine may obtain it legally if their doctor prescribes it but the sale of e-cigarette devices is prohibited. This creates a difficulty for people who wish to use e-liquid containing nicotine as an aid for quitting smoking.

¹⁹⁸ Hon Aaron Stonehouse MLC, Chair, and Dr Andrew Robertson, Assistant Director General, Public and Aboriginal Health Division, Department of Health, *Transcript of evidence*, 28 February 2019, pp 9–10.

Legislative Assembly inquiry into e-cigarettes

- 3.72 The Education and Health Standing Committee (EHSC) of the Legislative Assembly tabled a report in 2017 that investigated the current regulatory framework for e-cigarettes in Western Australia and arguments for and against restricting the sale of e-cigarette products.¹⁹⁹
- 3.73 The EHSC concluded that, despite the statutory regime in Western Australia that makes it broadly illegal to sell and use e-cigarettes:
- The reality is that the laws governing the sale and use of e-cigarettes are not well-known by the average citizen. ... [and] it is likely that WA users are using illegal products, whether knowingly or unknowingly ...²⁰⁰
- 3.74 The EHSC was also of the view that the difference in regulation between e-cigarettes and combustible cigarettes (such as vaping in public smoke-free places being permitted):
- may be undermining public health campaigns aimed at encouraging people to quit the habit altogether.²⁰¹
- 3.75 The EHSC made only one recommendation in the report, directed at the Minister for Health, to:
- report back to the Committee [EHSC] on any considerations that have been given to the regulation of e-cigarettes.²⁰²
- 3.76 Hon Roger Cook MLA, Minister for Health, responded to the Legislative Assembly's report in September 2017 and provided the following information on the approach taken to regulating e-cigarettes:
- The Minister supports a precautionary, evidence-based approach to regulating e-cigarettes.
 - The Department of Health 'continues to monitor evidence about e-cigarettes as it emerges' and a review of the TPCA was scheduled to take place in 2018.
 - The Commonwealth Government is better placed to determine the efficacy of e-cigarettes as a smoking-cessation aid and the WA Government would 'closely monitor determinations of Federal agencies'.²⁰³
- 3.77 According to section 127 of the TPCA, the Minister for Health must carry out a review of the operation and effectiveness of the TPCA as soon as is practicable every four years. The last review of the TPCA was tabled in Parliament in 2012.²⁰⁴
- 3.78 The Minister for Health ordered an urgent review of the TPCA in early January 2020. The review is to include consideration of the safety of e-cigarettes and their effectiveness as a

¹⁹⁹ Western Australia, Legislative Assembly, Education and Health Standing Committee, Report 1, *Clearing the air on e-cigarettes: factors regarding regulation that require consideration*, 29 June 2017.

²⁰⁰ *ibid.*, p 14.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ Tabled Paper 646, Legislative Assembly, 14 September 2017.

²⁰⁴ *Review of the WA Tobacco Products Control Act 2006 – Final Report (August 2011)*, Tabled Paper 5126, Legislative Council, 27 September 2012.

quit-smoking aid.²⁰⁵ The Committee notes that, as at 16 March 2020, no new review of the TPCA had been announced on the Department of Health's website.²⁰⁶

Potential injury risks due to lack of regulatory controls

- 3.79 With regard to the product safety of e-cigarettes and e-liquids used, the Minister for Commerce advised the Committee of the role of the Consumer Protection division within the Department of Mines, Industry Regulation and Safety:

Consumer Protection's product safety role is to provide advice and information to consumers and business on product safety, monitor the market and investigate unsafe products and, where necessary, remove them from sale.

It should be noted that Consumer Protection's safety role does not currently extend to the development of related health policy or specific regulatory oversight of the safety of e-cigarette fluid of either the nicotine or the non-nicotine variety.²⁰⁷

- 3.80 E-liquids containing nicotine *are* regulated by the MPA. However, for the reasons discussed at paragraphs 3.53–3.55, people who wish to vape with e-liquid containing nicotine tend to import it.²⁰⁸ Such imported nicotine solutions are therefore not subject to Australian laws and standards.
- 3.81 The Committee has heard evidence that the unregulated nature of e-cigarettes (due to a ban on the sale of e-cigarette devices within the state)²⁰⁹ and e-liquids results in significant risk to users in Western Australia who import and/or use products manufactured overseas with unsafe packaging and/or contents.²¹⁰

Risk from unsafe packaging of e-liquids

- 3.82 Injury Matters informed the Committee about the typical packaging of e-liquids:

If you look at the different vape liquids that are used, they are generally just in a normal opening bottle, dropper-type formulation, so obviously they are easily opened and accessed by a child if not stored appropriately. But they also have pictures on them that might be attractive to a child, such as pictures of cakes, fruit—things along those lines. ... it is therefore attractive to a young child, whereas them being regulated to be stored in more appropriate-style bottles and labelled accordingly, it might then create some barriers to children obtaining access to them.²¹¹

- 3.83 E-liquids containing nicotine can include very high concentrations of the chemical:

nicotine refills for e-cigarettes are available and the concentration of nicotine in those refills is highly variable. Some refills have concentrations of less than one milligram per millilitre of solution. They are available on the internet—up to 55 gallons, I have noticed—of liquid nicotine solutions that are in concentrations of

²⁰⁵ P Law, 'Vaping up in smoke', *The West Australian*, 3 January 2020, p 3.

²⁰⁶ Western Australian Government, Department of Health, *Tobacco control legislation in Western Australia*. See: https://www2.health.wa.gov.au/Articles/S_T/Tobacco-control-legislation-in-Western-Australia. Viewed 16 March 2020.

²⁰⁷ Hon John Quigley MLA, Minister for Commerce, Letter, 19 December 2018, p 2.

²⁰⁸ See paragraphs 3.44–3.55 and Findings 8–10.

²⁰⁹ See paragraphs 3.61–3.67.

²¹⁰ For example, Submission 72 from Eros Association, 5 October 2018, pp 3–4.

²¹¹ Chrisandra Lukjanowski, Chief Executive, Injury Matters, *Transcript of evidence*, 23 November 2018, p 5.

up to 200 milligrams per millilitre. Certainly, that is a highly toxic solution and there needs to be strict regulation and rules, either in terms of importing that or the storage and the regulation of that sort of concentrated amount of nicotine.²¹²

- 3.84 The Poisons Information Centre advised that children are particularly sensitive to nicotine and that there have been instances when children have been exposed to nicotine solutions:

[Nicotine exposure in children] ... is not an infrequent call to Poisons Information. Given the sensitivity of young children to nicotine, we routinely send all children that consume any nicotine to hospital for observation. I extracted WA Poisons Information Centre data for the last 10 months and looked at exposures over that period of time; 36 per cent of the cases involved children under 15 years of age.

...

This was an exposure to nicotine solution—either an e-cigarette itself or a refill solution that would be used in the use of e-nicotine. All of those children were sent to hospital. There were some cases of serious toxicity.²¹³

- 3.85 The Poisons Information Centre also advised the Committee of the toxicity of nicotine when it is found in the sorts of concentrations that are present in e-liquids:

our concern is with highly concentrated nicotine solutions that can be used in refills. They certainly pose a high public health risk. We have had a number of cases where children have been exposed to and ingested these liquids. They can come in highly concentrated forms, as you know, from small two milligrams per mil up to solutions that contain 200 milligrams per mil of nicotine. At that dose, a single mouthful or one millilitre of nicotine is a fatal dose for a child. There have been paediatric deaths through inadvertent exposure. ...

...

We are talking about, at these concentrations [200 mg/mL], a very high risk, highly toxic solution that poses a risk if it is brought into the household, indeed, even for adults through inadvertent use—transferring it to another container and not sure what it was. These sort of scenarios occur all the time to Poisons, where something is transferred to an unmarked container and someone just takes a swig. There is the potential even to cause serious poisoning in adults. In the data that I extracted—WAPIC data for the last 10 months—there was indeed a case of an adult who became severely unwell, where he said he had mistaken it for another pharmaceutical and ingested a considerable amount. Certainly, that developed life-threatening toxicity in that individual.²¹⁴

- 3.86 As to the issue of a need to regulate e-liquids containing nicotine, the following exchange is informative:

Hon Rick MAZZA: I understand that nicotine is a highly toxic substance, but I mean around a household, for children there are so many dangerous chemicals, whether they be cleaning products or garden pesticides or even medications lying around the house. Would you concede that a lot of these would be about adults making sure that children just do not have access to anything that may harm them?

²¹² Dr Ann-Maree Lynch, Head of Department, Poisons Information Centre, *Transcript of evidence*, 26 November 2018, p 3.

²¹³ *ibid.*, pp 3–4.

²¹⁴ *ibid.*, pp 3 and 4.

Dr LYNCH: That is always the case—there are parental and caregiver responsibilities in all things. But as I think I mentioned previously, there are few substances, very few pills—there is a small list—that we are well aware of in Poisons where one tablet can kill a toddler. They generally include some of the cardiac medication and the potent opioids. There are very few solutions, as I said, where one teaspoon will kill a toddler, and they include things such as organophosphates. Normally, people do not bring concentrated organophosphate solutions into their home. Normally, they are stored on farms and most people are very responsible about the storage and usage and dilution of those and they do not allow their children near them. My concern here is that these products of a highly concentrated nicotine solution are available on the internet, people do import them by whatever means, and they can be brought into the home. This needs to be recognised—the potential risk if such solutions were brought into homes.

Hon Rick MAZZA: That is one of my concerns. People who cannot access the nicotine liquid in Australia are importing them, where it is unregulated by Australian authorities. My thought is that if it was available in Australia, then there would be those regulations in place so that there was not such a highly concentrated nicotine liquid coming into the country.

Dr LYNCH: I take your point. I think that there needs to be—our Poisons centre issue is with these highly concentrated solutions and how we do not want them to find their way into homes.²¹⁵

3.87 The Committee notes:

- the view that regulating e-liquids, particularly those containing concentrated liquid nicotine, would reduce the risk of poisoning by accidental ingestion of the e-liquid
- the suggestion that regulation should include the requirement for child-safe packaging and minimum labelling requirements, such as an ingredients list and dosage information.

3.88 The Committee also notes that liquid nicotine for human therapeutic use (Schedule 4 nicotine) can technically be purchased, with a valid prescription, from Australian pharmacies.²¹⁶ This form of liquid nicotine would be subject to Australian labelling, container, storage and other requirements.²¹⁷ However, as stated earlier, evidence received by the Committee suggests that for various reasons, Western Australian vapers are more likely to access e-liquid containing nicotine from overseas online sources than an Australian source.²¹⁸

²¹⁵ Hon Rick Mazza MLC, Member, and Dr Ann-Maree Lynch, Head of Department, Poisons Information Centre, *Transcript of evidence*, 26 November 2018, pp 4–5.

²¹⁶ See paragraph 3.53.

²¹⁷ Generally, a poison scheduled in the *Poisons Standard* (Cth) must not be stored, supplied or transported unless its immediate container and label comply with Part 2 of the *Poisons Standard* (Cth): *Medicines and Poisons Regulations 2016* reg 82. For example, Schedule 4 poisons for human use must be labelled 'PRESCRIPTION ONLY MEDICINE' and all scheduled poisons must be labelled 'KEEP OUT OF REACH OF CHILDREN': *Poisons Standard* (Cth) Part 2, sections 1.3(1)(a) and (c). There are also alternate labelling requirements for dispensed medicines: *Poisons Standard* (Cth) Part 2, section 1.5.6(1)(a) and Appendix L, Part 1.

²¹⁸ See paragraphs 3.54–3.55 and Findings 8–10.

FINDING 12

With the exception of liquid nicotine for human therapeutic use (Schedule 4 nicotine) which has been compounded by, and purchased from, a pharmacy in Australia, the e-liquids currently available to Western Australian vapers may not be required to be packaged or labelled safely.

FINDING 13

The relevant Acts should be reviewed to examine the regulation of e-liquids, particularly those containing nicotine, including the imposition of child-safe packaging and labelling requirements.

Risk from exploding batteries in e-cigarette devices

3.89 According to Injury Matters, most e-cigarettes are of the rechargeable variety, relying on lithium-ion batteries to store electricity. When these types of e-cigarettes are left in extreme temperatures, overcharged or poorly made, they have been known to explode and cause injuries of varying severity.²¹⁹

3.90 There is evidence from around the world of e-cigarettes exploding in trouser pockets, in vapers' mouths and hands, while the device was being modified, and during motor vehicle accidents. Injury Matters is of the opinion that most of the incidents result from vapers' carelessness:

In short, end users are the most common reasons why e-cigarettes and other lithium-ion battery products become unsafe. Throwing devices, getting them wet, charging them with the wrong charger, and leaving them to bake in the sun have all found to be the cause of overheating.

Better made devices will contain safety features (which include protection from overheating, overcharging, being discharged too much, and protection from short-circuiting and being recharged using the wrong charger) that work to prevent damaged devices from becoming unsafe.²²⁰

3.91 While The Eros Association considers that the danger of exploding e-cigarette devices is minimal:

Australian consumers have a right to be protected from dangerous products. Implementing basic manufacturing and testing standards for personal vaporisers would help ensure the market is standardised for safety.²²¹

FINDING 14

The relevant Acts should be reviewed to determine whether the safety standards of e-cigarette devices could be improved by regulation.

Potential health risks—is it safe to inhale vapour from e-liquid?

3.92 As discussed in paragraphs 3.8–3.13, e-liquids contain a wide range of substances at varying concentrations and there is very little to guarantee the accuracy of any ingredients listed on

²¹⁹ Injury Matters, Answer to question on notice 2 asked at hearing held 23 November 2018, dated 11 December 2018, p 2.

²²⁰ *ibid.*

²²¹ Submission 72 from The Eros Association, 5 October 2018, p 4.

their labels. There is also the potential for e-cigarette vapour to adversely affect the health of bystanders by way of passive exposure:

A 2016 study^[222] found that the most common symptoms reported by those passively exposed to e-cigarettes included respiratory difficulties, eye irritation, headache, nausea and sore throat or throat irritation.²²³

- 3.93 Despite this, there is a general view that e-cigarettes are likely to be less harmful than combustible cigarettes because they expose users and bystanders to fewer toxic chemicals. While this may be true, the National Health and Medical Research Council (NHMRC) considers that there is insufficient evidence to determine the health risks of e-cigarettes when compared to that of combustible cigarettes:

Although a 2014 study reported that e-cigarettes are 95% less harmful than tobacco cigarettes,^[224] this finding was based on opinion rather than empirical evidence, and concerns have been raised about potential conflicts of interest.^[225] The World Health Organisation has stated that “no specific figure about how much ‘safer’ the use of these products is compared to smoking can be given any scientific credibility at this time.”²²⁶

- 3.94 The Committee notes that the 2014 study which has been criticised, particularly its statement that e-cigarettes are 95 per cent less harmful than combustible cigarettes, was often cited by submitters in support of e-cigarettes.²²⁷ The School of Public Health, Curtin University commented that:

Unfortunately, this figure of 95% has been restated and used to support arguments in favour of ENDS [electronic nicotine delivery systems].²²⁸

²²² The quoted statement references the following journal article: EL Durmowicz, SF Rudy and IL Chen, ‘Electronic cigarettes: analysis of FDA adverse experience reports in non users’, *Tobacco Control*, 2016, vol. 25, issue no. 2, p 242.

²²³ Australian Government, National Health and Medical Research Council, *NHMRC CEO statement: electronic cigarettes (e-cigarettes)*, 3 April 2017, p 2.

²²⁴ The quoted statement references the 2014 study as DJ Nutt, LD Phillips, D Balfour, HV Curran, M Dockrell, J Foulds, K Fagerstrom, K Letlape, A Milton, R Polosa, J Ramsey and D Sweanor, ‘Estimating the Harms of Nicotine-Containing Products Using the MCDA Approach’, *European Addiction Research*, 2014, vol. 20, issue no. 5, pp 218–25. Public Health England updated its review of e-cigarette evidence in 2018 and maintains the view that e-cigarettes are 95 per cent less harmful than combustible cigarettes: Public Health England, *Evidence review of e-cigarettes and heated tobacco products 2018. A report commissioned by Public Health England*, report prepared by A McNeill, LS Brose, R Calder, L Bauld and D Robson, London, February 2018, p 20.

²²⁵ The quoted statement references the following journal articles raising concerns about the 2014 study: The Lancet, ‘Public Health England’s evidence-based confusion’, *The Lancet*, 2015, vol. 386, p 829 and M McKee and S Capewell, ‘Evidence about electronic cigarettes: foundation built on rock or sand?’, *BMJ*, 2015, vol. 351.

²²⁶ Australian Government, National Health and Medical Research Council, *NHMRC CEO statement: electronic cigarettes (e-cigarettes)*, 3 April 2017, p 2.

²²⁷ For example, Submission 17 from Australasian Association of Convenience Stores, 25 September 2018; Submission 49 from Denise Lee, 4 October 2018; Submission 51 from Australian Tobacco Harm Reduction Association, 4 October 2018; Submission 54 from Shahin Enterprises, 4 October 2018; Submission 58 from Fontem Ventures, 4 October 2018; Submission 61 from Australian Retailers Association, 5 October 2018; Submission 69 from Australian Vaping Advocacy, Trade and Research Inc, 5 October 2018; Submission 79 from Dr Joe Kostrich, 5 October 2018; Submission 80 from Australian Taxpayers’ Alliance, 5 October 2018; Submission 98 from Liberal Democrats WA, 11 October 2018 and Submission 100 from Just Vapours Australia, 1 November 2018.

²²⁸ Submission 63 from School of Public Health, Curtin University, 5 October 2018, p 1.

- 3.95 The Australian Medical Association was similarly critical of the 2014 study and the 2015 use of that study by Public Health England. It preferred that a precautionary approach be applied to e-cigarette products.²²⁹
- 3.96 However, since the 2015 report, Public Health England has commissioned a series of independent evidence reviews. A Public Health England evidence review published in 2018 reinforced their previous finding that:
- Vaping poses only a small fraction of the risks of smoking and switching completely from smoking to vaping conveys substantial health benefits over continued smoking. Based on current knowledge, stating that vaping is at least 95% less harmful than smoking remains a good way to communicate the large difference in relative risk unambiguously so that more smokers are encouraged to make the switch from smoking to vaping. It should be noted that this does not mean e-cigarettes are safe.²³⁰
- 3.97 The New Zealand Government has also taken the view that vaping, while not harm-free, is less harmful than smoking combustible cigarettes.²³¹
- 3.98 At the time of writing this report, the NHMRC was funding 13 grants for research into the:
- efficacy of e-cigarettes for smoking cessation, including amongst disadvantaged and vulnerable populations
 - health effects of e-cigarettes
 - uptake of e-cigarettes in children and adolescents
 - potential impact of e-cigarettes on smoking uptake
 - effect of new media platforms on e-cigarette promotion and consumer behaviour.²³²
- 3.99 Refer to paragraphs 3.125–3.133 for recent developments in the United States.

FINDING 15

The inhalation of e-cigarette vapour is not without risk. However, the magnitude of that risk, and how it compares to the risks associated with inhaling smoke from combustible cigarettes, is currently contested.

Classification of e-cigarettes as consumer and/or therapeutic products

- 3.100 E-cigarettes are sometimes marketed as an option to assist people in quitting smoking or as a tobacco replacement. These types of claims could be interpreted as an attempt to portray e-cigarettes as a therapeutic good rather than a general consumer product.
- 3.101 The TGA is the national regulatory body that has responsibility for assessing and monitoring therapeutic goods in Australia. Part of the TGA's role is to assess products or services that make therapeutic claims, which means that the product claims to:

²²⁹ Submission 75 from Australian Medical Association, 5 October 2018, p 4.

²³⁰ Public Health England, *Evidence review of e-cigarettes and heated tobacco products 2018. A report commissioned by Public Health England*, report prepared by A McNeill, LS Brose, R Calder, L Bauld and D Robson, London, February 2018, p 20.

