

The Shopfront

YOUTH LEGAL CENTRE

Smoking and vaping – legal issues for young people

1 Introduction

This is a basic guide to the laws about smoking and vaping in New South Wales.

These laws apply to:

- cigarettes,
- other tobacco products (eg. pipes, cigars),
- non-tobacco smoking products (according to section 4 of the *Public Health (Tobacco) Act 2008*, this means a substance other than tobacco that is designed to be smoked, eg. herbal cigarettes, tobacco-free shisha), and
- electronic cigarettes (vaping).

Smoking *cannabis* is still *illegal* and is *not* covered in this fact sheet (see our fact sheet on *Drugs* for more details).

2 Electronic cigarettes (vaping)

2.1 Vaping without nicotine

Electronic cigarettes (e-cigarettes) *that do not contain nicotine* are legal in NSW.

The use of e-cigarettes is “smoking” for the purposes of smoke-free areas and signage (*Smoke-free Environment Amendment Act 2000* section 4).

2.2 Vaping with nicotine

It is legal to vape with nicotine in NSW if you are over 18 and if it is prescribed by a doctor as part of a smoking cessation plan.

Nicotine for therapeutic use is a prescription-only medicine (except in products such as nicotine patches, gums, and mouth sprays). [See Schedule 4 of the Australian Poisons Standard, Oct 2020: <https://www.legislation.gov.au/Details/F2020L01255/Html/Text>.]

Like many other prescription medications, nicotine is considered a “restricted substance” under NSW law (*Poisons and Therapeutic Goods Act 1996* section 3).

It is an offence to supply a restricted substance (eg. nicotine-containing e-cigarettes or nicotine-containing liquids for use in e-cigarettes) without a valid prescription or other lawful authority. The maximum penalty is a \$1,650 fine and/or 6 months’ imprisonment (*Poisons and Therapeutic Goods Act 1996* section 10(3)(b)).

2.3 Importing e-cigarettes with nicotine

Liquid nicotine or e-cigarettes containing liquid nicotine cannot be sold legally in NSW without approval from the Ministry of Health. No retailer has been granted approval, so you won't be able to legally buy it from stores.

You can legally import nicotine-containing e-cigarettes (or nicotine-containing liquids for use in e-cigarettes) under the Personal Importation Scheme (*Therapeutic Goods Act 1989* (Commonwealth) section 18; *Therapeutic Goods Regulations 1990* (Commonwealth) Schedule 5).

The product must only be used to help you quit smoking, and you must have a current valid prescription from an Australian-registered medical practitioner.

You can only import nicotine-containing e-cigarettes for your own personal use (or for your immediate family, as long as your family member holds a valid prescription).

You can't import more than 3 months' supply at one time under the scheme. If you wish to bring in more than 3 months' supply, your doctor will first need to apply to the Therapeutic Goods Administration (TGA) for approval.

Importing nicotine-containing e-cigarettes without a valid permit is illegal and may attract harsh penalties, including a fine of up to \$222,000 (*Customs Act 1901* (Commonwealth) section 233BABAE).

3 Selling and supplying tobacco or e-cigarettes

Generally it is legal for you to *give out* or *share* cigarettes (and other smoking products such as e-cigarettes or shisha).

It is illegal to sell cigarettes to someone under 18 or to buy them on behalf of someone under 18 (see Part 5 of this fact sheet for more details).

It appears to be legal for an individual to sell cigarettes to another person aged over 18 (eg. selling a few cigarettes to a friend), although we don't recommend this.

There are laws and regulations about wholesale and retail (for more information see <https://www.health.nsw.gov.au/tobacco/Factsheets/retailers-penalties-and-enforcement.pdf>).

4 Smoke-free areas

Smoking and using e-cigarettes (vaping) is banned in all enclosed public places and certain outdoor public places (*Smoke-free Environment Act 2000* sections 6 & 6A and *Smoke-free Environment Regulation 2016*).

Enclosed public places include shopping centres, cinemas, libraries, trains and buses (*Smoke-free Environment Act 2000* Schedule 1).