²³¹ New Zealand Government. See: <https://vapingfacts.health.nz/vaping-vs-smoking/>. Viewed 24 March 2020. Refer to paragraphs 3.61–3.67 for a discussion of New Zealand's approach to regulating e-cigarettes.

²³² Australian Government, National Health and Medical Research Council. See: <https://www.nhmrc.gov.au/health-advice/all-topics/electronic-cigarettes>. Viewed 10 March 2020.

- prevent, diagnose, cure or alleviate a disease, ailment, defect or injury
 - influence, inhibit or modify a physiological process
 - test the susceptibility of persons to a disease or ailment
 - influence, control or prevent conception
 - test for pregnancy.²³³
- 3.102 The McKell Institute²³⁴ has observed that, internationally, e-cigarette devices and e-liquids containing nicotine are classified as general consumer, therapeutic or tobacco products.²³⁵ The institute considers that the ideal approach would be to treat e-cigarette products as both consumer and therapeutic goods, with an emphasis on regulation as a consumer good. At the very least, they should be treated differently from smoking because:
- Vaping products do not contain tobacco and do not combust or generate smoke. Although they are not risk-free, they carry only a small fraction of the risk of combustible tobacco products.^[236] Classification of vaping devices as tobacco products would lead to stringent regulation and send a misleading message to smokers that vaping is just as harmful as smoking.²³⁷
- 3.103 The institute recommended that e-cigarette products be regulated primarily as consumer goods. Therapeutic regulation should only be imposed if the manufacturer wished to make a therapeutic claim about its product:
- Consumer products

Vaping products are essentially consumer goods designed to compete with and replace an existing, far more harmful, consumer product. As such, they can be effectively managed under existing consumer law which would regulate quality and safety, advertising, display, sales to minors and restrictions on use.
 - Therapeutic goods

Manufacturers who wish to make therapeutic claims can apply to the medicines regulator, the Therapeutic Goods Administration (TGA), for approval as therapeutic products. This process would require higher standards of quality and testing and would enable these products to be available on prescription by medical practitioners. TGA approval involves a costly and onerous application process and is not feasible for any but the very largest manufacturers, particularly tobacco companies. TGA regulation would also reduce innovation as every application would involve substantial expense and delays to market. In this fast-evolving field, devices are being rapidly replaced by newer models. At present, no product in any country

²³³ Australian Government, Department of Health, Therapeutic Goods Administration, *What are 'therapeutic goods'?*, See: <https://www.tga.gov.au/node/3970>. Viewed 14 June 2019.

²³⁴ The institute describes itself as 'a progressive research institute dedicated to providing practical and innovative solutions to contemporary policy challenges.' The McKell Institute, *About The McKell Institute*. See: <https://mckellinstitute.org.au/about/about-the-mckell-institute/>. Viewed 2 December 2019.

²³⁵ For example, see Table 4 on page 39.

²³⁶ As to the level of risk posed by inhaling e-liquid vapours, see paragraphs 3.92–3.99.

²³⁷ Associate Professor Colin Mendelsohn & Dr Alex Wodak AM, The McKell Institute, *Legalising vaping in Australia*, March 2019, p 27. See: <https://mckellinstitute.org.au/app/uploads/McKell-Institute-Vaping-in-Australia-1.pdf>. Viewed 26 November 2019.

has been approved by a national regulator and subsequently come to market.²³⁸

- 3.104 The Department of Health is not convinced about the effectiveness of e-cigarettes as a smoking-cessation aid:

Dr ROBERTSON: The evidence that even as a cessation device that it is any more effective [than TGA-approved smoking-cessation aids] is very limited. Apart from that paper that was in the *New England Journal of Medicine*, there are a number of other papers that suggest that that is not the case. The evidence is still not in that it is even effective and there is certain evidence that suggests that other modalities like Nicorette gum, sublingual spray, patches are more effective.

The CHAIR: It is certainly true that for every study we see that says vaping is less harmful or is an effective quitting aid, there is probably another study that counters those claims. If we are looking at the balance of evidence, and we have got studies that go both ways on this issue, how many studies do we need, I suppose, to build a consensus on this? At what point do we say, “Okay, Queen Mary University of London is not a puppet of big tobacco and their study has merit and we can accept their findings and build some policy around that”?

Dr ROBERTSON: With any evidence base you need to have a range of studies and they have to be of sufficient quality before we should be able to make a definitive decision. But we are, again, not talking about introducing a new tablet that is being used to treat a particular condition; we are talking about introducing something more broadly into the community that we know is likely to cause harm to a broader community. We know that the tobacco companies have deliberately targeted the young and the youth in other countries with massive uptake of these products and then onward gateway effects. Along with that, we have seen massive increases in that population also taking up smoking, in the US particularly. Why would we introduce a product to deal with a perceived minor issue [people wishing to use e-cigarettes as a smoking-cessation aid] when there are plenty of other alternatives to help people come off cigarettes?²³⁹

- 3.105 Similarly, the NHMRC’s position is that, currently, there is insufficient evidence to conclude whether e-cigarettes can assist smokers to quit:

Experts disagree about whether e-cigarettes may help smokers to quit, or whether they will become ‘dual users’ of both e-cigarettes and tobacco cigarettes. ... Although a 2016 systematic review conducted by the Cochrane Collaboration [²⁴⁰] found some evidence that e-cigarettes with nicotine may assist smokers to quit, the review authors had a low level of confidence in this finding, due to the small volume of evidence. The review also reported results from one study comparing e-cigarettes with nicotine replacement therapy, which found that both methods resulted in similar rates of smoking cessation at 6 months follow-up. However, the reviewers noted that more research is required to enable confidence in these estimates and that further research is likely to change the estimate of effect.²⁴¹

²³⁸ *ibid.*

²³⁹ Hon Aaron Stonehouse MLC, Chair, and Dr Andrew Robertson, Assistant Director, Public and Aboriginal Health Division, Department of Health, *Transcript of evidence*, 28 February 2019, p 10.

²⁴⁰ The quoted statement references the following journal article: J Hartmann-Boyce, H McRobbie, C Bullen, R Begh, LF Stead and P Hajek, ‘Electronic cigarettes for smoking cessation (Review)’, *Cochrane Database of Systematic Reviews*, 2016, issue no. 9.

²⁴¹ Australian Government, National Health and Medical Research Council, *NHMRC CEO statement: electronic cigarettes (e-cigarettes)*, 3 April 2017, p 3.

3.106 The TGA, Australian Medical Association, Cancer Australia, Cancer Council Australia, National Heart Foundation of Australia and Thoracic Society of Australia and New Zealand support the NHMRC's position.²⁴²

3.107 Similarly, in 2018, the Commonwealth Scientific and Industrial Research Organisation made the following conclusions, amongst others, after reviewing the available evidence on e-cigarettes:

In many countries where appropriate evidence is available, it appears that e-cigarette use occurs with cigarette use. However the evidence is consistent in suggesting that use of e-cigarettes by non-smoking youth predicts future smoking. While many smokers and former smokers state a preference for e-cigarettes as a smoking cessation method, the effectiveness of this method compared with other smoking cessation methods is not known.

...

when e-cigarettes are used by smokers instead of conventional cigarettes there is evidence for improvement in individual health. However, use of e-cigarettes may also introduce independent health risks, and 'dual use' (using both e-cigarettes and conventional cigarettes) is popular.

...

It is a critical research question to determine the effectiveness of e-cigarettes compared to other smoking cessation methods among Australian smokers generally, and also among specific groups with a high smoking rate. The rate at which young people and adults in Australia start smoking as a result of using e-cigarettes should be assessed and monitored to fill a research gap. On present evidence, it is not possible to determine whether less restrictive access to e-cigarettes would reduce rates of smoking in Australia.²⁴³

3.108 However, the Committee has heard that e-cigarette manufacturers claim that e-cigarettes can help smokers of combustible cigarettes quit smoking:

From the UK to Canada, New Zealand and Japan, like-minded countries have embraced smoke-free products as a way to get smokers off cigarettes and switch to alternatives that are scientifically substantiated as a better option than continuing to smoke cigarettes ... it is clear that with the right regulatory and fiscal framework and appropriate knowledge sharing, smokers who would otherwise continue to smoke will embrace smoke-free products as a way to give up cigarettes.²⁴⁴

3.109 British American Tobacco Australia (BATA) advised the Committee in careful terms that it views e-cigarettes as being 'a potentially safer alternative to smoking' for Australian smokers

²⁴² Australian Government, Department of Health, Therapeutic Goods Administration, *Electronic cigarettes*, 25 October 2019. See: <https://www.tga.gov.au/community-ga/electronic-cigarettes>. Viewed 3 December 2019, and Dr M Gannon, President, Australian Medical Association, Dr H Zorbas, Chief Executive Officer, Cancer Australia, Professor S Aranda, Chief Executive Officer, Cancer Council Australia, Dr J Johns AM, National President, National Heart Foundation of Australia, and T Buchanan, Chief Executive Officer, Thoracic Society of Australia and New Zealand, *Statement on e-cigarettes in Australia*, February 2018. See: https://canceraustralia.gov.au/sites/default/files/statement_on_e-cigarettes_february_2018_0.pdf#_ga=2.158968761.2065463224.1538653161-374889567.1530604221. Viewed 3 December 2019.

²⁴³ S Byrne, E Brindal, G Williams, K Anastasiou, A Tonkin, S Battams and M Riley, Commonwealth Scientific and Industrial Research Organisation, *E-cigarettes, smoking and health. A literature review update*, 22 June 2018, pp vi–viii.

²⁴⁴ Tammy Chan, Managing Director, Philip Morris Limited, *Transcript of evidence*, 27 February 2019, pp 1–2.

but that risk reduction products do not amount to therapeutic goods.²⁴⁵ The BATA website also states that:

If we are successful in developing and bringing to market a large range of products that meet the needs of adult smokers seeking potentially less risky alternatives to cigarettes, this will help to meet the objectives of a number of leading public health professionals.²⁴⁶

- 3.110 The Committee notes that this statement could amount to a therapeutic claim.²⁴⁷ According to the TGA, however, no e-cigarette products have been submitted for assessment as a therapeutic good and its position on e-cigarettes (specifically those that contain nicotine) is that:

Products claiming to help people quit smoking are therapeutic goods.

The importation and supply (including sale) of therapeutic goods is illegal in Australia unless authorised by the TGA.

Nicotine is classified by law as a dangerous poison. States and territories have responsibility for regulating dangerous poisons. In all states and territories, the retail sale of nicotine is an offence unless a permit has been issued by the relevant state or territory authority. In some states and territories, obtaining, purchasing, possession and/or using nicotine without a permit is an offence. In most jurisdictions there are similar controls on manufacturing (including mixing), storage, labelling and packaging and other aspects of dangerous poisons. For details, contact the relevant state or territory health agency. These state and territory laws have not been overridden by Commonwealth legislation.

Some states and territories have legislation prohibiting the marketing of products that resemble tobacco products.

Electronic cigarettes have not been evaluated for quality, safety or performance by the TGA.²⁴⁸

- 3.111 The Committee held hearings with two major tobacco companies that also manufacture e-cigarettes and queried why no e-cigarettes containing nicotine have been submitted to the TGA for assessment as a therapeutic good. Philip Morris advised that it does not view its e-cigarette products as being therapeutic in nature:

Dr FRANZON: ... A therapeutic product, the way I used to develop those products, has an indication ... The studies we are doing, we are actually studying less harmful products, potentially, in small groups that want to continue smoking. So this will not generate a claim based on, for example, reduced exposure, reduced risk, but it does not give me a therapeutic claim in the sense that there is something I can actually put on a label and get approved—for example, smoking cessation.

Hon Dr Sally TALBOT: So you are not pursuing the avenue of it being a therapeutic product?

Dr FRANZON: Not at this stage, no.

²⁴⁵ Nicholas Booth, Head of Corporate and Government Affairs, British American Tobacco Australia, *Transcript of evidence*, 22 February 2019, pp 2 and 5.

²⁴⁶ British American Tobacco Australia, *E-cigarettes and other Next Generation Products*. See: http://www.bata.com.au/group/sites/BAT_9RNFLH.nsf/vwPagesWebLive/DO9RNMSL. Viewed 3 July 2019.

²⁴⁷ That is, 'prevent, diagnose, cure or alleviate a disease, ailment, defect or injury': see paragraph 3.101.

²⁴⁸ Australian Government, Department of Health, Therapeutic Goods Administration, *Electronic cigarettes*. See: <https://www.tga.gov.au/node/1909>. Viewed 14 June 2019.

Ms CHAN: Not at this stage, because we are really trying to compare to the effect of continued smoking, and is it, in many countries, being regulated as a consumer product.²⁴⁹

- 3.112 The Committee notes that BATA referred to its e-cigarette products as ‘potentially reduced risk products’ rather than therapeutic goods during its hearing.²⁵⁰ During the same hearing, BATA advised the Committee that:

Mr BOOTH: ... As the law and the legal framework [for TGA assessment] exists at the moment, it was created at a time when vaping products did not exist. They had not been invented. We are looking at an old piece of regulation that will not fit this technology. Where we look to comparable jurisdictions—the New Zealand, the UKs, the Americas, the EUs of this world—these products are being regulated under more of a consumer regulatory framework as opposed to therapeutic. I guess, in a nutshell, the framework as it exists in Australia will have to catch up to regulate these products.

...

Anyone can submit a product to the TGA, but if you took a product which was being sold in the UK within a robust regulatory framework or the US or elsewhere and tried to get it across the line in the current Australian framework, it would not be approved.

Hon Dr Sally TALBOT: But there is nothing technically preventing you from submitting the product to the TGA.

Mr BOOTH: Not at all.

Hon Dr Sally TALBOT: You are not suggesting it has to be legalised and regulated before it goes to the TGA, are you?

Mr BOOTH: No. What I am saying is that the regulatory framework around these products needs to be reviewed. The current framework was created before e-cigarettes were even a twinkle in someone’s eye. It is not geared up to be able to generate supportive regulation for them. ...²⁵¹

- 3.113 This exchange between the Committee and BATA confirms that there is no legal impediment to producers of e-cigarettes applying for therapeutic assessment by the TGA under the current legislative regime (see also, paragraphs 3.56–3.57 regarding the re-scheduling of drugs). The Committee notes, however, a reluctance to submit products to the TGA based on a view that e-cigarettes should be regulated as consumer goods.

FINDING 16

There is no legal impediment to submitting e-cigarette products for Therapeutic Goods Administration approval.

²⁴⁹ Hon Dr Sally Talbot MLC, Deputy Chair, Dr Michael Franzone, Senior Medical Advisor, Philip Morris International and Tammy Chan, Managing Director, Philip Morris Limited, *Transcript of evidence*, 27 February 2019, p 9.

²⁵⁰ Nicholas Booth, Head of Corporate and Government Affairs, British American Tobacco Australia, *Transcript of evidence*, 22 February 2019, pp 4, 7 and 8.

²⁵¹ Hon Dr Sally Talbot MLC, Deputy Chair, and Nicholas Booth, Head of Corporate and Government Affairs, British American Tobacco Australia, *Transcript of evidence*, 22 February 2019, p 10.

E-cigarettes in New Zealand: a different approach

Smoking rates in New Zealand

- 3.114 New Zealand promotes itself as being 'at the forefront of tobacco control internationally',²⁵² with its smoking rates declining over time. The latest New Zealand Health Survey, conducted in 2018-19, found that rates of smoking continued to decrease across most demographics:
- 14.2 per cent of adult New Zealanders smoked in 2018-19, down from 18.2 per cent in 2011-12
 - Māori adults have much higher rates of smoking: 34 per cent in 2018-19, a decrease from 40.2 per cent in 2011-12
 - 24.4 per cent of Pacific adults were current smokers—this has not changed since 2011-12.²⁵³
- 3.115 The 'Smokefree 2025' public health campaign, launched in 2011, aims to reduce smoking rates in New Zealand to a daily smoking prevalence of 10 per cent and to halve the Māori and Pacific smoking rates from their 2011 levels by 2025. The Ministry of Health aims not to ban smoking altogether, but to reduce smoking rates to minimal levels, 'thereby making New Zealand essentially a smokefree nation by 2025'.²⁵⁴
- 3.116 Part of the campaign involves promoting e-cigarettes as:
- a route out of smoking for New Zealand's 550 000 daily smokers, without providing a route into smoking for children and non-smokers.²⁵⁵

Encouraging adult smokers to switch to e-cigarettes

- 3.117 New Zealand's regulation of e-cigarettes was triggered by a recent District Court decision that found that anti-smoking legislation actually permitted the importation and sale of e-cigarettes and similar products. Prior to the District Court judgment, New Zealand took a precautionary approach to e-cigarettes and the divergent views of tobacco control experts on the efficacy of e-cigarettes was identified as an emerging issue back in 2014.²⁵⁶
- 3.118 In 2017, the Ministry of Health prosecuted Philip Morris New Zealand for selling a heat-not-burn tobacco product, 'HEETS, designed to be used with its 'IQOS' units. The HEETS component of the heat-not-burn system is a heated tobacco unit that includes a tobacco plug, hollow acetate tube, various filters and outer papers. HEETS are inserted into the IQOS holder and heated to 350 degrees Celsius to release the tobacco vapour, which is then inhaled through the mouth.²⁵⁷

²⁵² New Zealand Government, Ministry of Health, 28 May 2018. See: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/tobacco-control-new-zealand>. Viewed 21 August 2019.

²⁵³ New Zealand Government, Ministry of Health, *Annual update of key results 2018/19: New Zealand Health Survey*, 4 December 2019. See: <https://www.health.govt.nz/publication/annual-update-key-results-2018-19-new-zealand-health-survey>. Viewed 26 February 2020.

²⁵⁴ New Zealand Government, Ministry of Health, *Insights into Māori women smoking*, 21 November 2018. See: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/insights-maori-women-smoking>. Viewed 2 July 2019.

²⁵⁵ New Zealand Government, Ministry of Health, *Position Statement on vaping*, 12 September 2018. See: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco>. Viewed 2 July 2019.

²⁵⁶ New Zealand Government, *Tobacco Achievements Summary Report*, Tabled in New Zealand Parliament by Hon Tariana Turia, Associate Minister for Health, 14 August 2014, p 22.

²⁵⁷ Philip Morris International, *HEETS and HeatSticks*. See: <https://www.pmi.com/glossary-section/glossary/heets-and-heatsticks>. Viewed 1 July 2019.

- 3.119 Philip Morris New Zealand was charged by the Ministry of Health for selling the HEETS products in contravention of the ban on selling tobacco products in New Zealand legislation. The *Smoke-free Environments Act 1990* (NZ) contains a specifically-worded prohibition on selling tobacco products that are used orally:

No person shall import for sale, sell, pack, or distribute any tobacco product labelled or otherwise described as suitable for chewing, or for any other oral use (other than smoking).²⁵⁸

- 3.120 The District Court (Butler J) found that the words used in the statute should be interpreted so as to limit the prohibition against selling tobacco products to only those that are used by chewing (or a similar activity).²⁵⁹

- 3.121 While the applicable legislation has not been amended, an effect of the 2018 decision has been that the Ministry of Health in New Zealand now acknowledges vaping as an aid to quitting smoking as part of its Smokefree 2025 vision:

The Ministry of Health encourages smokers who want to use vaping products to quit smoking to seek the support of local stop smoking services. Local smoking services provide smokers with the best chance of quitting successfully and must support smokers who want to quit with the help of vaping products.²⁶⁰

- 3.122 The New Zealand Government has adopted the following policy objectives to achieve its Smokefree 2025 vision:

- protecting children from exposure to tobacco marketing and promotion
- reducing the supply of, and demand for, tobacco
- providing the best possible support for quitting.²⁶¹

- 3.123 The New Zealand position on vaping is one that acknowledges the disruptive potential of e-cigarettes, but that also clearly notes that e-cigarettes are not completely without risk:

Expert opinion is that vaping products are much less harmful than smoking tobacco but not completely harmless. A range of toxicants have been found in vapour including some cancer causing agents but, in general, at levels much lower than found in cigarette smoke or at levels that are unlikely to cause harm.²⁶²

- 3.124 'Vaping Facts' is a website jointly run by the New Zealand Ministry of Health and the Health Promotion Agency, aimed at smokers seeking information on vaping and how to switch from combustible cigarettes.²⁶³ The website acknowledges that e-cigarettes may be a means for

²⁵⁸ *Smoke-free Environments Act 1990* (NZ) s 29(2).

²⁵⁹ *Ministry of Health v Philip Morris (New Zealand) Limited* [2018] NZDC 4478. The Ministry of Health decided not to appeal this decision: 'Health Ministry abandons its legal fight against tobacco sticks', *Radio New Zealand*, 12 May 2018. See: <https://www.rnz.co.nz/news/national/357217/health-ministry-abandons-its-legal-fight-against-tobacco-sticks>. Viewed 8 January 2020.

²⁶⁰ New Zealand Government, Ministry of Health, *Position Statement on vaping*, 12 September 2018. See: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco>. Viewed 2 July 2019.

²⁶¹ New Zealand Government, Ministry of Health, *Smokefree Aotearoa 2025*, 29 May 2019. See: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/smokefree-aotearoa-2025>. Viewed 4 December 2019.

²⁶² New Zealand Government, Ministry of Health, *Position Statement on vaping*, 12 September 2018. See: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/vaping-and-smokeless-tobacco>. Viewed 2 July 2019.

²⁶³ New Zealand Government, Ministry of Health and Health Promotion Agency, *Vaping Facts*. See: <https://vapingfacts.health.nz/>. Viewed 1 July 2019.

adult smokers to switch from combustible cigarettes and then, ultimately, to quitting smoking altogether. The biggest risks of vaping are described as:

the unknown risks. Vaping hasn't been around long enough to know the risks of long-term use, but we do know it's less harmful than smoking.

...

Scientists will not be certain for many years of any health risks associated with vaping. The Ministry of Health has a role in continuing to monitor the risk.

We don't know what is in all vaping e-liquids, as there are no safety standards in New Zealand yet for vaping products.²⁶⁴

Recent evidence linking e-cigarettes to severe lung illness

3.125 There is now growing international evidence of a possible association between the use of e-cigarettes and lung disease. For example, by mid-September 2019, there had been:

- six confirmed fatalities in the United States linked to vaping²⁶⁵
- 380 confirmed and probable cases of lung illness in the United States linked to vaping since July 2019.²⁶⁶

3.126 By 20 November 2019, these numbers had risen to 47 deaths in 2290 cases.²⁶⁷ As at 18 February 2020, there had been 68 confirmed deaths.²⁶⁸

3.127 The patients presented with unexplained respiratory symptoms, such as coughs, shortness of breath and chest pain. Some have also reported:

- gastrointestinal symptoms (nausea, vomiting or diarrhoea)
- non-specific symptoms (fatigue, fever or weight loss).²⁶⁹

3.128 As noted in paragraphs 3.8–3.13, e-liquids can contain compounds that are already known to be harmful to human health. While no single e-cigarette substance or product had initially been associated consistently with illness, many affected patients had reported using cannabinoids in their e-liquids.²⁷⁰ Cannabinoids include tetrahydrocannabinol (THC), which is the compound in marijuana which induces euphoria.²⁷¹ There were also reports of the

²⁶⁴ New Zealand Government, Ministry of Health and Health Promotion Agency, *The Facts of Vaping: risks of vaping*. See: <https://vapingfacts.health.nz/the-facts-of-vaping/risks-of-vaping/>. Viewed 1 July 2019.

²⁶⁵ Commonwealth, State and Territory Chief Medical Officers, *E-cigarettes linked to severe lung illness*, Media statement, Department of Health (Cth), 13 September 2019. See: <https://www.health.gov.au/news/e-cigarettes-linked-to-severe-lung-illness>. Viewed 24 September 2019.

²⁶⁶ Dr L Kelly, 'Why there's an uptick in vaping-related lung illnesses', *ABC News*, 15 September 2019. See: <https://abcnews.go.com/Health/uptick-vaping-related-lung-illnesses/story?id=65627293>. Viewed 25 September 2019.

²⁶⁷ United States Government, Department of Health and Human Services, Centres for Disease Control and Prevention, *Outbreak of lung injury associated with the use of e-cigarette, or vaping, products*, 21 November 2019. See: https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#investigation-details. Viewed 4 December 2019.

²⁶⁸ *ibid.*, 25 February 2020. Viewed 26 February 2020.

²⁶⁹ Commonwealth, State and Territory Chief Medical Officers, *E-cigarettes linked to severe lung illness*, Media statement, Department of Health (Cth), 13 September 2019. See: <https://www.health.gov.au/news/e-cigarettes-linked-to-severe-lung-illness>. Viewed 24 September 2019.

²⁷⁰ *ibid.*

²⁷¹ Definition of 'tetrahydrocannabinol': *Macquarie Dictionary*.

presence of vitamin E acetate, a commonly available nutritional supplement that has oil-like properties.²⁷² It is used as a diluent in THC-containing vaping products.²⁷³

- 3.129 In late November 2019, the latest national and state findings in the United States suggested that products containing THC, particularly those obtained off the street or from other informal sources (for example, friends, family members and illicit dealers), were linked to most of the cases and played a major role in the outbreak.²⁷⁴ Vitamin E acetate has also been linked strongly to the outbreak. However, the:

Evidence is not sufficient to rule out the contribution of other chemicals of concern, including chemicals in either THC or non-THC products, in some of the reported ... [lung injury] ... cases.²⁷⁵

- 3.130 While the United States Food and Drug Administration and Centres for Disease Control and Prevention continue their investigations, they have advised the public not to use e-cigarette products which contain THC.²⁷⁶ Since the outbreak, several American states have banned flavoured e-cigarettes temporarily, while New York City and the State of Massachusetts have imposed a permanent ban.²⁷⁷ Cities such as San Francisco and Oakland, within the State of California, had already introduced bans which took effect in 2017 and 2018, respectively.²⁷⁸

- 3.131 In response to these events, the Chief Medical Officers around Australia issued a statement that:

All Australian governments are united in maintaining a precautionary approach to the marketing and use of e-cigarettes. There is growing evidence implicating e-cigarettes in a range of harms to individual and population health. ...

At a population level, there continues to be insufficient evidence to promote the use of e-cigarettes for smoking cessation. Unlike any e-cigarette product, all smoking cessation products lawfully available for sale in Australia have been evaluated for safety and efficacy and have been registered with the Therapeutic

²⁷² Dr L Kelly, 'Explaining what the link may be between mysterious illnesses and vaping', *ABC News*, 5 September 2019. See: <https://abcnews.go.com/Health/explaining-causing-mysterious-illnesses-caused-vaping/story?id=65415318>. Viewed 25 September 2019.

²⁷³ United States Government, Food and Drug Administration, *Lung injuries associated with use of vaping products*, 14 February 2020. See: <https://www.fda.gov/news-events/public-health-focus/lung-illnesses-associated-use-vaping-products>. Viewed 26 February 2020.

²⁷⁴ *ibid.*, 29 November 2019. Viewed 4 December 2019.

²⁷⁵ United States Government, Department of Health and Human Services, Centres for Disease Control and Prevention, *Outbreak of lung injury associated with the use of e-cigarette, or vaping, products*, 25 February 2020. See: https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#investigation-details. Viewed 26 February 2020.

²⁷⁶ *ibid.* United States Government, Food and Drug Administration, *Lung injuries associated with use of vaping products*, 14 February 2020. See: <https://www.fda.gov/news-events/public-health-focus/lung-illnesses-associated-use-vaping-products>. Viewed 26 February 2020.

²⁷⁷ William Feuer, 'New York City Council approves ban on all flavored e-cigarettes as US officials backpedal', *CNBC*, 26 November 2019. See: <https://www.cnn.com/2019/11/26/new-york-city-council-approves-ban-on-all-flavored-e-cigarettes.html>. Viewed 4 December 2019 and William Feuer, 'Massachusetts lawmakers approve bill banning flavored tobacco and levying 75% excise tax on e-cigarettes', *CNBC*, 21 November 2019. See: <https://www.cnn.com/2019/11/21/massachusetts-lawmakers-vote-to-ban-flavored-tobacco-and-tax-e-cigs.html>. Viewed 4 December 2019.

²⁷⁸ Angelica LaVito, 'San Francisco approves ban on menthol cigarettes and flavoured e-cigarette liquids', *CNBC*, 6 June 2018. See: <https://www.cnn.com/2018/06/06/san-francisco-approves-ban-on-menthol-cigarettes-and-flavored-e-cigarette-liquids.html>. Viewed 4 December 2019.

Goods Administration (TGA). To date, the TGA has not approved any e-cigarette product as a therapeutic good to help smokers quit.²⁷⁹

- 3.132 In New Zealand's response to the media reports about vaping-related harm, the government maintained its position on vaping:

Recently there has been some media coverage of vaping causing harm, including serious lung illness and deaths reported in the United States and elsewhere. The Ministry of Health continues to monitor new research and developments. To-date, there are no signs of similar concerns in New Zealand.

Vaping is not harmless, but it is much less harmful than smoking. Vapers who are concerned about the safety of vaping should not return to smoking which is far more harmful.

The Government is working to put legislation in place as quickly as possible to ensure vaping products are accessible to those who need them while protecting children and young people. A Bill to amend the Smoke-free Environments Act is expected to come before Parliament by the end of the year.²⁸⁰

- 3.133 Similarly, the United Kingdom distinguished the events in the United States from its own situation:

We need to be clear about what this outbreak is and is not. It is not a problem linked to long-term use of regulated nicotine vaping products. If it were, we would expect to see a very different demographic profile affected, more typical of long term vapers.

E-cigarettes containing nicotine are more tightly regulated in the UK than in the US and our medicines regulator, the Medicines and Healthcare products Regulatory Agency (MHRA) is responsible for overseeing the tobacco regulations.

The main chemicals under suspicion in the US such as THC and Vitamin E acetate oil are not permitted in e-cigarettes in this country.

...

It's also a similar situation across Europe, where there are similar restrictions on e-cigarettes as in the UK – under the European Tobacco Products Directive. No vaping related cases like in the US have been reported to the EMCDDA [European Monitoring Centre for Drugs and Drug Addiction] by its EU Early Warning System Network to date.

The illicit drugs market is global and it is possible that similar products to those in the US are available in the UK, which is why we are warning of this new and serious threat and continue to monitor carefully the situation in the UK.²⁸¹

²⁷⁹ Commonwealth, State and Territory Chief Medical Officers, *E-cigarettes linked to severe lung illness*, Media statement, Department of Health (Cth), 13 September 2019. See: <https://www.health.gov.au/news/e-cigarettes-linked-to-severe-lung-illness>. Viewed 24 September 2019.

²⁸⁰ New Zealand Government, Ministry of Health, *Ministry of Health reminder about vaping*, 30 September 2019. See: <https://www.health.govt.nz/news-media/news-items/ministry-health-reminder-about-vaping>. Viewed 7 October 2019.

²⁸¹ United Kingdom Government, Public Health England, *Vaping and lung disease in the US: PHE's advice*, 29 October 2019. See: <https://publichealthmatters.blog.gov.uk/2019/10/29/vaping-and-lung-disease-in-the-us-phes-advice/>. Viewed 26 February 2020.

Committee's conclusions on regulating e-cigarettes in Western Australia

3.134 The Committee recognises that there is a conflict in e-cigarette use between promoting the benefits for smokers who want to quit and the risk of attracting young people to the habit. The United States National Academy of Sciences concluded in 2018 that:

[Overall] ... , the evidence suggests that while e-cigarettes might cause youth who use them to transition to use of combustible tobacco products, they might also increase adult cessation of combustible tobacco cigarettes.²⁸²

3.135 The statement above demonstrates the complexity of trying to balance a purely precautionary approach to e-cigarette regulation (that is, a complete ban on e-cigarettes) with an approach which seeks to reduce the harm already being caused by combustible cigarettes (that is, the acknowledgement that e-cigarette use may help people quit smoking). That balance may be harder to achieve when the emerging evidence of vaping-related harm is taken into account.

3.136 In the Committee's view, the inconsistency and confusion created by the current regulatory regime where consumers in Western Australia cannot purchase an e-cigarette device but can purchase:

- non-nicotine e-liquid
- and
- e-liquid containing nicotine with a prescription,

is unfortunate. The Committee is aware of evidence that some consumers go so far as to assemble 'homemade' e-cigarettes from parts that they purchase separately.

3.137 The requirement for smokers who wish to switch to e-cigarettes containing nicotine to obtain a medical prescription for liquid nicotine (both for personal importation and pharmacist dispensing) is not well known. This lack of knowledge should be addressed.

3.138 Evidence of the harm caused by vaping is still emerging and the long-term effects of vaping are still unknown. However, it is clear that e-cigarette use is associated with health and injury risks.

FINDING 17

A lack of understanding about the current scheduling of nicotine and the banning of the sale of e-cigarette devices in Western Australia has resulted in Western Australian vapers relying on an overseas black market for liquid nicotine and e-cigarette devices, exposing them to greater risk.

FINDING 18

A number of overseas jurisdictions have adopted protocols which acknowledge that e-cigarettes may be an effective way of assisting people to quit smoking.

FINDING 19

While vaping is often considered to be less harmful than combustible cigarettes, evidence of the harm is still emerging and the long-term effects are still unknown. The Government should continue the practice of dissuading non-smokers from taking up smoking and vaping.

²⁸² United States, National Academy of Sciences, *Public Health Consequences of E-cigarettes: consensus report highlights*, January 2018, p 3.

FINDING 20

There is some evidence that e-cigarettes can be a gateway to children becoming smokers of combustible cigarettes and children should be dissuaded from taking up vaping.

3.139 The Committee, comprised of a majority, makes the following recommendation:

RECOMMENDATION 3

The *Tobacco Products Control Act 2006* be amended to lift the prohibition on the sale of e-cigarette devices and provide for regulation proportionate to the risk; for example, banning the sale of e-cigarette devices to children.

3.140 Hons Dr Sally Talbot and Pierre Yang MLCs prefer the following alternative to Recommendation 3:

The Government continue to take a precautionary approach to e-cigarettes, actively monitor current research to ascertain whether there is evidence to promote the use of e-cigarettes for smoking cessation, and lift prohibition on e-cigarette devices only if such a move is indicated in that research.

3.141 The Committee, comprised of a majority, makes the following recommendation:

RECOMMENDATION 4

The Government formally request the Therapeutic Goods Administration to review the scheduling of liquid nicotine.

3.142 Hons Dr Sally Talbot and Pierre Yang MLCs prefer the following alternative to Recommendation 4:

If evidence emerges that e-cigarettes could be promoted for smoking cessation, the Government take all necessary steps to ensure that the sale and availability of e-cigarette products are brought into line with the smoking-cessation products currently lawfully available for sale in Western Australia, including evaluation and registration with the Therapeutic Goods Administration.

RECOMMENDATION 5

The Government investigate the safety and harm-reduction benefits of increasing awareness about the legal requirement to obtain a medical prescription before importing e-liquid or e-cigarettes containing nicotine under the Personal Importation Scheme.

RECOMMENDATION 6

The relevant Acts be reviewed to examine the regulation of e-liquids, particularly those containing nicotine, including the imposition of child-safe packaging and labelling requirements.

CHAPTER 4

Vehicle modifications in Western Australia

Introduction

- 4.1 The Committee received six submissions relating to vehicle modification legislation in Western Australia and the approval process undertaken by the Department of Transport (DoT) in relation to licences for modified cars.
- 4.2 The submissions raised the following concerns:
- It is very difficult to register a modified vintage or classic vehicle.²⁸³
 - The DoT does not adhere to the *National Code of Practice for Light Vehicle Construction and Modification—Vehicle Standard Bulletin 14* (VSB14)²⁸⁴ and will not cooperate with the public.²⁸⁵ The DoT does not apply the VSB14; instead, DoT staff use their discretion in assessing vehicle modifications incorrectly.²⁸⁶
 - The DoT staff block and refuse vehicle modifications that do not strictly adhere to the VSB14 and staff are ‘unprofessional’, ‘uneducated’ and ‘biased’.²⁸⁷
 - The DoT’s approval process takes too long and the DoT does not employ enough staff to consider modification requests.²⁸⁸
 - The DoT’s public safety concerns regarding modified vehicles do not have any factual basis.²⁸⁹

Statutory regime for vehicle modifications in Western Australia

- 4.3 The statutory regime that governs (light) vehicle modification in Western Australia is extremely complex and involves complicated interactions between State legislation—both primary and subsidiary—and Commonwealth codes of practice, guidelines and model laws.
- 4.4 The vehicle modification regime in Western Australia is administered by the DoT, pursuant to the following legislation and standards:
- *Road Traffic (Vehicles) Act 2012*: the statute that governs the licensing of vehicles generally
 - *Road Traffic (Vehicles) Regulations 2014*: provides details of the vehicle modifications and alterations that require different licences and approvals
 - VSB14: a Commonwealth Government document that defines the standards and technical/engineering requirements for proposed modifications to light vehicles (a vehicle with a gross vehicle mass of less than or equal to 4.5 tonnes). The VSB14 was last updated in January 2011.

²⁸³ Submission 16 from Mick Allender, 25 September 2018.

²⁸⁴ The *National Code of Practice for Light Vehicle Construction and Modification—Vehicle Standard Bulletin 14* is explained in paragraph 4.4.

²⁸⁵ Submission 41 from Clint Di Giovanni, 2 October 2018.

²⁸⁶ Submission 99 from Reno Marchesi, 31 October 2018 and Submission 35 from Australian Street Machine Federation (WA State Division), 2 October 2018.

²⁸⁷ Submission 53 from Dean Hogen-Esch, 4 October 2018.

²⁸⁸ Submission 99 from Reno Marchesi, 31 October 2018.

²⁸⁹ Submission 35 from Australian Street Machine Federation (WA State Division), 2 October 2018.

State legislation

4.5 The *Road Traffic (Vehicles) Act 2012* (RTVA) sets out the licensing requirements for vehicles in Western Australia and section 5 provides that:

- (1) An owner of a vehicle may apply for the grant, renewal, transfer or variation of a licence for a vehicle by —
 - (a) submitting an application in a form approved by the CEO; and
 - (b) paying the amount of —
 - (i) any fee or charge that would be required by section 7; and
 - (ii) the duty, and any penalty tax, payable under the *Duties Act 2008* on the grant or transfer of the licence.

...

- (3) Upon an application under subsection (1) the CEO, in accordance with the regulations, is to grant, renew, transfer or vary a licence for a vehicle if —
 - (a) either —
 - (i) the vehicle meets the prescribed standards and requirements for that vehicle and is otherwise fit for the purpose for which the licence is required; or
 - (ii) the vehicle does not meet a prescribed standard or requirement for that vehicle but the vehicle is of a prescribed class or is used in a prescribed manner or otherwise complies with each requirement prescribed for the purposes of this subparagraph ...

4.6 Other licensing requirements are also set out in detail in the RTVA, including mass, dimension and loading requirements (Parts 4-6) and container weight in relation to freight containers (Part 7).

4.7 Section 132 of the RTVA contains the power to make regulations that may be necessary or convenient to give effect to the purposes of the Act. In particular, section 132(2)(b) refers to a power to:

prescribe standards or other requirements in respect of vehicles, including standards or requirements relating to —

- (i) the design, construction, efficiency and performance of, and the equipment to be carried on, vehicles; and
- (ii) the attachment of operational or safety devices; and
- (iii) roadworthiness; and
- (iv) safety, emissions and noise; and
- (v) the coupling of trailers and motor vehicles; and
- (vi) the identification of vehicles or components of vehicles; and
- (vii) security of vehicles and the equipment to be fitted to vehicles for the purposes of security.