Outdoor public places that are smoke-free areas include public swimming pools, spectator areas, public transport stops and platforms, within 4 metres of a pedestrian access point to a public building, and commercial outdoor dining areas (*Smoke-free Environment Act 2000* section 6A).

It is an offence to smoke or use e-cigarettes in a smoke-free area, unless you didn't know it was a smoke-free area and there was no simple way of knowing it was a smoke-free area (*Smoke-free Environment Act 2000* section 7). There is a \$300 on-the-spot fine, or a maximum \$550 fine if convicted by a court.

It is also an offence to smoke or use e-cigarettes on public transport vehicles such as trains, buses, light rail and ferries, or in related public areas like train stations (*Passenger Transport (General) Regulation 2017* clause 51). There is a \$300 on-the-spot fine, or a maximum fine of \$550 if convicted by a court.

It is an offence to smoke or use e-cigarettes in a vehicle with a child under 16 in the vehicle (*Public Health (Tobacco) Act 2006* section 30). There is a \$250 on-the-spot fine, or a maximum \$1,100 fine if convicted by a court.

5 Laws applying to people under 18

5.1 Is it legal for under-18s to smoke or vape?

The short answer is “yes”. It is *not* an offence for a person aged under 18 to buy, possess or smoke cigarettes or nicotine-free e-cigarettes.

However, police have the power to confiscate cigarettes or other smoking products from people under 18.

There are also laws against selling these products to, or buying them on behalf of, under-18s.

5.2 Selling and buying tobacco and/or e-cigarettes

It is illegal to sell tobacco, non-tobacco smoking products or e-cigarettes and e-cigarette accessories to a person under 18 years of age (*Public Health (Tobacco) Act 2006* section 22). The maximum penalty is a fine of \$11,000 (for a first offence) or \$55,000 (for a second or subsequent offence).

It is also illegal to purchase tobacco, smoking or vaping products on behalf of a person under 18 years of age (*Public Health (Tobacco) Act 2006* section 23). This carries a maximum fine of \$2,200.

It is legal to *give* cigarettes to a person under 18, although we don't recommend it.

5.3 Police power to confiscate cigarettes and other smoking products

A police officer may confiscate tobacco or non-tobacco smoking product from a person under 18 in a public place (*Public Health (Tobacco) Act 2006* section 26).

6 How offences are dealt with

6.1 Court

Any of the offences mentioned in this fact sheet can end up in court, most likely the Local Court (or the Children's Court if you were under 18 at the time of the alleged offence).

This fact sheet sets out the *maximum* penalties, which are not often imposed. Apart from fines and imprisonment, courts have other sentencing options such as cautions

(for children), “section 10” dismissals (for adults), good behaviour bonds and conditional release orders. For more information about sentencing options see our fact sheet on *Sentencing*.

6.2 On-the-spot fines

The police can issue on-the-spot fines (penalty notices) for most smoking-related offences.

You can choose to pay the fine or contest it in court. Taking it to court may be a good idea in some cases, but you could end up with a criminal record, so it’s best to get legal advice before you decide.

Doing nothing will not make the fine go away, and may have serious consequences. See our fact sheet on *Fines* for more information.

6.3 Young Offenders Act

The *Young Offenders Act* allows some offences committed by people under 18 to be dealt with by a warning, caution or Youth Justice Conference instead of going to court.

This would apply to most smoking-related offences.

See our fact sheet on *The Young Offenders Act* for more information.

7 More information

NSW Health: links to resources about tobacco and smoking in NSW. There are links to other resources/webpages with information about laws relating to smoking and tobacco, as well as resources for individuals who wish to quit, and resources for professionals who are helping others quit. <https://www.health.nsw.gov.au/tobacco/Pages/default.aspx>

Australian Tobacco Harm Reduction Association (ATHRA): legal information about the purchase, possession and use of nicotine products other than cigarettes, ie. vaping. Outlines the current Australian laws and penalties relating to liquid nicotine and vaporisers at both Commonwealth and State levels. There is also a brief summary of vaping laws in some other countries. <https://www.athra.org.au/vaping/the-law/>

The Shopfront Youth Legal Centre Updated December 2020

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army.

This document was last updated in December 2020 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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