(Committee emphases: these are topics that the VSB14 covers.)

4.8 Section 132(2)(c) of the RTVA also specifies that regulations may be made to provide for examination and testing requirements for vehicles. Section 137 relevantly provides that the regulations may refer to published documents:

- (1) Regulations made for the purposes of this Act may adopt the text of any published document specified in the regulations —
 - (a) as that text exists at a particular date; or
 - (b) as that text may from time to time be amended.
- (2) The text may be adopted —
 - (a) wholly or in part; or
 - (b) as modified by the regulations.
- ...
- (4) The adoption of text is of no effect unless —
 - (a) the adopted text; and
 - (b) if text is adopted as it may be amended from time to time, either —
 - (i) the amendments to the text; or
 - (ii) the text as amended,

can at all reasonable times be inspected or purchased by the public.

Part 10 of the Road Traffic (Vehicles) Regulations 2014 in more detail

4.9 Regulation 17 of the *Road Traffic (Vehicles) Regulations 2014* (RTVR) provides that the standards and requirements for vehicles to be licensed are set out in Parts 8, 10 and 11 of the RTVR. Part 8 of the RTVR sets out mass, dimension and loading requirements (including technical specifications and formulae for calculations), Part 10 provides for standards and requirements for motor vehicles, trailers and combinations and contains a table of alterations that require approval²⁹⁰ and Part 11 sets out the standards and requirements for animal-drawn vehicles and bicycles.

4.10 Part 10 of the RTVR extensively details the various features and components of a vehicle and the standards and requirements against which a vehicle will be assessed before it is licensed. These include:

- general safety requirements (for example, windscreen wipers, horns, window tinting)²⁹¹
- vehicle markings²⁹²
- lights and reflectors (including headlights)²⁹³
- braking systems²⁹⁴
- vehicle emissions²⁹⁵
- LPG fuel systems.²⁹⁶

²⁹⁰ *Road Traffic (Vehicles) Regulations 2014* reg 235(2). See paragraphs 4.12–4.13 and Table 5 on page 73.

²⁹¹ *ibid.*, Part 10, Division 5.

²⁹² *ibid.*, Division 6.

²⁹³ *ibid.*, Division 8.

²⁹⁴ *ibid.*, Division 9.

²⁹⁵ *ibid.*, Division 10.

²⁹⁶ *ibid.*, Division 11.

- 4.11 Part 10 Division 3 sets out the consequences for non-compliance with the requirements of Part 10 of the RTVR. For example, a person who drives a vehicle that does not comply with all of the applicable provisions in Part 10 for that vehicle commits an offence, with a modified penalty of \$100 or a maximum court-imposed fine of \$800.²⁹⁷
- 4.12 Regulation 235 of the RTVR creates an offence where a person alters a car in the manner set out in the associated table without obtaining the Chief Executive Officer's (CEO) approval, with a modified penalty of \$100 (or maximum court-imposed fine of \$800). The Committee has extracted the table of alterations that require the CEO's approval:

Table 5. *Vehicle alterations requiring Chief Executive Officer approval*

No.	Alteration
1.	Fitting an engine of greater displacement volume than an engine that was available as an option for the vehicle with the same braking system.
2.	Making modifications to braking systems which include the fitting of smaller diameter brake drums, or narrower brake drums or brake shoes which reduce the swept area of braking surface or which reduce the weight of the brake drum or disc.
3.	Fitting any wheel rim with more than a single weld around the circumference, or which does not conform to one of the dimensional standards for wheel rims set down in the Tyre and Rim Standards Manual issued by the Tyre and Rim Association.
4.	Widening the wheel track of front or rear wheels by more than 25 mm beyond the maximum specified by the vehicle manufacturer.
5.	Fitting spacers between wheels and hubs additional to any provided by the vehicle manufacturer.
6.	Fitting wheel nuts which do not engage the thread of the wheel studs for at least the same length as the nuts provided by the vehicle manufacturer, or wheel nuts which do not match with the taper on the wheel.
7.	Fitting tyres other than those appropriate to the wheel rim as specified in the Tyre and Rim Standards Manual issued by the Tyre and Rim Association.
8.	Making modifications to an axle, axles or suspension which reduces the available suspension travel from static conditions to full bump position to less than two-thirds of that provided by the vehicle manufacturer.
9.	Making modifications to an axle, axles or suspension so that any part of the vehicle other than the tyre or rim will contact a road surface in the case of the deflation of any tyre.
10.	Welding or heating any axle, stub axle, steering arm or steering knuckle support.
11.	Lengthening or shortening the chassis frame, or the body structure in the case of a vehicle of mono (chassis-less) construction.

[Source: *Road Traffic (Vehicles) Regulations 2014* reg 235(2)]

- 4.13 Making any of the 11 modifications listed in Table 5 without the required approval will constitute an offence under the regulations.
- 4.14 Part 10 Division 4 of the RTVR refers to the Australian Design Rules (ADR). Regulation 236(2) provides that where a second edition ADR 'recommends' its application to the design and construction of a vehicle, the vehicle 'must' comply. Similarly, regulation 238(2) is worded so

²⁹⁷ *ibid.*, reg 232(1) read with *Road Traffic (Administration) Act 2008* s 7.

that where a third edition ADR 'applies' to a vehicle, the vehicle 'must' comply with that edition's design and construction requirements. However, compliance with the second and third edition ADRs is waived if those editions have been superseded and the vehicle complies with the requirements of the later version.²⁹⁸

4.15 Part 10 Division 4 contains extensive detail regarding exemptions to the various ADR editions which are possible under other Commonwealth legislation,²⁹⁹ but these provisions are not relevant to this inquiry.

4.16 Regulation 462 in Part 14 of the RTVR gives the CEO the power to exempt a vehicle from a required standard, but only in the circumstances set out in the legislation:

(2) The CEO may grant an exemption from a provision of a vehicle standard regulation in respect of a vehicle only if satisfied that —

- (a) compliance with the provision would prevent the vehicle from operating in the way in which, or for the purpose for which, the vehicle was built or modified; or
- (b) the vehicle is an experimental vehicle, a prototype, or another vehicle, that could not reasonably be expected to comply with the provision; or
- (c) before the provision commenced —
 - (i) the vehicle was licensed, or otherwise authorised, by the CEO or a corresponding authority, to be driven or towed on a road; and
 - (ii) was not required to comply with a similar provision before that commencement;

or

- (d) the vehicle has been constructed, equipped or adapted so as to enable it to be driven by a person with a physical disability who cannot safely drive a vehicle that has not been so constructed, equipped or adapted; or
- (e) it would be unreasonable to require the vehicle to comply with the provision.

(3) When deciding whether to grant a CEO exemption, the CEO must take into account the likelihood and significance of any adverse effect on safety or the environment if the exemption were granted.

4.17 There has been no reference to an exemption (or the possibility thereof) under regulation 462 of the RTVR in any of the submissions received by the Committee. This issue does not appear to be central to the concerns raised by submitters.

²⁹⁸ *Road Traffic (Vehicles) Regulations 2014* regs 236(4) and 238(4).

²⁹⁹ *ibid.*, reg 240.

Review of decisions

- 4.18 Not every decision made pursuant to the RTVR is subject to review and regulation 478 sets out those types of decisions which can be reviewed (firstly by an internal review and then to the State Administrative Tribunal).³⁰⁰ There are three categories of reviewable decisions:
- CEO exemption reviewable decisions (see paragraph 4.16)
 - reviewable decisions made relating to mass/dimension/load requirements
 - vehicle licensing reviewable decisions: defined as 'a decision under Part 2 of the Act to grant, renew, transfer, vary, cancel or suspend a licence, or to refuse to do any of those things'. Part 2 of the RTVA includes section 5 (see paragraph 4.5), which is the key section for granting licences.
- 4.19 The decision to not approve an alteration to a vehicle pursuant to regulation 235 of the RTVR is not a reviewable decision for the purposes of regulation 478. Members of the public who apply for a vehicle modification and are refused are therefore unable to have that decision reviewed.

National Code of Practice for Light Vehicle Construction and Modification: VSB14

- 4.20 The National Code of Practice for Light Vehicle Construction and Modification was approved in principle in 2005, endorsed in 2006 and subsequently made publicly available on the Commonwealth Department of Infrastructure and Transport's website in 2006 in its final form as the VSB14.³⁰¹
- 4.21 The VSB14 is referred to in the *Australian Light Vehicle Standards Rules 2015* (ALVSR)³⁰², which are in turn based on the ADR, developed and administered by the Commonwealth. The ALVSR are model laws and do not have any legal effect beyond forming the basis for each State and Territory to implement their own vehicle standards rules. The National Transport Commission reviews the ALVSR annually.³⁰³
- 4.22 The Preface to the VSB14 makes it clear that:
- vehicle owners, registered operators, builders and modifiers of vehicles need to be aware that compliance with this VSB 14 does not guarantee that a vehicle will be acceptable for registration in the case of an ICV [Individually Constructed Vehicle, that is, a one-off], or for continued registration in the case of a modified registered production vehicle.³⁰⁴
- (Committee emphasis.)

³⁰⁰ The rights of review are prescribed by regulation 33 of the *Road Traffic (Administration) Regulations 2014*, which was made pursuant to section 133 of the *Road Traffic (Administration) Act 2008*.

³⁰¹ Australian Government, Department of Infrastructure, Transport, Cities and Regional Development, Vehicle Standards Bulletin 14, *National Code of Practice for Light Vehicle Construction and Modification: Preface*, version 2.0, January 2011, p 3.

³⁰² Previously known as the *Australian Vehicle Standards Rules 1999* and referred to in VSB14 as such.

³⁰³ Australian Government, National Transport Commission, 'Australian Light Vehicle Standards Rules', 15 November 2018. See: <https://www.ntc.gov.au/roads/rules-compliance/australian-light-vehicle-standards-rules/>. Viewed 29 November 2018.

³⁰⁴ Australian Government, Department of Infrastructure, Transport, Cities and Regional Development, Vehicle Standards Bulletin 14, *National Code of Practice for Light Vehicle Construction and Modification: Preface*, version 2.0, January 2011, p 5.

- 4.23 The VSB14 interacts with State legislation by providing guidance as to the design, construction, installation and performance requirements for modifications to light vehicles. According to a (redacted) refusal letter attached to Submission 35:

VSB14 ... has not been enacted into national law and therefore the application of VSB14 in any State or Territory is subject to the discretion of the jurisdiction concerned.³⁰⁵

A confusing and inconsistent system

- 4.24 At a hearing with the DoT, the Committee heard that there is confusion amongst decision makers about what constitutes a right of review for vehicle modification applicants:

Mr DAVERS: ... In general terms, some road rule provisions have statutory appeals processes built into reviewable decisions; others do not. But the general process is that it is open for somebody to go to the Driver and Vehicle Services general manager. So occasionally you will hear a complaint through either the general manager or to our managing director or DG, or to the minister's office. The general approach, although all cases are considered on their individual merits, is we will have another look at the approval, particularly if they can provide further evidence as to—if they believe we have got something wrong, our general approach is to engage with the individual and say we are aware that we got it wrong, and review it. Sometimes there is a formal process. ...

Mr SELLERS: In summary, Chair, there is an escalation. For example, if [Mr Hosie's technical policy and services] team looked at a review and still there is some dissatisfaction in it—the general manager and that process that [Mr Davers] described—in my experience in two and a half years I have not had any come to me as director general, so it is probably a rare thing that it makes it up that high, and they are resolved in some way, shape or form along that way.³⁰⁶

- 4.25 The Committee notes that the DoT is aware of the general right of review by the Parliamentary Commissioner for Administrative Investigations (Ombudsman), but remains concerned that this is not communicated to applicants:

Mr DAVERS: ... there is a general principle that decisions made by public officers are subject to administrative review. That could be internally within the department; it could be through the ombudsman's office ...

...

Our aim would always be to resolve those sorts of [administrative review] issues internally, just because it is quicker for the customer, it is easier, and it gives a better outcome.

...

The CHAIR: ... The current review process that you are following and that you outlined a moment ago I suppose is an internal policy that you currently follow for escalating disputes and requests for review around modification permits. It is an internal policy that you have. Is that right?

³⁰⁵ Submission 35 from Australian Street Machine Federation (WA State Division), 2 October 2018, p 4.

³⁰⁶ Christopher Davers, Assistant Director, Policy and Knowledge, Driver and Vehicle Services, Department of Transport and Richard Sellers, Director General, Department of Transport, *Transcript of evidence*, 27 February 2019, p 6.

Mr DAVERS: I do not know whether it is written up as a policy as such. My understanding is that that is just the —

The CHAIR: Standard practice?

Mr DAVERS: Yes.³⁰⁷

4.26 The Ombudsman has very broad statutory powers to investigate decisions made by public authorities, which extends to administrative decisions made by officers at the DoT. The *Parliamentary Commissioner Act 1971*, which establishes the Ombudsman's office, provides an avenue for members of the public who have been personally affected by an administrative decision within the past 12 months to apply to the Ombudsman to investigate the circumstances of the individual case.³⁰⁸

4.27 The Committee is concerned that the DoT does not communicate, in its decision records, the existence of this avenue of review to applicants who submit their vehicle modifications to the department. For example, the Committee notes the following extract from a decision record provided to an unsuccessful applicant for a vehicle modification, which contains no information about the Ombudsman³⁰⁹ or the role of that office:

A decision under Regulation 235 of the *Road Traffic (Vehicles) Regulations 2014* to refuse to approve modifications to a vehicle is not a decision that the Department is obliged to reconsider under the *Road Traffic (Vehicles) Act 2012* or related Acts and regulations. A decision under that regulation is also not subject to a right of review in the State Administrative Tribunal (SAT), unlike some other types of decision made under this legislation. It is open to you to seek your own advice on whether other avenues of appeal or review are available to a decision of this kind.

Should you require any further assistance or seek further clarification, please do not hesitate to contact the Coordinator on telephone number [redacted by Committee]

Yours sincerely

[redacted by Committee].³¹⁰

4.28 The vehicle modification approval process was raised during this inquiry by six submissions, with all submitters mentioning the same issue: confusion and unfairness within the decision making process undertaken by the DoT. The Committee finds it concerning that members of the public, who may not be familiar with the role of the Ombudsman, are not advised of their right to contact the Ombudsman in the written decisions records given to them by the DoT.

4.29 The Committee also notes that the DoT's account of its internal policies seems to bear out the observations of submitters about the arbitrary nature of its considerations, such as the power measurements for vehicles seeking to be modified:

Hon Rick MAZZA: Some of the evidence we heard from those who are into modifying vehicles substantially, is that there is a 180 per kilowatt per tonne limit for these vehicles. Is that something that is actually a regulation or is that a policy of the department?

³⁰⁷ Hon Aaron Stonehouse MLC, Chair and Christopher Davers, Assistant Director, Policy and Knowledge, Driver and Vehicle Services, Department of Transport, *Transcript of evidence*, 27 February 2019, p 7.

³⁰⁸ *Parliamentary Commissioner Act 1971* s 14(1). The 12-month period can be extended in special circumstances: *ibid.* s 17(5).

³⁰⁹ Or the Parliamentary Commissioner for Administrative Investigations, as the position is known formally.

³¹⁰ Submission 99 from Reno Marchesi, 31 October 2018, p 12.

Mr HOSIE: No, that would be a policy.

Hon Rick MAZZA: A policy? Is this policy something that is consistent across all states of Australia?

Mr HOSIE: No, that is not consistent across all states of Australia.

Hon Rick MAZZA: So where has this 180 kilowatt per tonne policy been derived from?

Mr HOSIE: The engineering section, which is not one that I supervise, went back historically through hundreds of vehicle specifications over the years. Basically, there were no high performance vehicles in the early days, in the 1980s, that came anywhere near that sort of power output. There is concern that if you look at the occupant protection and the safety of earlier vehicles, they have poor brakes and poor handling, and they do not perform very well in accidents. ...³¹¹

- 4.30 At a hearing with Australian Street Machine Federation, the Committee heard that many modern cars have power to weight ratios well in excess of the 180 kilowatt per tonne limit that the DoT is enforcing on modified vehicle applications:

For example, an engine that has come out of a brand-new Commodore 2018 is actually designated as an LS engine. It has got a capacity of five litres. It has got a power output of about 300 kilowatts. That comes out from the Holden or Ford factory – 300 kilowatts.³¹²

- 4.31 The VSB14 does not refer to specific limitations on the power to weight ratios that should be approved for modification, but provides the following guidelines in relation to engines (specifically engine replacement):

A manufacturer's standard or optional engine should be selected and installed using all the standard components for that vehicle model. However, where this is not practicable, the following requirements should be met:

- Any replacement engine should be of similar mass and power output to that of an engine fitted by the original vehicle manufacturer as standard or optional equipment;
- When the replacement engine is larger in power output than an engine offered by the vehicle manufacturer as standard or optional equipment, the vehicle must be equipped with any necessary upgrading of equipment eg brakes, front suspension, etc; and
- The power and/or torque of the replacement engine must not exceed the capacity of the vehicle driveline.³¹³

- 4.32 The Committee notes, therefore, that it appears that the VSB14 suggests a case-by-case approach to assessments of engine replacements or upgrades, rather than fixing a maximum power to weight figure to apply to all vehicles.

³¹¹ Hon Rick Mazza MLC, Member, and David Hosie, Technical Policy and Services Coordinator, Department of Transport, *Transcript of evidence*, 27 February 2019, p 5.

³¹² Stanley Khose, State Director, Australian Street Machine Federation-WA State Division, *Transcript of evidence*, 15 February 2019, p 4.

³¹³ Australian Government, Department of Infrastructure, Transport, Cities and Regional Development, Vehicle Standards Bulletin 14, *National Code of Practice for Light Vehicle Construction and Modification: section LA Engine*, version 2.0, January 2011, p 7.

- 4.33 The South Australian Department of Planning, Transport and Infrastructure also conforms to the approach suggested by the VSB14 and assesses vehicle modifications on a case-by case basis, advising applicants that when it assesses:
- an application [for engine change] the following factors will be considered:
- weight
 - power and torque output in relation to braking
 - strength of the vehicle
 - effect on steering and suspension components
 - the effect on vehicle handling.³¹⁴
- 4.34 Applicants who wish to modify their engines in Victoria must obtain a certificate from approved engineers where the proposed change will increase the power of the vehicle by more than 20 per cent (as well as where the new engine is not an optional 'extra' offered by the vehicle manufacturer).³¹⁵ Vicroads also advises applicants that proposed vehicle modifications must still comply with the requirements of the VSB14 and will be assessed on a case-by-case basis.
- 4.35 It is therefore not apparent to the Committee why the DoT has chosen to impose a limit of 180 kilowatts per tonne as the maximum figure for applications for vehicle modifications, when other States do not prescribe such an arbitrary figure. The Committee notes the inconsistency that the DoT's approach creates in what is intended to be a uniform system for modifying vehicles across Australia.

Committee's conclusions on the process for modifying vehicles in Western Australia

- 4.36 The Committee has investigated the issue of applications for vehicle modifications in Western Australia and has uncovered a process that is disorganised and inconsistent.
- 4.37 Evidence received from members of the public who are involved in the vehicle modification process, both as applicants and as providers of vehicle modification services, suggests that the policies being applied by the DoT are unclear and inconsistently applied. The Committee is concerned that, in applying a strict limit of 180 kilowatts per tonne for all vehicle modifications, this may create an arbitrary threshold for all applications, rather than assessing each application on its individual merits.
- 4.38 There is no external right of review to the State Administrative Tribunal for regulation 235 of the RTVR. The Committee is of the view that there should be a right of review.
- 4.39 The Committee is of the view that the DoT should be more explicit in communicating to applicants that they have the right to contact the Ombudsman to seek review of their application.
- 4.40 The Committee is mindful that the VSB14 has not become part of Western Australian legislation and remains a guideline for decision makers at the DoT in this instance. However, the DoT should do more to communicate this fact to prospective applicants for vehicle

³¹⁴ South Australia, Department of Planning, Transport and Infrastructure, *Standards and modifications: Engine and exhaust modifications*, 4 October 2017. See: <https://www.sa.gov.au/topics/driving-and-transport/vehicles/vehicle-standards-and-modifications/engine-and-exhaust-modifications>. Viewed 31 July 2019. The Committee further confirmed with departmental staff that there is no maximum upper limit for engine change, as its approved engineers assess each proposed modification on its individual merits.

³¹⁵ Victoria, Vicroads, *Vehicle Standards Information: Guide to Modifications for Motor Vehicles*, October 2011, p 3.

modifications given the complexity of the statutory framework and the high financial investment of a modified vehicle.

4.41 The Committee therefore makes the following findings and recommendations:

FINDING 21

The process within the Department of Transport for determining applications for vehicle modifications is haphazard, arbitrary and is perceived by applicants to be capricious and lacking in procedural fairness.

FINDING 22

The lack of a right of review to the State Administrative Tribunal for decisions made under regulation 235 of the *Road Traffic (Vehicles) Regulations 2014* is inconsistent with community expectations of procedural fairness.

FINDING 23

The Department of Transport does not adequately inform applicants of their rights to lodge a review with the Ombudsman of Western Australia for decisions made under regulation 235 of the *Road Traffic (Vehicles) Regulations 2014*.

RECOMMENDATION 7

The Government legislate a right of review to the State Administrative Tribunal for decisions made pursuant to regulation 235 of the *Road Traffic (Vehicles) Regulations 2014*.

RECOMMENDATION 8

The Government update the Department of Transport's publicly available information regarding the standards applied by the Department when assessing vehicle modification applications.

RECOMMENDATION 9

The Government ensure that the Department of Transport's decision records and correspondence sent to applicants for vehicle modifications in Western Australia provide clear information about:

- (a) the role of the Parliamentary Commissioner for Administrative Investigations (Ombudsman)
- (b) applicants' right of review under the *Parliamentary Commissioner Act 1971*.

CHAPTER 5

Safety in water

Introduction

- 5.1 Issues related to safety in and on bodies of water were raised by 12 public submissions to this inquiry: six submissions referred to mandatory lifejackets being worn during recreational water activities and six referred to the requirement for pool fencing around residential swimming pools. The Committee notes that two thirds of the submissions that raised mandatory lifejackets were in favour and one third was opposed to mandatory lifejackets, but that only one submission opposed mandatory fencing for pools.
- 5.2 The Committee has focused on the issue of lifejackets being made mandatory for all water activities in this chapter. The Committee also makes comment on the mandatory pool-fencing regime that exists in Western Australia.

When is it mandatory to carry a lifejacket in Western Australia?

- 5.3 The *Navigable Waters Regulations 1958* (NWR), as amended,³¹⁶ prescribe the situations in which drivers or passengers on vessels and personal watercraft must carry and/or wear lifejackets. The regulations also specify the different levels of lifejackets required, depending on where the vessel is being operated. There are differing carriage requirements for vessels, depending on the location of the vessel (see Table 6 below for carriage requirements for lifejackets).
- 5.4 The Committee notes evidence from Recfishwest that different types of lifejackets cater for a wide range of activities on water:

A rock fisher requires a jacket that allows them to cast from the rocks with little obstruction while a kayaker is likely to prefer a lifejacket that rides higher on the torso allowing for the paddling movement required when kayaking.

Someone who is fishing alone or not a confident swimmer may be better suited to wearing an automatically inflating lifejacket while a confident swimmer may choose the manual inflation allowing themselves the opportunity to swim back to the boat if they fall in. A rock fisher may want to have the opportunity to swim away from the rock in the event they are washed into the water to prevent being repeatedly washed up against the rocks and so may prefer a manual inflating lifejacket while others may fear banging their head against the rock and may want an automatically inflating jacket.³¹⁷

- 5.5 The Committee agrees with the position held by Recfishwest that 'lifejackets are not a one size fits all solution'.³¹⁸

³¹⁶ These regulations were last amended on 1 July 2019.

³¹⁷ Leyland Campbell, Acting Chief Executive Officer, Recfishwest, Letter, 20 March 2019, p 3.

³¹⁸ *ibid.*

Table 6. *Lif jackets—Carriage: as currently required in Western Australia*

Vessel type	Protected waters	Unprotected waters within 400m from shore	Unprotected waters beyond 400m from shore
Motorboats, sailboats, dinghies¹ (ie vessels not tabled below)	-	Lif jacket minimum Level 100	Lif jacket minimum Level 100
PWCs (Personal Water Craft)	Lif jacket minimum Level 50 or 50S	Lif jacket minimum Level 50 or 50S	Lif jacket minimum Level 100
Sailboards (wind surfers and kite boards)	-	-	Lif jacket minimum Level 50 or 50S
Paddle craft²	-	-	Lif jacket minimum Level 50 or 50S
Slalom Skiing³ (only for the skier)	Lif jacket minimum Level 50 or 50S	Lif jacket minimum Level 50 or 50S	Lif jacket minimum Level 50 or 50S

¹These vessels include dinghies and tenders – powered or unpowered

²Paddle craft include pedalled craft, canoes, kayaks, sit-on-tops, surf-skis and paddle boards. They do not include tenders or dinghies (powered or unpowered)

³Note that this includes parasailing, but excludes normal skiing.

[Source: Department of Transport, *Recreational Vessel Safety Equipment Discussion Paper: Full*, March 2017]

- 5.6 'Protected waters' are defined in regulation 2 of the NWR as being 'the waters contained in any lake, river or estuary, or by any breakwater, but does not include the waters of Cambridge Gulf or Lake Argyle'
- 5.7 A 'personal watercraft' (PWC) is any vessel that is propelled by an inboard motor powering a water jet pump and is designed to be steered by a person sitting, standing or kneeling on the vessel rather than within it.³¹⁹
- 5.8 The Committee heard from Recfishwest that cost can be a significant factor in the decision of whether or not to purchase a lif jacket, and what type:

With the new style of Type 1 slimline manual and automatic inflation lif jackets currently retailing for around \$90+ and \$130+ respectively, the cost to provide these jackets for an entire family can quickly become substantial.³²⁰

When is it mandatory to wear a lif jacket in Western Australia?

- 5.9 The Committee notes that only operators of PWC must wear lif jackets at all times. Other users of watercraft are required to wear lif jackets depending on the distance that they travel from shore (see Table 7 below).

³¹⁹ *Navigable Waters Regulations 1958* reg 46.

³²⁰ Leyland Campbell, Acting Chief Executive Officer, Recfishwest, Letter, 20 March 2019, p 5.

Table 7. *Lifejackets—Wearing: as currently required in Western Australia*

Vessel type	Protected waters	Unprotected waters within 400m from shore	Unprotected waters beyond 400m from shore
Motorboats, sailboats, dinghies¹ (ie vessels not tabled below)	-	-	-
PWCs (Personal Water Craft)	Compulsory wearing	Compulsory wearing	Compulsory wearing
Sailboards (wind surfers and kite boards)	-	-	Compulsory wearing
Paddle craft²	-	-	-
Slalom skiing³ (only the skier while skiing)	Compulsory wearing by skier	Compulsory wearing by skier	Compulsory wearing by skier

¹These vessels include dinghies and tenders – powered or unpowered

²Paddle craft include pedalled craft, canoes, kayaks, sit-on-tops, surf-skis and paddle boards. They do not include tenders or dinghies (powered or unpowered)

³Note that this includes parasailing, but excludes normal skiing.

[Source: Department of Transport, *Recreational Vessel Safety Equipment Discussion Paper: Full*, March 2017]

Review of Recreational Vessel Safety Equipment

- 5.10 The Committee understands that the DoT has been conducting a review of the safety equipment required to be carried on recreational vessels on Western Australian waters, the first review of its kind since 1992.³²¹
- 5.11 Part of the Recreational Vessel Safety Equipment Review (RVSE Review) includes examining the requirements for mandatory lifejackets on Western Australian recreational vessels, noting that:
- currently, WA is not aligned with other jurisdictions for [lifejacket use on] protected waters, but is aligned for [lifejacket requirements] for vessels on unprotected waters.³²²
- 5.12 According to the DoT:
- [In] ... an emergency, wearing a lifejacket can mean the difference between life and death. In an incident, people have little time to put on a lifejacket and this can contribute substantially to their deaths.³²³
- 5.13 The RVSE Review notes statistics about person overboard incidents and anecdotal evidence that suggest that mandatory wearing of lifejackets depends on the situation and is not a 'one size fits all' approach:

³²¹ Western Australian Government, Department of Transport, *Recreational Vessel Safety Equipment Discussion Paper: Summary*, March 2017, p 4.

³²² *ibid.*, p 8.

³²³ *ibid.*, p 9.

Of all incidents in WA between 2007 and 2014, 30 were [person overboard] incidents. Of these, one third (33 per cent) resulted in death ... Anecdotally, where people fell overboard and could have drowned but did not, [this] was because there were people on hand to assist. It may be that when operating alone in isolation, lifejackets should be worn instead of just carried.

Wearing a lifejacket inside an enclosed compartment with small exits is likely to increase the chance of drowning if the vessel capsizes or sinks very rapidly.³²⁴

- 5.14 The RSVE Review suggests that compulsory wearing of lifejackets might be targeted at vessels:
- that are likely to capsize (small vessels operating in the ocean, small sailing dinghies, canoes, kayaks)
 - from which people are prone to falling overboard (such as smaller or unstable vessels)
 - that are carrying children
 - that are operated in situations where there is a higher risk of a person not being recovered if they fall overboard (for example, a person operating alone, or at night).³²⁵
- 5.15 As at 18 March 2020, the RVSE Review was ongoing. A position paper was released in October 2019, initiating the second and final round of consultation for the review.³²⁶ That final round of consultation ended on 22 November 2019.³²⁷
- 5.16 In the position paper, the proposal for lifejacket wearing was as follows—mandatory wearing for:
- vessels less than 4.8 metres in length
 - all vessels carrying children aged above one year and under 12 years,
- while in unprotected waters beyond 400 metres from shore.³²⁸

Current trial of mandatory lifejackets in Albany

- 5.17 In early December 2018, the Minister for Fisheries announced a two and a half year trial for mandatory lifejackets for all visitors to Salmon Holes in Albany. The trial was prescribed by regulation³²⁹ and commenced on 1 January 2019, with a one-month grace period in place for fine enforcement.
- 5.18 The Minister for Fisheries stated that the trial will 'evaluate if the wearing of lifejackets is effective in reducing rock fishing fatalities' and will run for 'three salmon seasons' (2019, 2020 and 2021). The Committee notes, however, that the regulations do not prescribe an end date to the trial. Under the trial, all visitors to Salmon Holes are required to wear a Type 1 lifejacket, whether hired or purchased outright.³³⁰ The Committee notes that Type 1

³²⁴ *ibid.*

³²⁵ *ibid.*

³²⁶ Western Australian Government, Department of Transport, *Recreational Vessel Safety Equipment Review—Position Paper*, October 2019, p 17.

³²⁷ Western Australian Government, Department of Transport, *Safety equipment review*, 22 November 2019. See: <https://www.transport.wa.gov.au/imagery/safety-equipment-review.asp>. Viewed 3 February 2020.

³²⁸ Western Australian Government, Department of Transport, *Recreational Vessel Safety Equipment Review—Position Paper*, October 2019, p 9.

³²⁹ *Conservation and Land Management Amendment Regulations (No. 4) 2018* gazetted on 11 December 2018.

³³⁰ Hon Dave Kelly MLA, Minister for Fisheries, *New lifejacket trial to commence at Salmon Holes in January*, Media statement, Department of Primary Industries and Regional Development, 11 December 2018.

lifejackets consist of the three highest-rated lifejackets—those rated for use in unprotected waters (see Figure 12).³³¹

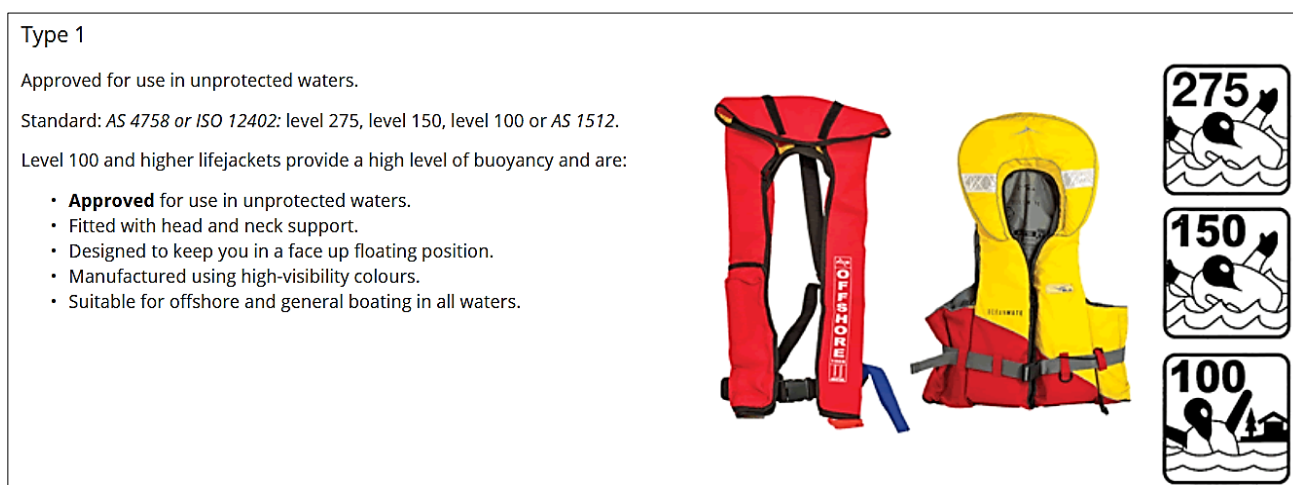


Figure 12. *Type 1 lifejacket information*

[Source: Department of Transport]³³²

5.19 Thirteen people have drowned at Salmon Holes since 1983 by being swept off rocks while fishing. According to the Minister, Salmon Holes is ‘by far the most dangerous location if you judge the number of fatalities’.³³³

5.20 Following the deaths of three rock fishers in 2018 in two separate incidents, the State Coroner made several safety recommendations, including that regulations:

be implemented which make it a requirement [that] rock fishermen wear life jackets when fishing from rocks subject to wave action and spray on the WA coast.³³⁴

5.21 A Lifejacket Trial Reference Group has been established, comprising representatives from Recfishwest, the Department of Fire and Emergency Services, Department of Primary Industries and Regional Development, Department of Biodiversity, Conservation and Attractions and the City of Albany. According to the Minister for Fisheries:

the majority of people fishing at Salmon Holes have been observed fishing from the beach, not the rocks. Only two infringements have been issued for people fishing from the rocks at Salmon Holes without wearing a lifejacket.³³⁵

³³¹ Types 1, 2 and 3 lifejackets are made to older Australian Standards—AS 1512, AS 1499 and AS 2260, respectively. The *Navigable Waters Regulations 1958* refer to these older lifejackets as personal flotation devices (or PFD) 1, 2 or 3: reg 46. While these older lifejackets, if they are in good condition, may still be used in Western Australia, lifejackets are now made to newer standards—AS 4758 or ISO 12402—and rated as Level 50, 50S, 100, 150 or 275. Western Australian Government, Department of Transport, *Lifejackets*, 10 January 2020. See: <https://www.transport.wa.gov.au/imagery/life-jackets.asp>. Viewed 13 January 2020.

³³² Western Australian Government, Department of Transport, *Lifejackets*, 10 January 2020. See: <https://www.transport.wa.gov.au/imagery/life-jackets.asp>. Viewed 13 January 2020.

³³³ Toby Hussey, ‘Fines up to \$1000 in lifejacket trial’, *The West Australian*, 12 December 2018, p 4.

³³⁴ Western Australia, Deputy State Coroner Vicker, *Inquest into the Deaths of Chunjun LI and Jiaolong ZHANG*, 16 March 2018 and *Inquest into the Death of Ali Mohammad SOLTANI*, 23 March 2018.

³³⁵ Hon Dave Kelly MLA, Minister for Fisheries, Letter, 8 July 2019, p 1.

- 5.22 The Minister has also advised that free lifejackets are available for loan at five locations across Albany as part of Recfishwest's 'Fish and Survive' initiative.³³⁶

Committee's conclusions on mandatory use of lifejackets

- 5.23 The Committee is of the view that individuals should be encouraged to be proactive about their personal safety; that is, to assess their relative risk and take actions to mitigate that risk.
- 5.24 Further, the Committee notes Recfishwest's observation that lifejackets are not a one size fits all approach and their use should depend on risk.³³⁷
- 5.25 Where there are identified risky activities, such as operating a PWC in unprotected waters or in designated 'black spot' areas (such as Salmon Holes), the Committee supports the mandating of lifejackets as a protective measure.
- 5.26 The Committee endorses an approach where education of the benefits of lifejackets allows adults to make informed decisions about their acceptance of the risk of the activity on water, noting the view expressed by Recfishwest that 'educating the boating public and empowering them to make their own choices is a better approach than legislating the wearing of lifejackets'.³³⁸

RECOMMENDATION 10

The requirements for carrying and wearing lifejackets in the *Navigable Waters Regulations 1958* should be changed only if there is compelling evidence provided by the Recreational Vessel Safety Equipment Review to do so.

FINDING 24

Mandatory lifejackets may be an appropriate safety measure for areas identified as 'black spots', subject to the outcomes of the trial at Salmon Holes.

Committee comment on mandatory pool fencing

- 5.27 The Committee received six public submissions that referred to pool fencing with only one submission against the requirement for residential pools to be adequately fenced. Submitters raised the following concerns:
- Mandatory pool fencing is a gross imposition on the property rights of homeowners and negatively affects the visual amenity of a house.³³⁹
 - Mandatory pool fencing laws should continue as they have contributed to lower rates of toddler drowning deaths and have become a community norm.³⁴⁰
 - Removing or reducing pool-fencing requirements now would put children at unnecessary risk of drowning—most fatal drowning accidents occur in private swimming pools where there is no barrier.³⁴¹

³³⁶ *ibid.*

³³⁷ Submission 81 from Recfishwest, 5 October 2018, p 2.

³³⁸ Leyland Campbell, Acting Chief Executive Officer, Recfishwest, Letter, 20 March 2019, p 6.

³³⁹ Submission 5 from Ken Helsby, 19 September 2018.

³⁴⁰ Submission 64 from Royal Life Saving Society of Western Australia, 4 October 2018.

³⁴¹ Submission 90 from Injury Matters, 5 October 2018.

Pool fencing legislation in Western Australia

5.28 The *Building Act 2011*, the *Building Regulations 2012* and the Building Code of Australia form the relevant statutory framework that mandates pool fencing for private swimming pools. The legislative requirements for private swimming pool owners in Western Australia are as follows.

- A private swimming pool or spa pool that contains water that is more than 300 millimetres deep must have a compliant barrier installed that restricts access by children younger than five years of age to the pool and its immediate surrounds.³⁴² The fine for non-compliance is \$5000.
- Private swimming or spa pools include: in-ground or above-ground swimming pools (including inflatable or portable ones), in-ground or above-ground spa pools (but not spa baths that are emptied after each use) and bathing or wading pools.³⁴³
- A building permit is required under section 9 of the *Building Act 2011* before a swimming pool can be installed and a permit is also required prior to installing a pool barrier. Local governments are responsible for granting permits under the *Building Act 2011*. They must also carry out inspections of pool barriers at least every four years and must not charge more than \$58.45.³⁴⁴
- Different requirements apply to the type of barrier fence, depending on when the private swimming pool or spa was installed or approved: different standards apply for pre-May 2016 pools (including a concession for pre-November 2001 pools) and all post-May 2016 pools.³⁴⁵
- The Building Code and other prescribed standards set out all of the exact details of the height, material, fixtures and location of barrier fences.³⁴⁶

5.29 While all states and territories have requirements for pool fencing, Western Australia is the only Australian State that mandates regular inspections of pool fencing and, according to research from the Royal Life Saving Society of Western Australia, of 28 143 pool barriers inspected, 92.3 per cent were found to be compliant with legislative requirements.³⁴⁷

Ombudsman's investigation into child drownings in 2017

5.30 In 2017, the Ombudsman reviewed the circumstances and details of deaths that occurred in 2009–15 from drowning, where the victim was a child (under 18 years of age). The Ombudsman undertook this investigation to determine 'whether it may be appropriate to make recommendations to any local government or state government department or authority about ways to prevent or reduce deaths of children by drowning'.³⁴⁸

5.31 The Ombudsman collected data from the former Department of Child Protection and Family Support (now Department of Communities) about children who had died by drowning. The

³⁴² *Building Regulations 2012* reg 50.

³⁴³ Western Australian Government, Department of Mines, Industry Regulation and Safety, Building and Energy Division, *Rules for Pools and Spas*, 2nd edition, May 2016, p 4.

³⁴⁴ *Building Regulations 2012* reg 53(2).

³⁴⁵ Western Australian Government, Department of Mines, Industry Regulation and Safety, Building and Energy Division, *Rules for Pools and Spas*, 2nd edition, May 2016, p 6.

³⁴⁶ The Building Code requirements are reproduced in *ibid.*, pp 7–32.

³⁴⁷ Submission 64 from Royal Life Saving Society of Western Australia, 4 October, p 3.

³⁴⁸ Ombudsman Western Australia, *Investigation into ways to prevent or reduce deaths of children by drowning*, 23 November 2017, p 13.

Ombudsman also collected data relating to hospital attendance and admission following a non-fatal drowning incident.

5.32 In relation to the age of victims, the data revealed that:

- 34 children died by drowning between 1 July 2009 and 30 June 2015; 71 per cent of these children were aged under five years
- 258 children were admitted to hospital following a non-fatal drowning incident; 74 per cent of these children were aged under five years
- 2310 children attended an emergency department at a hospital following a non-fatal drowning incident; 67 per cent of these children were aged under five years.³⁴⁹

5.33 In relation to the location of incidents, the data revealed that:

- 47 per cent of the drownings occurred in a private swimming pool
- for children who drowned aged less than one year old, the location was usually the bath/shower
- for children who drowned aged 1–4 years, the location was usually a private swimming pool
- for children who drowned aged 5–17 years, the location was usually a river, ocean, lake, dam or pond
- for children who drowned aged older than five years, 54 per cent died in a private swimming pool.³⁵⁰

5.34 The Ombudsman defines active supervision as when ‘a child is being constantly watched by an adult who is within arms’ reach at all times’.³⁵¹ The Committee supports the Ombudsman’s position that parental supervision should be the first and most important way to prevent child drownings.

5.35 The Ombudsman also found that swimming pool barriers act as a ‘second line of defence for when a child is not known to be in, on, or around water’. Further, the Ombudsman concluded that:

The research literature identifies that most fatal drowning incidents in private swimming pools occur where there is no barrier or a faulty barrier between the residence and the swimming pool area. The ... [Ombudsman] ... found that all of the 13 children aged under five years, not known to be in and around water, who died by drowning in a private swimming pool, died in a private swimming pool with either no barrier, a defective barrier or a climbable object near the permanent barrier.³⁵²

(Committee emphasis.)

Evidence that the Committee has heard about pool fencing

5.36 The Committee held a hearing with Injury Matters who made the claim that mandatory pool fencing requirements are not an onerous imposition on pool owners:

The fact that WA has the highest rate of pool ownership as well as the strictest pool barrier legislation in the nation, one can conclude that pool fencing does not

³⁴⁹ *ibid.*, pp 39–40.

³⁵⁰ *ibid.*, pp 51 and 53.

³⁵¹ *ibid.*, p 16.

³⁵² *ibid.*

hinder, restrict or impact on pool users' wellbeing and enjoyment. On the contrary, it ensures that pools are a safe and enjoyable addition to many households in Western Australia.³⁵³

- 5.37 The Committee raised the apparent irony in requiring private swimming pools to be fenced, while public waterbodies (dams, lakes and lagoons) remain a risk for children:

Hon Rick MAZZA: ... sometimes we have the ridiculous situation where there is a canal with open water very steep to the canal and yet if you put in a spa, you have to have a fence around that. ...

Mrs LUKJANOWSKI: Yes, I completely agree. I think that pool fences are obviously a deterrent and slow down a child from potentially gaining access to that particular body of water. However, as per the Royal Life Saving data, it is showing that there is an increased risk in those waterways now, where they are saying there are issues with children having quite serious or horrific injuries as a result. So it is something that as a whole community we still need to continue education on.³⁵⁴

- 5.38 Since 2008, five children have drowned in public canals/channels, while there have been 20 drowning deaths in lake/dam/lagoon locations.³⁵⁵ Injury Matters also provided the Committee with information on measures which can mitigate the risk of drowning for children around public waterways:

- Safety and risk management audits
- Consultation with safety organisations in planning phases
- Barriers – around playgrounds in close proximity to waterway, handrails/balustrades where appropriate
- Safety signage
- Public education – dangers of waterways, supervision of young children, safe behaviours etc
- Provision of programs to develop swimming and water safety skills
- Provision of programs to develop first aid, rescue and resuscitation skills.

Risk comes in many forms but here we would like to highlight two forms. The physical environment, including shallow water, currents/flowing water, sudden changes in water depth, steep gradient of entry to water, submerged obstacles, deep water, water quality, flooding/seasonal variations, steep crumbling banks/thick vegetation, pathways/platforms, jetties/bridges, pontoons, activity areas (BBQ areas, playgrounds), lighting. And the human environment, covering the lack of awareness of dangers, lack of swimming ability, inadequate parental supervision, risk taking behaviour, alcohol consumption, unauthorised use of waterway, ability of bystanders to respond in an emergency.³⁵⁶

- 5.39 The Committee notes that many of the measures referred to by Injury Matters can be implemented through greater education and community awareness of the dangers around public waterways and their risk to unsupervised children.

³⁵³ Chrisandra Lukjanowski, Chief Executive, Injury Matters, *Transcript of evidence*, 23 November 2018, p 2.

³⁵⁴ Hon Rick Mazza MLC, Member, and Chrisandra Lukjanowski, Chief Executive, Injury Matters, *Transcript of evidence*, 23 November 2018, pp 8–9.

³⁵⁵ Samantha Dowling, Injury Matters, Answers to questions on notice 4 and 5 asked at hearing held 26 November 2018, dated 11 December 2018, p 3.

³⁵⁶ Samantha Dowling, Injury Matters, Answer to question on notice 3 asked at hearing held 26 November 2018, dated 11 December 2018, p 3.

CHAPTER 6

Assessment and scrutiny of regulatory reform

Introduction

- 6.1 Throughout this inquiry, the Committee has focused on current measures that impact on the personal choice of individuals and the safety of the community. This chapter outlines possible ways in which policy makers and regulators can ensure that future policy proposals or new regulation is implemented in a balanced manner which preserves both personal freedom and community safety.
- 6.2 The Committee has considered various tools for policy makers implemented in similar environments in other jurisdictions (such as New Zealand). In this chapter, the Committee will discuss the current regulatory process in Western Australia and recommend modified frameworks for the Parliament and the Government to assess how the actions of legislators and policy makers impact on individuals.

Government assessment of the impact of regulatory reform

Regulatory impact assessment in Western Australia

- 6.3 Regulatory Impact Assessment (RIA) is a process overseen by the Department of Treasury (Treasury) to assist agencies in developing policies and legislation to address an issue.
- it is designed to improve the quality of regulation by ensuring that decision-makers are fully informed when making regulatory instruments. The program seeks to ensure that rigorous analysis of regulatory proposals is undertaken and the use of effective and appropriate consultation and transparency in the regulation-making process.³⁵⁷
- 6.4 Since late 2009, RIA has applied to all regulatory proposals, including primary and subsidiary legislation:
- The RIA process applies to proposals that may result in new or amending regulation, all forms of primary legislation, subordinate legislation that goes to cabinet or Executive Council and quasi-regulations that go to cabinet. There are some minor or standard amendments that are exempted from the RIA process, such as regulatory proposals that are machinery of government or administrative in nature, relate to the management of the public sector or relate to policy powers or the administration of justice, such as rules of court. In addition, a Treasurer's exemption can be sought by ministers in cases of election commitments or when an emergency response is required.³⁵⁸
- 6.5 RIA comprises of the following three stages:
- Preliminary Impact Assessment (PIA)—this is the stage when the proposal is assessed for its significance. It involves considering what regulatory options are available and conducting a preliminary cost-benefit analysis of each option. The agency then completes a form with a summary of this information, the problem that the policy or legislation is attempting to solve and steps taken to assess the community's views of the

³⁵⁷ Alistair Jones, Executive Director, Economic, Department of Treasury, *Transcript of evidence*, 20 August 2019, pp 1–2.

³⁵⁸ *ibid.*, p 2.

issue. This form³⁵⁹ is lodged electronically with Treasury and remains an internal document.³⁶⁰

- Consultation Regulatory Impact Assessment—this stage is conducted if the PIA reveals that there will be significant impacts on the economy or consumers. There is an emphasis on consultation, with the public release of a ‘consultation regulatory impact statement’. This stage also includes a more detailed cost-benefit analysis of the regulatory options.³⁶¹
- Decision Regulatory Impact Assessment—the RIA is finalised and the agency must nominate a preferred option and discuss the plans for implementation. All of this analysis is captured in a ‘decision regulatory impact statement’ (Decision RIS). The Decision RIS is submitted to Cabinet as part of the Cabinet submission for the regulatory change.³⁶² Treasury advised the Committee that:

[Prompt publication of the Decision RIS] ... is encouraged.^[363] The majority of them are made public relatively quickly. It is regulatory best practice to get them out there as soon as possible. Sometimes if the issues are contentious, government may decide that it either does not or delays the release of a decision RIS, but that is usually the call of the minister in the portfolio.³⁶⁴

6.6 When the Committee queried whether it would be feasible to make the publication of Decision RISs mandatory, Treasury responded as follows:

One of the issues you often find with a decision RIS, too, sometimes it informs you not to do something. Obviously, often what they do then is make the decision not to do it and do not put the D[ecision]RIS up on the website. Again, it is a call of whether that has actually served its purpose; it was transparent in government decision-making and did it, but again it is up to government. It may have had a policy that they run for a RIS process and it has shown it has not worked. Again, [if the publication of Decision RISs was mandatory] you are asking a government of either political persuasion to basically say, “Hey, we got it wrong”, and put it up. Often they will say, “We’re not doing it”, and that is probably to the extent that they go to admit that that policy, in its form that they presented it, was not a good idea. Often that is where you find that there is a reluctance to put a RIS up.

...

You want your D[ecision]RIS to be frank and fearless and sometimes if they know it is going to be mandatorily put up, we would probably spend a lot more time arguing with them over what should be in and what should not.³⁶⁵

³⁵⁹ Western Australian Government, Department of Treasury, *Preliminary Impact Assessment Template*. See: https://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Reform/RIA_Program/PIA-Template.docx. Viewed 24 July 2019.

³⁶⁰ Mr Andrew Dolling, Director, Economic Policy, Department of Treasury, *Transcript of evidence*, 20 August 2019, p 4.
³⁶¹ *ibid.*

³⁶² Western Australian Government, Department of Treasury, *Regulatory Impact Assessment: The Regulatory Impact Assessment Program*. See: <https://www.treasury.wa.gov.au/Economic-Policy/RIA-Program/>. Viewed 24 July 2019.

³⁶³ Western Australian Government, Department of Treasury, *Regulatory Impact Assessment Guidelines for Western Australia*, July 2010, p 16. See: https://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Reform/RIA_Program/ria_guidelines.pdf. Viewed 30 October 2019.

³⁶⁴ Alistair Jones, Executive Director, Economic, Department of Treasury, *Transcript of evidence*, 20 August 2019, p 4.

³⁶⁵ *ibid.*, pp 11 and 12.

RECOMMENDATION 11

The Government:

- (a) always consider the merits of publishing Decision Regulatory Impact Statements
- (b) publish Decision Regulatory Impact Statements where appropriate.

Better Regulation Unit in Western Australia

6.7 The Better Regulation Unit (BRU) within Treasury assists government agencies with RIA by offering them training on decision-making, regulatory design and how to undertake consultation.³⁶⁶ The BRU advises government agencies that:

Just because a problem has been identified, it does not automatically mean more or new regulation is needed. A case for government action requires careful and thorough analysis of the problem to be remedied. It is generally accepted that allowing markets to operate with the least amount of government intervention possible will, in most cases, deliver the best outcome for the community, in that overall community welfare is maximised.³⁶⁷

6.8 The BRU also encourages decision-makers to consider responding to an identified problem in a way that may not require further regulation. A risk analysis may be an appropriate way to address the threshold question of whether or not a government should intervene in an issue.³⁶⁸

6.9 Options such as quasi-regulation (codes of conduct) and non-regulatory approaches can be used instead of resorting to legislation and the BRU outlines the following options for regulators to consider:

- information disclosure
- behavioural insight ('nudge theory')
- voluntary agreements and education programs.³⁶⁹

6.10 The BRU also refers to other options including the 'do nothing' option (see paragraph 6.43), increasing enforcement of existing legislation or extending the legislation already in place to cover the new situation being considered.³⁷⁰

Review of the Western Australian regulatory impact assessment process

6.11 Now that the RIA process is 10 years old, Treasury has observed a marked improvement in the regulatory practices of government agencies. Prior to the introduction of RIA:

Treasury, in particular, were finding that in the larger regulatory agencies they were incentivised to actually increase regulation because it translated into extra FTE and extra funding. We had a bit of a circle where regulators were incentivised to come up with new areas of regulation, because then they employed people to

³⁶⁶ The Better Regulation Unit also publishes fact sheets, available from: <https://www.treasury.wa.gov.au/Economic-Policy/Better-Regulation-Unit/Fact-Sheets/>.

³⁶⁷ Western Australian Government, Department of Treasury, Better Regulation Unit, *Why should governments get involved?*, Fact sheets, August 2018.

³⁶⁸ Western Australian Government, Department of Treasury, Better Regulation Unit, *Is a regulatory response the only way?*, Fact sheets, August 2018.

³⁶⁹ *ibid.*

³⁷⁰ *ibid.*

administer that regulation and in a lot of cases set up compliance units. RIA was to put some discipline into it. ...

...

... It would be fair to say that when RIA started, probably 95 per cent of all proposals that went to government had no oversight of the regulatory impacts until it actually went to cabinet. What we have seen over the years is that that has improved significantly. Now it is under half. We are engaged by departments earlier on, which assists them in designing better regulation. ...³⁷¹

- 6.12 In August 2019, Treasury informed the Committee that it was in its final stages of the latest internal review of the RIA process. Now that the RIA process is mature and agencies have built up their RIA expertise, Treasury is aiming to change its role from a gatekeeper to that of an adviser:

One of the things we are looking at doing is getting agencies to take responsibility for signing off that their proposals have met regulatory best practice to give them ownership of them. At the moment, they tend to hide behind the fact that we have actually assessed the process.³⁷²

- 6.13 One of the expected changes to the RIA process will be the removal of the formal PIA stage, making way for a greater focus on evaluating, measuring and understanding regulatory outcomes.³⁷³

- 6.14 Questions in the PIA template include the following:

- What is the problem you are trying to solve? Alternatively, why are you proposing a change?
- What evidence is there to substantiate the problem? Why is this an issue?
- Why is there a role for government?³⁷⁴

- 6.15 The Committee notes that the question, 'Why is there a role for government?' is particularly relevant when considering questions of personal choice and individual responsibility as Treasury asks the contact officer to explain why 'the market or community cannot address the problem'.³⁷⁵

- 6.16 The PIA form also requires information on consultation with, and concerns raised by, stakeholders and the community. Agencies are required to outline how they plan to address these concerns.

- 6.17 The agency is also specifically required to consider whether the problem at hand can be solved by maintaining the status quo, or through various other options, including the proposed regulatory change.

- 6.18 Although the requirement to complete a formal PIA template may be removed from the RIA process, Treasury made it clear that the change in form will not necessarily equate to a change in substance:

³⁷¹ Alistair Jones, Executive Director, Economic, Department of Treasury, *Transcript of evidence*, 20 August 2019, p 3.

³⁷² *ibid.*

³⁷³ Alistair Jones, Executive Director, Economic, and Andrew Dolling, Director, Economic Policy, Department of Treasury, *Transcript of evidence*, 20 August 2019, pp 3 and 7, respectively.

³⁷⁴ Western Australian Government, Department of Treasury, *Preliminary Impact Assessment Template*. See: https://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Reform/RIA_Program/PIA-Template.docx. Viewed 24 July 2019.

³⁷⁵ See question 1.4 in section 1 of the template: refer to footnote 359.

we will be seeking to encourage agencies to still undertake a lower-case preliminary impact assessment, so we still want people to do early assessment and early thinking. Indeed, we have been drafting and consulting with agencies about some regulatory principles that will help and will be then, if agreed by government, essentially encouraged to comply with, adopt, and those regulatory principles—things such as proportionality, to give you an example, so regulation should be proportionate to the problem that it is trying to address—would then be guiding principles for all regulation, whether they are big, small or little and affecting business, social or environment. We will have those to guide that early thinking. Indeed, we would want that. It is not a matter of saying that we do not think early thinking is important—in fact, the opposite—but we think we have [come] to a point where the sector is largely, not entirely, adopting that anyway and we would rather have the principles to help people, guide them, in that early thinking, along with us focusing on training and guidance rather than, dare I say, the forms.³⁷⁶

(Committee emphasis.)

Regulatory impact assessment in some other jurisdictions

- 6.19 New Zealand and New South Wales have introduced regulatory principles to guide their agencies in legislative and policy reform. Treasury advised the Committee that it will be looking closely at the operation of regulatory principles in other jurisdictions in order to inform the development of similar principles for Western Australia.³⁷⁷

New Zealand regulatory stewardship

- 6.20 In New Zealand, the *State Sector Act 1988* (NZ) requires a government department to exercise stewardship of the legislation it administers. The departmental CEO is responsible to the appropriate Minister for such stewardship.³⁷⁸
- 6.21 Stewardship is defined by the legislation as the ‘active planning and management of medium- and long-term interest, along with associated advice’.
- 6.22 The New Zealand Government’s April 2017 document called the ‘Government Expectations for Good Regulatory Practice’ sets out the government’s expectations for regulatory stewardship by government agencies. ‘Regulatory agencies’ are defined as any agency (other than courts, tribunals or other independent appeal bodies) that is responsible for the following (even if only partly):
- monitoring
 - evaluation
 - performance reporting
 - policy advice
 - policy and operational design
 - legislative design
 - implementation
 - administration

³⁷⁶ Andrew Dolling, Director, Economic Policy, Department of Treasury, *Transcript of evidence*, 20 August 2019, p 8.

³⁷⁷ Alistair Jones, Executive Director, Economic, and Andrew Dolling, Director, Economic Policy, Department of Treasury, *Transcript of evidence*, 20 August 2019, p 9.

³⁷⁸ *State Sector Act 1988* (NZ) s 32.

- information provision
- standard-setting
- licensing and approvals
- compliance and enforcement.³⁷⁹

6.23 The document requires regulatory agencies to ‘pay close attention to their regulatory environment’ and be aware of the need to ‘properly discharge their stewardship responsibilities’. There are 10 outcomes described in the document that regulatory agencies should aim to achieve, including that the regulatory system meets its objectives ‘with the least adverse impact on market competition, property rights and individual autonomy and responsibility’.³⁸⁰ The full list of these ‘expectations’ is reproduced here:

The government believes that durable outcomes of real value to New Zealanders are more likely when a regulatory system:

- has clear objectives
- seeks to achieve those objectives in a least cost way, and with the least adverse impact on market competition, property rights, and individual autonomy and responsibility
- is flexible enough to allow regulators to adapt their regulatory approach to the attitudes and needs of different regulated parties, and to allow those parties to adopt efficient or innovative approaches to meeting their regulatory obligations
- has processes that produce predictable and consistent outcomes for regulated parties across time and place
- is proportionate, fair and equitable in the way it treats regulated parties
- is consistent with relevant international standards and practices to maximise the benefits from trade and from cross border flows of people, capital and ideas (except when this would compromise important domestic objectives and values)
- is well-aligned with existing requirements in related or supporting regulatory systems through minimising unintended gaps or overlaps and inconsistent or duplicative requirements
- conforms to established legal and constitutional principles and supports compliance with New Zealand’s international and Treaty of Waitangi obligations
- sets out legal obligations and regulator expectations and practices in ways that are easy to find, easy to navigate, and clear and easy to understand, and
- has scope to evolve in response to changing circumstances or new information on the regulatory system’s performance.³⁸¹

³⁷⁹ New Zealand Government, The Treasury, *Government Expectations for Good Regulatory Practice*, 21 April 2017, p 1. See: <https://treasury.govt.nz/publications/guide/government-expectations-good-regulatory-practice>. Viewed 30 October 2019.

³⁸⁰ *ibid.*, pp 1 and 2.

³⁸¹ *ibid.*, p 2.

- 6.24 Once a regulatory system is established, the New Zealand Government expects the relevant regulatory agency to monitor and review the system.³⁸²

New South Wales' better regulation principles

- 6.25 The better regulation principles are designed to improve the quality of regulation in New South Wales by:

ensuring that the decision maker is fully informed when considering regulatory proposals. ... The principles are the cornerstone of the Government's commitment to good regulation and must be followed in the development of every regulatory proposal. In doing so, it is demonstrated that the proposal is required, reasonable and responsive.³⁸³

- 6.26 The seven better regulation principles are reproduced here:

- Principle 1—The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.
- Principle 2—The objective of government action should be clear.
- Principle 3—The impact of government action should be properly understood by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.
- Principle 4—Government action should be effective and proportional.
- Principle 5—Consultation with business and the community should inform regulatory development.
- Principle 6—The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.
- Principle 7—Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.³⁸⁴

Nuffield Council on Bioethics—stewardship model

- 6.27 The Nuffield Council on Bioethics (Nuffield) is an independent panel of experts based in the United Kingdom that researches and reports on ethical questions that arise in biology and medicine. Nuffield was established in 1991 and receives funding from the Nuffield Foundation, the Medical Research Council and the Wellcome Trust.³⁸⁵

- 6.28 Nuffield's terms of reference are:

- to identify and define ethical questions raised by recent advances in biological and medical research in order to respond to, and to anticipate, public concern
- to make arrangements for examining and reporting on such questions with a view to promoting public understanding and discussion; this may lead, where needed, to the formulation of new guidelines by the appropriate regulatory or other body

³⁸² *ibid.*, p 3.

³⁸³ New South Wales Government, Department of Finance, Services and Innovation, *NSW guide to better regulation*, Sydney, October 2016, p 6. See: http://productivity.nsw.gov.au/sites/default/files/2018-05/Guide_to_Better_Regulation-October_2016.pdf. Viewed 16 December 2019.

³⁸⁴ *ibid.*

³⁸⁵ Nuffield Council on Bioethics, *About*, See: <http://nuffieldbioethics.org/about>. Viewed 5 August 2019.

- in the light of the outcome of its work, to publish reports, and to make representations, as the Council may judge appropriate.³⁸⁶
- 6.29 Nuffield has published reports on diverse topics, including the use of human embryos in research, cosmetic procedures, bio-information and dementia.
- 6.30 In 2007, Nuffield published the findings from its research into ethical issues that may arise in public health and the different roles of government in formulating public health policy. Nuffield established a Working Party to undertake this research, chaired by a co-opted member of Nuffield and made up of academics and medical experts in law and health, as well as other Nuffield members. The terms of reference for the inquiry were:
1. To identify and consider ethical, legal and social issues arising when designing measures to improve public health
 2. To consider, by means of case studies:
 - a) the variety of aims for such measures, such as informing individual choices and protecting the wider community, and their relative priorities
 - b) the role of autonomy, consent and solidarity
 - c) issues raised by decisions about, and perceptions of, risk
 - d) criteria for the allocation of resources in specific areas of public health
 - e) the special situation of children and those who are poor or socially excluded
 3. To examine the implications of the above for the development of frameworks for policy making in public health.³⁸⁷
- 6.31 The Chair of the inquiry's Working Party, Lord Krebs posed the following questions in its final report, *Public health: ethical issues*:
- Whose job is it to ensure that we lead a healthy life? Who should help us not to eat or drink too much, to take exercise and to protect our children and ourselves against disease? Is it entirely up to us as individuals to choose how to lead our lives, or does the state also have a role to play?³⁸⁸
- 6.32 Throughout the report, Nuffield discusses the balance between obtaining explicit individual consent in public health matters and those where preventing harm to others outweighs this requirement; that is, where interfering with a person's liberty is justified based on public health needs:
- The central issue in public health is the extent to which it is acceptable for the state to establish policies that will influence population health.³⁸⁹
- 6.33 The Committee notes that the concerns identified in the Nuffield report are similar to those that the Committee has been investigating with its current inquiry.

³⁸⁶ *ibid.*

³⁸⁷ Nuffield Council on Bioethics, *Public health: ethical issues*. See: <https://www.nuffieldbioethics.org/publications/public-health/terms-of-reference>. Viewed 4 March 2020.

³⁸⁸ Nuffield Council on Bioethics, *Public health: ethical issues*, London, November 2007, p v.

³⁸⁹ *ibid.*, p xvi.

The Nuffield Council on Bioethics' view of stewardship

6.34 Nuffield builds upon a classic liberal framework in its discussion of how best to manage public health policy, with the ultimate goal of balancing a state's duty towards its citizens as a collective and to individual autonomy.

6.35 In basic terms, the stewardship model is the system whereby a state has a duty to look after the important needs of its citizens, both collectively and individually.³⁹⁰ According to Nuffield, the stewardship model emphasises the obligations of a government to provide conditions that will allow people to be healthy and to 'take measures to reduce health inequalities'.³⁹¹

6.36 In its discussion of what the best model for a successful framework for a community, Nuffield notes that the ideal model lies somewhere between the individualistic liberal framework and the interference in people's lives that coercive paternalism espouses:

The justification and feasibility of public health policies therefore depends heavily on their having a mandate. At the same time, there may be questions about which policies adequately address people's will, desire, individuality or autonomy and how conflicts should be resolved where there is a mismatch.

...

'Libertarian paternalism' would suggest that the baseline option of policies should express value judgments about what is good for one's life, although individuals should be able to opt out at relative ease and low cost.³⁹²

6.37 Nuffield concludes that a revised liberal stewardship concept rather than this libertarian paternalism model is the best way to manage public health policies.³⁹³

6.38 Nuffield notes that under the stewardship model, public health policy should be 'compatible with the views of the public' and be 'more sensitive to the need to respect individuality'.³⁹⁴ Nuffield summarises its preferred stewardship model as follows:

Concerning goals, public health programmes should:

- aim to reduce the risks of ill health that people might impose on each other;
- aim to reduce causes of ill health by regulations that ensure environmental conditions that sustain good health, such as the provision of clean air and water, safe food and appropriate housing;
- pay special attention to the health of children and other vulnerable people;
- promote health not only by providing information and advice, but also by programmes to help people overcome addictions and other unhealthy behaviours;
- aim to ensure that it is easy for people to lead a healthy life, for example by providing convenient and safe opportunities for exercise;
- ensure that people have appropriate access to medical services; and

³⁹⁰ Quoting from the World Health Organization, *World Health Report 2000*: *ibid.*, p xvi.

³⁹¹ *ibid.*, p xvii.

³⁹² *ibid.*, pp 23 and 24.

³⁹³ *ibid.*, p 25.

³⁹⁴ *ibid.*, p 26.

- aim to reduce health inequalities.

In terms of constraints, such programmes should:

- not attempt to coerce adults to lead healthy lives;
- minimise interventions that are introduced without the individual consent of the those affected, or without procedural justice arrangements (such as democratic decision-making procedures) which provide adequate mandate;
- seek to minimise interventions that are perceived as unduly restrictive and in conflict with important personal values.³⁹⁵

6.39 The Committee notes that Nuffield situates the stewardship model in the context of an overarching opposition to 'coercive interventions whose aim is simply to force people to be healthy'.³⁹⁶

The ladder of intervention

6.40 In its consideration of the stewardship model, Nuffield proposes a new method of thinking about the impact and acceptability of policy initiatives to improve public health: the intervention ladder (see Figure 13).

6.41 According to the intervention ladder, different 'steps' represent different levels of intrusion on the freedom of individuals, depending on the strength of the justification for the action taken. Nuffield proposes the intervention ladder as a tool for government and policy makers to use when deciding what measures to implement to achieve their policy initiatives and notes that:

the higher the rung on the ladder at which the policy maker intervenes, the stronger the justification has to be. A more intrusive policy initiative is likely to be publicly acceptable only if it is clear that it will produce the desired effect and that this can be weighed against the loss of liberty that will result.³⁹⁷

6.42 In the Committee's view, this statement effectively captures what the underlying intent of policy makers should be: to consider community safety while minimising the impact of regulation on personal freedom.

6.43 Nuffield also clarifies that it does not follow that the bottom rung of the ladder ('Do nothing') is a step that requires no justification, as 'deciding to "do nothing" is itself a value judgement and may have adverse consequences for some'.³⁹⁸

³⁹⁵ *ibid.*, p xvii.

³⁹⁶ *ibid.*, p 27.

³⁹⁷ *ibid.*, p 42.

³⁹⁸ *ibid.*

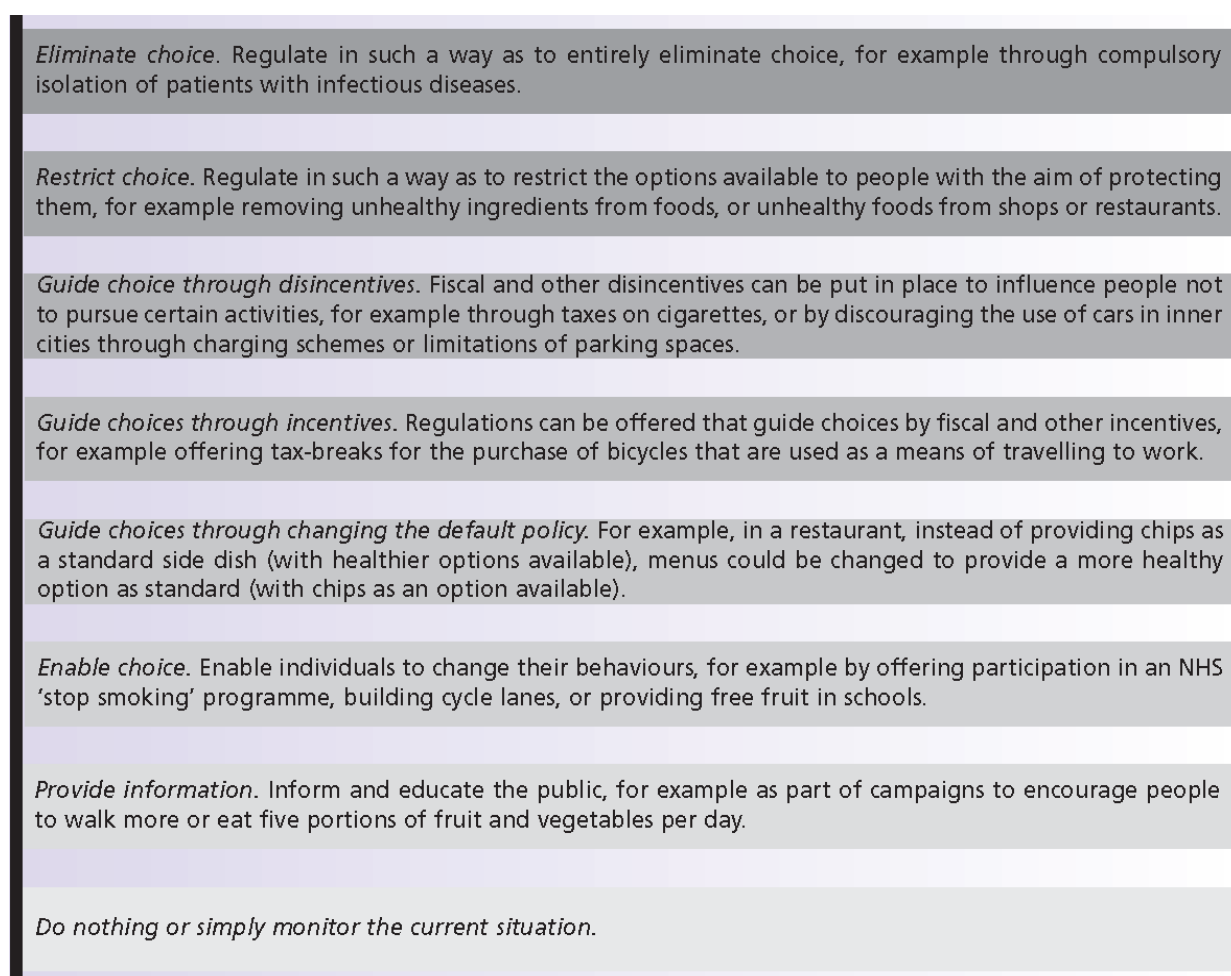


Figure 13. *The intervention ladder*

[Source: Nuffield Council on Bioethics, *Public health: ethical issues*, 2007]

- 6.44 The Committee found that the intervention ladder provides a useful tool for government and policy makers to use when deciding what measures to implement to achieve their policy initiatives.

RECOMMENDATION 12

Government agencies have regard to the Nuffield Council on Bioethics' intervention ladder when developing policies and regulation.

RECOMMENDATION 13

The Government develop regulatory principles which:

- (a) are based on international best practice
- (b) require the consideration of the potential adverse impact of regulation on personal choice and responsibility.

Parliamentary scrutiny of legislative reform—fundamental legislative principles

The origins of fundamental legislative principles

- 6.45 Queensland first began to develop a systematic approach to legislative principles in the early 1990s, when the work of its scrutiny committees and the Office of the Parliamentary Counsel were reviewed by the Electoral and Administrative Review Commission. These reviews included a recommendation that a new Scrutiny of Legislation Committee be created in Queensland's Parliament to examine primary and delegated legislation while considering the application of fundamental legislative principles (FLPs).³⁹⁹
- 6.46 FLPs were enshrined in legislation through the *Legislative Standards Act 1992* (Qld) (LSA), which continues in force today. Section 4 of the LSA states that:
- For the purposes of this Act, **fundamental legislative principles** are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
- 6.47 In relation to the scrutiny of bills and subordinate (or delegated) legislation, the FLPs listed in the LSA are divided into two broad categories: whether the legislation in question has sufficient regard to the rights and liberties of individuals and to the institution of Parliament. Figure 14 provides a summary of these categories of FLPs.⁴⁰⁰
- 6.48 As a result of a review of Queensland's committee process in 2010, the Scrutiny of Legislation Committee was abolished and committees were re-organised according to portfolios. Each portfolio-based committee must examine all bills and subordinate legislation within its own portfolio area, rather than being referred to a separate scrutiny committee.

Rights and liberties of individuals	Institution of Parliament
Bills and subordinate legislation	Bills
<ul style="list-style-type: none"> Make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review Are consistent with the principles of natural justice Allow the delegation of administrative power only in appropriate cases and to appropriate persons Do not reverse the onus of proof in criminal proceedings without adequate justification Confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer Provide adequate protection against self-incrimination Do not adversely affect rights and liberties, or impose obligations, retrospectively Do not confer immunity from proceeding or prosecution without adequate justification Provide for the compulsory acquisition of property only with fair compensation Have sufficient regard to Aboriginal tradition and Island custom Are unambiguous and drafted in a sufficiently clear and precise way 	<ul style="list-style-type: none"> Allow the delegation of legislative power only in appropriate cases and to appropriate persons Sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly Authorise the amendment of an Act only by another Act
	Subordinate legislation
	<ul style="list-style-type: none"> Is within the power that allows the subordinate legislation to be made Is consistent with the policy objectives of the authorising law Contains only matter appropriate to subordinate legislation. Amends statutory instruments only Allows the subdelegation of a power delegated by an Act only – <ul style="list-style-type: none"> in appropriate cases to appropriate persons if authorised by an Act

Figure 14. *Summary of fundamental legislative principles*

[Source: Scrutiny of Legislation Committee, Queensland Parliament, Report 47, 2011]

³⁹⁹ Queensland, Electoral and Administrative Review Commission, *Report on Review of the Office of the Parliamentary Counsel*, 1991 and *Report on Review of Parliamentary Committees*, 1992, vol. 1, chapter 4.

⁴⁰⁰ Queensland, Scrutiny of Legislation Committee, Report 47, *Our Principles: Review of the Meaning of 'Fundamental Legislative Principles'*, June 2011, p 3.

- 6.49 Since 2010, portfolio committees have also considered the policy behind the proposed legislation and the lawfulness of delegated legislation. The LSA mandates specific information that must be included in explanatory material for bills and delegated legislation, which each committee must also scrutinise.⁴⁰¹ The required information includes:
- brief statements explaining the policy objectives of the legislation
 - a brief assessment of the legislation's consistency with the FLPs, and the reasons for any inconsistency
 - a cost-benefit analysis of implementing the legislation
 - details of any consultation that occurred
 - (in relation to delegated legislation) interaction with existing statutes.
- 6.50 Compliance with FLPs is not mandatory and it is always up to the Parliament to determine whether legislation has sufficient regard to an FLP or whether sufficient justification has been provided for any departure from the FLPs.

The Western Australian approach

- 6.51 By convention, Western Australian parliamentary scrutiny of legislation committees have applied Queensland's FLPs, in various forms, since 2004. This is despite the fact that:
- the FLPs do not appear in the terms of reference of either the Standing Committee on Legislation or the Standing Committee on Uniform Legislation and Statutes Review
 - the Joint Standing Committee on Delegated Legislation's terms of reference contain only a selection of the FLPs that are most relevant to delegated legislation. This selection of FLPs have also been paraphrased and amalgamated into four legislative scrutiny principles.

Standing Committee on Legislation

- 6.52 The Standing Committee on Legislation considers the following 16 FLPs as part of its scrutiny of the bills that are referred to it by the Legislative Council:

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?

⁴⁰¹ *Legislative Standards Act 1992* (Qld) ss 23 and 24. But note that a failure to comply with the requirement to provide that information does not affect the validity of the legislation: *ibid.*, s 25.

7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?⁴⁰²

- 6.53 The Committee is of the view that, when scrutinising legislation, the FLPs provide a point of reference that may aid in the consideration of matters of personal choice and community safety.

FINDING 25

When scrutinising legislation, fundamental legislative principles provide a point of reference that may aid in the consideration of matters of personal choice and community safety.

- 6.54 As in Queensland, compliance with FLPs is not mandatory in Western Australia, but the Standing Committee on Legislation has regularly used them as a framework for fair and effective scrutiny of legislation.

Standing Committee on Uniform Legislation and Statutes Review

- 6.55 Since 2012, the Standing Committee on Uniform Legislation and Statutes Review has considered and applied only those FLPs that refer to the institution of Parliament (FLPs 12–16) in its scrutiny of legislation based on intergovernmental agreements.⁴⁰³

Joint Standing Committee on Delegated Legislation

- 6.56 The Joint Standing Committee on Delegated Legislation's terms of reference set out the following four issues for its scrutiny of delegated legislation:

⁴⁰² Parliament of Western Australia, Legislative Council, Standing Committee on Legislation, Report 41, *Ticket Scalping Bill 2018*, 5 September 2019, p 1 (paragraph 1.7) and Appendix 2.

⁴⁰³ *Standing Orders of the Legislative Council*, Schedule 1, item 6.4.

In its consideration of an instrument, the Committee is to inquire whether the instrument—

- (a) is within power;
- (b) has no unintended effect on any person's existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.⁴⁰⁴

FINDING 26

Fundamental legislative principles are a useful tool for legislators when scrutinising legislation. However:

- (a) they are absent from the terms of reference of the Standing Committee on Legislation and the Standing Committee on Uniform Legislation and Statutes Review
- (b) only a selection of the principles are captured in the terms of reference of the Joint Standing Committee on Delegated Legislation.

RECOMMENDATION 14

The Standing Committee on Procedure and Privileges inquire into amending the *Standing Orders of the Legislative Council* to include fundamental legislative principles in the terms of reference for the Standing Committee on Legislation, the Standing Committee on Uniform Legislation and Statutes Review and, where appropriate, the Joint Standing Committee on Delegated Legislation.

⁴⁰⁴ *ibid.*, Schedule 1, item 10.6.

CHAPTER 7

Committee's final thoughts

- 7.1 It is the Committee's view that government intervention in the lives of individuals should sit on a spectrum of regulatory responses: one size does not fit all. Nuffield's ladder of intervention is a helpful starting point for decision makers to use when developing policies or practices that restrict or regulate the personal choices of individuals.
- 7.2 The Committee notes that choices are best made, and community safety is maximised, when people are fully informed. Education is an ideal first choice for regulators.
- 7.3 The Committee notes, however, that the concept of the fully informed individual may not always be relevant or practical. For example, children are particularly impressionable and are susceptible to manipulation, which can influence their understanding of what constitute good choices.
- 7.4 The Committee also recognises that individual freedom is not absolute. That is, the rights of an individual to autonomy do not automatically override the need for the community and/or the environment to be protected, including the need for good legislation and governance.
- 7.5 The Committee observes that the high level of public interest in this inquiry and plentiful academic research into some of the issues explored by the Committee demonstrate that matters which limit personal choice and curb individual liberty are key issues of concern in the community. The Committee believes these concerns can be addressed by ensuring that the objectives of government regulation are clear.
- 7.6 For the community to have confidence in and respect for government regulation, the need for such regulation should be established. Such regulation should occur only when it can be seen to be in the public interest and should be subject to regular review and scrutiny.
- 7.7 Regulation should be proportionate to the risks it seeks to address, and fair and equitable in the way it treats regulated parties. Where regulation is perceived to achieve its objectives with as little adverse impact on personal choice and responsibility as possible, it is likely to be well supported by the community.



Hon Aaron Stonehouse MLC
Chair

APPENDIX 1

STAKEHOLDERS, SUBMISSIONS AND PUBLIC HEARINGS

Stakeholders invited to make a submission

Number	Name
1	Western Australia Police
2	Department of Transport
3	Department of Health
4	Road Safety Commission
5	Insurance Commission of Western Australia
6	Kidsafe WA
7	Associate Professor Tom Briffa, Centre for Health Services Research, University of Western Australia
8	Cancer Council of Western Australia
9	HeadWest, Brain Injury Association of WA Inc.
10	Royal Life Saving Society
11	City of Fremantle
12	Australian Tobacco Harm Reduction Association
13	Freestyle Cyclists WA
14	Recfishwest
15	Albany Marine Rescue
16	Telethon Kids Institute
17	Professor Fiona Stanley AC, University of Western Australia
18	Australian Medical Association
19	Institute of Public Affairs
20	CycleSport WA
21	Law Society of Western Australia
22	Western Australian Bar Association
23	Law Council of Australia
24	Australian Bar Association
25	Australian Lawyers Alliance
26	Criminal Lawyers Association of WA
27	Law School, Murdoch University
28	Office of the State Coroner
29	DonateLife Western Australia
30	National Health and Medical Research Council
31	Australian Drug Law Reform Foundation
32	Therapeutic Goods Administration

Number	Name
33	Australasian Association of Convenience Stores
34	Australian Retailers Association
35	Alliance of Australian Retailers
36	Peregrine Corporation
37	New Nicotine Alliance Australia
38	mysailing.com.au
39	Centre for Independent Studies
40	Australian Taxpayers' Alliance
41	Mannkal Economic Education Foundation
42	Professor Sinclair Davidson, School of Economics, Finance and Marketing, RMIT University
43	Dr Joe Kosterich, Kingsley Woodvale Medical Centre
44	Insurance Council of Western Australia
45	Australian Hotels Association WA
46	Liquor Store Association WA
47	Associate Professor David van Mill, University of Western Australia

Submissions received

Number	From
1	Crispin Travers
2	Chris Gillham
3	Greg Rickie
4	Professor Chris Rissel
5	Ken Helsby
6	Kim Christopher
7	Joanne Dasborough
8	John Robinson
9	Heinrich Benz
10	Geoff McLeod
11	Neil and Irene Evans
12	Philip Makin
13	Luke Ruskin
14	Peter Jackson
15	James Steward
16	Mick Allender
17	Australasian Association of Convenience Stores
18	Cycling without Age Australia

Number	From
19	Anne and William Bate
20	Gary Sprunt
21	Patricia Somogyi
22	Stephen Wells
23	William Matthews
24	Norbert Schaber
25	Peter Van Der Meer
26	Cancer Council WA
27	David Frankland
28	Tony Arnold
29	Kathy Francis
30	Colin Clarke
31	McCusker Centre for Action on Alcohol and Youth
32	Arwen Birch
33	Simon Schmidt
34	Private submission
35	Australian Street Machine Federation (WA State Division)
36	Colin Delane
37	Department of Transport
38	Australian Council on Smoking and Health
39	John Lennon
40	Dr James Lemon
41	Clint Di Giovanni
42	Nicole Peterson
43	WestCycle
44	Australian Drivers Association
45	Road Safety Council
46	Fatima Omar
47	Eddie Ieraci
48	TSG Franchise Management
49	Denise Lee
50	Katie Cowcher
51	Australian Tobacco Harm Reduction Association
52	Dr Elise Klein
53	Dean Hogen-Esch
54	Shahin Enterprises
55	Jai Cooper
56	Bruce Maycock

Number	From
57	Eliminate Cancer Initiative
58	Fontem Ventures
59	Stephen Humble
60	Freestyle Cyclists Inc.
61	Australian Retailers Association
62	Department of Health
63	School of Public Health, Curtin University
64	Royal Lifesaving Society Western Australia
65	Townsville Bicycle User Group
66	Martyn Griffiths
67	Philip Morris Limited
68	Mannkal Economic Education Foundation
69	Australian Vaping Advocacy, Trade and Research Inc.
70	Markus Egli
71	Master Grocers Australia
72	The Eros Association
73	Public Health Association of Australia
74	Telethon Kids Institute
75	Australian Medical Association (WA)
76	Private submission
77	New Nicotine Alliance (AU)
78	British American Tobacco Australia
79	Dr Joe Kosterich
80	Australian Taxpayers' Alliance
81	Recfishwest
82	Sex Work; Education, Advocacy and Rights WA (SWEAR WA)
83	School of Population and Global Health, University of Western Australia
84	Cignall Specialist Tobacconist
85	Conrad Drake
86	Australian Health Promotion Association (WA Branch)
87	Private Citizen
88	Ian Murchison
89	Cycle-Safe
90	Injury Matters
91	Sophie van Dam
92	Dr Sundance Bilson-Thompson
93	Bruce Sutherland
94	Public Health Advocacy Institute of Western Australia, Curtin University

Number	From
95	Patricia Marshall
96	Scarlet Alliance, Australian Sex Workers Association
97	Verena Anderson
98	Liberal Democrats WA
99	Reno Marchesi
100	Just Vapours Australia
101	Australian Lottery and Newsagents Association
102	Alcohol Beverages Australia
103	City of Fremantle
104	Fluoride Free WA
105	Magenta
106	Richard Stallard
107	Private Citizen

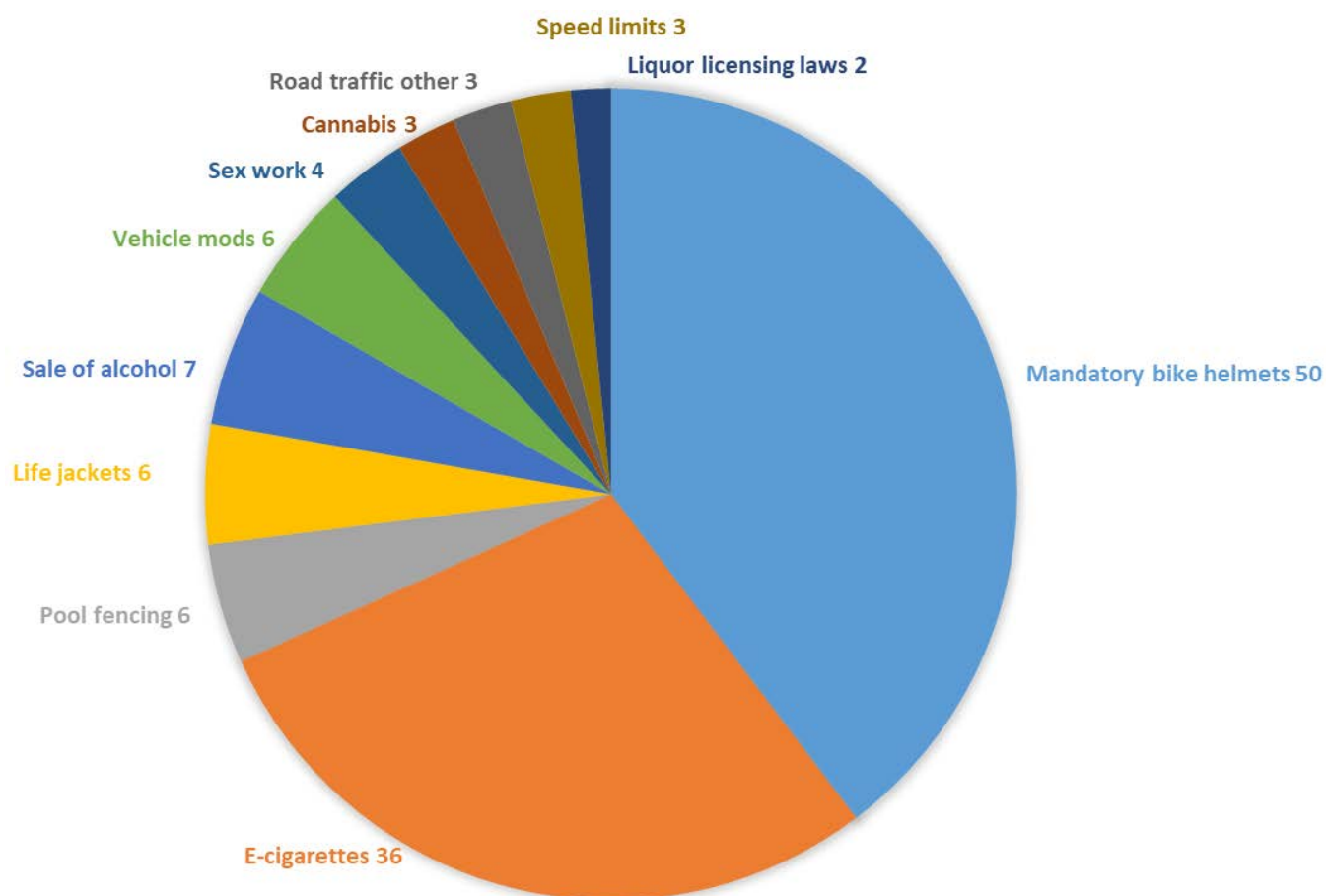
Public hearings

Date	Participant
16 November 2018	Cancer Council WA Ashley Reid, Chief Executive Officer
23 November 2018	Injury Matters Chrisandra Lukjanowski, Chief Executive Samantha Dowling, Partnership and Sector Engagement Lead Dr Ann-Maree Lynch, Head of Department, WA Poisons Information Centre WestCycle Matt Fulton, Chief Executive Officer
15 February 2019	Australian Street Machine Federation Stanley Khose, State Director Australian Tobacco Harm Reduction Association Dr Joe Kosterich, Director
22 February 2019	British American Tobacco Australia Nicholas Booth, Head of Corporate and Government Affairs Nat Openshaw, Government Affairs Manager Road Safety Council Iain Cameron, Chair

Date	Participant
27 February 2019	<p>School of Public Health, Curtin University</p> <p>Kahlia McCausland, Project Officer and PhD Scholar</p> <p>Professor Bruce Maycock, Professor, Public Health</p> <p>Professor Jonine Jancey, Associate Professor, Public Health</p> <p>Philip Morris</p> <p>Tammy Chan, Managing Director, Philip Morris Limited</p> <p>Dr Michael Franzon, Senior Medical Advisor, Philip Morris International</p> <p>Department of Transport</p> <p>Richard Sellers, Director General</p> <p>Raymond Buchholz, General Manager, Marine Safety</p> <p>Ashley McCormick, Manager, Cycling</p> <p>Michelle Prior, Acting Director, Transport Planning, Major Urban Centres</p> <p>Christopher Davers, Assistant Director, Policy and Knowledge, Driver and Vehicle Services</p> <p>David Hosie, Technical Policy and Services Coordinator</p> <p>Department of Health</p> <p>Dr Andrew Robertson, Assistant Director General, Public and Aboriginal Health Division</p>
27 March 2019	<p>Australian Taxpayers' Alliance</p> <p>Brian Marlow, Campaign Director</p> <p>Australian Council on Smoking and Health</p> <p>Professor Kingsley Faulkner, President</p> <p>Maurice Swanson, Executive Director</p> <p>Freestyle Cyclists Inc.</p> <p>Alan Todd, President</p> <p>Christopher Gillham, Journalist</p>
10 May 2019	Professor Chris Rissel, University of Sydney
20 August 2019	<p>Department of Treasury</p> <p>Alistair Jones, Executive Director, Economic</p> <p>Andrew Dolling, Director, Economic Policy</p>

APPENDIX 2

BREAKDOWN OF SUBMISSIONS RECEIVED



Topics where only one submission was received

Retail trading issues	Fishing in water catchment areas
Working with Children/Criminal Record Checks	Monofins
Public health advertising	Vaccinations
Radar detectors	Cashless Debit Card system
Motorcycle licensing scheme	X-rated material
Sale of energy drinks to children	Airsoft
International drivers licences	Fluoridation of water
Smoking generally	

GLOSSARY

Term	Definition
ABS	Australian Bureau of Statistics
ADR	Australian Design Rules
ALVSR	<i>Australian Light Vehicle Standards Rules 2015</i> (Cth)
AIHW	Australian Institute of Health and Welfare
ASSAD 2017	2017 Australian Secondary School Students' Use of Tobacco, Alcohol, Over-the-Counter Drugs and Illicit Substances report
BATA	British American Tobacco Australia
BRU	Better Regulation Unit, Department of Treasury
CARRS	Centre for Accident Research and Road Safety (Qld)
CEO	Chief Executive Officer
Code	<i>Road Traffic Code 2000</i>
Committee	Select Committee on Personal Choice and Community Safety
combustible cigarette	Cigarettes that contain dried tobacco (amongst other things) and that work by burning the contents of the cigarette and inhaling the smoke created
DoT	Department of Transport
Decision RIS	Decision regulatory impact statement
e-cigarette	Electronic cigarette: a battery-operated device that often resembles a tobacco cigarette that uses heat to vaporise liquid for inhaling
EHSC	Education and Health Standing Committee, Legislative Assembly (WA)
e-liquid/e-juice	Liquid for use with e-cigarettes, which may be flavoured or can contain nicotine at varying strengths
ERASS	Participation in Exercise, Recreation and Sport Survey
FDA	Food and Drug Administration, United States Government
FLP	Fundamental legislative principles
harm principle	Theory that individuals should be free to do as they wish as long their actions do not harm others. Government intervention in people's lives is limited to action that is required to prevent or minimise harm done to others
harm reduction	Also called harm minimisation and usually refers to drug or alcohol issues, where harm is reduced by focusing on broad strategies that include safer and controlled use of a substance, rather than exclusively enforcing abstinence

Term	Definition
heat-not-burn product	A battery-operated device that uses power to heat tobacco to temperatures lower than combustible cigarettes and produces a nicotine vapour for inhalation rather than smoking
LSA	<i>Legislative Standards Act 1992</i> (Qld)
MPA	<i>Medicines and Poisons Act 2014</i>
MHL	Mandatory (bicycle) helmet laws
NCPS	National Cycling Participation Survey
NHMRC	National Health and Medical Research Council (Australia)
Nuffield	Nuffield Council on Bioethics—an independent panel of experts based in the United Kingdom that researches and reports on ethical questions that arise in biology and medicine
NWR	<i>Navigable Waters Regulations 1958</i>
Ombudsman	Parliamentary Commissioner for Administrative Investigations
paternalism	The principle whereby a state regulates or manages the lives of its citizens without their consent ‘for their own good’ and carries the often negative connotation that individual rights are abrogated by such interference
PIA	Preliminary impact assessment
PSPRA	Participation in Sport and Physical Recreation Survey
PWC	Personal Watercraft: the operator sits, stands or kneels on the vessel and uses handle bars to steer the craft. PWC are propelled by an inboard motor that powers a water jet pump, such as a jet ski
precautionary principle	Usually in relation to environmental or public health matters: the principle whereby decision makers adopt precautionary measures (that is, to limit exposure or risk) when scientific evidence about a hazard is uncertain
public health	The collective health state of a community or population and measures implemented to reduce unhealthy behaviour or improve wellbeing
RIA	Regulatory impact assessment
RTVA	<i>Road Traffic (Vehicles) Act 2012</i>
RTVR	<i>Road Traffic (Vehicles) Regulations 2014</i>
RVSE Review	Recreational Vessel Safety Equipment Review
TGA	Therapeutic Goods Administration (Cth)
THC	tetrahydrocannabinol, the compound in marijuana which induces euphoria

Term	Definition
TPCA	<i>Tobacco Products Control Act 2006</i>
Treasury	Department of Treasury
vaping	Colloquial term used for the process of inhaling vapour from an e-cigarette or heat-not-burn product
VS14	<i>National Code of Practice for Light Vehicle Construction and Modification—Vehicle Standard Bulletin 14 (Cth)</i>

Select Committee on Personal Choice and Community Safety

Date first appointed:

29 August 2018

Terms of Reference:

The Select Committee is to inquire into and report on the economic and social impact of measures introduced in Western Australia to restrict personal choice 'for the individual's own good', with particular reference to —

- (1) risk-reduction products such as e-cigarettes, e-liquids and heat-not-burn tobacco products, including any impact on the wellbeing, enjoyment and finances of users and non-users;
- (2) outdoor recreation such as cycling and aquatic leisure, including any impact on the wellbeing, enjoyment and finances of users and non-users; and
- (3) any other measures introduced to restrict personal choice for individuals as a means of preventing harm to themselves.

The Select Committee is to report by no later than 12 months after the Committee has been established.

By order of the Legislative Council on Wednesday 29 August 2018, membership of the Select Committee on Personal Choice and Community Safety shall be:

- Hon Aaron Stonehouse (Chair)
- Hon Dr Sally Talbot (Deputy Chair)
- Hon Dr Steve Thomas
- Hon Rick Mazza
- Hon Pierre Yang.



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