

Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024

Explanatory Notes

For

Amendments to be moved during consideration in detail by the Honourable Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services Minister for Women

Title of the Bill

Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024

Objectives of the Amendments

Vaping amendments

On 21 March 2024, the Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024 (Commonwealth Bill) was introduced in the Commonwealth House of Representatives. The Commonwealth Bill proposed to amend the *Therapeutic Goods Act 1989* (Cwlth) (TG Act) to prohibit the domestic manufacture, supply, and possession of recreational vaping goods and to implement a new framework for the regulation of therapeutic vaping goods.

On 12 June 2024, the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 (Bill) was introduced in Queensland's Legislative Assembly. The Bill proposes to amend the *Tobacco and Other Smoking Products Act 1998* to create state-level offences for the supply and possession of illicit nicotine products, including vaping goods, and ensure an effective enforcement framework. The Bill was drafted to align with and complement the Commonwealth Bill.

On 26 June 2024, the Senate passed the Commonwealth Bill, which included changes from the Commonwealth Bill as introduced. These changes primarily addressed possession offences for vaping goods and the related personal use exceptions. As a result, some minor inconsistencies have arisen between the amended TG Act and the Bill as introduced. A key objective of the amendments is to ensure consistency between the Bill and the TG Act.

Additionally, the Bill as introduced contains several references to exceptions under ‘a law of the Commonwealth’ or the TG Act, related to the supply, possession and advertising of vaping goods. At the time of introduction, cross-references to specific provisions in the TG Act were not possible, as the Commonwealth Bill had not yet been passed. Now that it has passed, incorporating precise references to the TG Act will enhance clarity regarding the application of the offences in the Bill.

The Bill was originally proposed to commence by proclamation, because at the time of its introduction, there was uncertainty regarding the passage of the corresponding Commonwealth Bill and the subsequent implementation of enforcement measures. As the Commonwealth Bill has passed, this is no longer the case. Another objective of the amendments is therefore to enable the Queensland Government to act as soon as possible to address the public health concerns related to vaping.

During the Health, Environment and Agriculture Committee’s review of the Bill, one stakeholder expressed concerns about the potential impact of a longer-term closure order under new section 209B on a landlord. Amendments are required to ensure that the closure powers can both operate effectively and offer procedural fairness to landlords.

Amendment to Hospital and Health Boards Act 2011

Section 85A of the *Hospital and Health Boards Act 2011* provides that if a Quality Assurance Committee (QAC) reasonably believes a health professional poses a serious risk of harm to a person because of the health professional’s health, conduct or performance, the QAC must disclose the basis for this belief and the health professional’s identity to the health professional’s chief executive. It was recently identified that section 85A does not exhaustively describe the working arrangements for health professionals working in public and private health facilities.

The objective of the amendment is to amend the provision to ensure it covers all of the employment and contracting arrangements applicable to health professionals working in the department, a Hospital and Health Service or private health facility. A technical clarification is also required to ensure information from the QAC can be disclosed to enable another person to make a notification under the Health Practitioner Regulation National Law (Queensland), part 8, division 2 (such as an employer or registered health practitioner).

Achievement of the Objectives

Vaping amendments

Personal use defence

The Commonwealth Bill, as introduced on 21 March 2024, included an offence in relation to the possession of less than a commercial quantity of vaping goods, to which a personal use exception was available. This offence captured all individuals, including retailers and non-retailers. However, prior to the passage of the Commonwealth Bill, this offence was replaced with a new, more targeted possession offence.

New section 41QD of the TG Act makes it an offence for a retailer at a retail premises to possess less than a commercial quantity of vaping goods. This provision aims to curtail deliberate commercial dealings in small quantities of unlawful vaping goods by retailers, without penalising individual users. New section 41QD entitles a retailer to claim a personal use exception if the retailer possesses no more than the ‘permitted quantity’ of vaping goods. ‘Permitted quantity’ is defined in the *Therapeutic Goods Regulation 1990* (Cwth) (TG Regulation) to mean two vaping devices, four vaping accessories and 60mL of a vaping substance that is a liquid.

Section 161A of the Bill prohibits a person from supplying or possessing illicit nicotine products as part of a business activity. ‘Illicit nicotine product’ is defined to include vaping goods, and other products containing nicotine or another harmful substance that are prescribed by regulation. As introduced, the Bill included a personal use defence which could be used in relation to a charge for possession of illicit nicotine products.

The amendments omit the current personal use defence in section 161A(5). New section 161A(6) provides that it is a defence to a charge for possession under section 161A(2) for the person charged to prove that the illicit nicotine product is stored or possessed for personal use by the person or an employee of the person. To achieve the policy objective of ensuring the Bill is consistent with the TG Act, subsection (7) provides that this defence does not apply if the illicit nicotine products that are possessed are vaping goods and the quantity exceeds the ‘permitted quantity’.

The amendments amend the *Tobacco and Other Smoking Products Regulation 2021* to prescribe the ‘permitted quantity’ to mean two vaping devices, four vaping accessories and 60mL of a vaping substance, to align with the definition of ‘permitted quantity’ in the TG Regulation.

The amended personal use defence remains consistent with the Bill’s purpose, which is to target the commercial supply and possession of unlawful illicit nicotine products. Section 161A(5), as introduced, did not specify a maximum quantity for the personal use defence, which technically would have allowed the defence to apply to any quantity of vaping goods in a person's possession. However, in practice, as the quantity of vaping goods increased, it would become increasingly difficult for a defendant to substantiate that the vaping goods were for personal use, especially in a commercial setting. Therefore, the practical distinction between the personal use defence in section 161A(5) as introduced, and the personal use defence as amended, is minimal.

For illicit nicotine products that are not vaping goods, the personal use defence is not restricted to a permitted quantity. However, the greater the quantity of products possessed, the more difficult it is likely to be for a defendant to prove that the products are for personal use.

Minor amendments to improve clarity

Section 109A of the Bill, as introduced, provided that the prohibition on display, advertising or promotion of illicit nicotine products did not apply if the act constituting the offence is authorised or permitted under the TG Act. Similarly, section 161A(4) of the Bill, as introduced, provided that supply and possession offences under subsections (1) and (2) did not apply if the individual, were they charged with an offence under a Commonwealth law relating to the supply and possession of such products, would be eligible to claim an exception for the offence.

These provisions did not specify the relevant provisions of the TG Act, as the Commonwealth Bill had not passed at the time the Bill was introduced.

The amendments amend new section 109A to explicitly reference the provisions related to advertising, display and promotion in chapter 5, part 5-1A of the TG Act. The amendments also amend new section 161A to explicitly reference the exceptions in section 41QB of the TG Act in relation to supply, and sections 41QC(12), (13) and (14) of the TG Act, and section 41QD(6), (7) and (8) of the TG Act in relation to the possession of vaping goods. These amendments provide clarity around the specific exceptions in the TG Act that are applicable under the Tobacco and Other Smoking Products Act.

Commencement

As noted above, clause 2 of the Bill as introduced provided that the Bill was to commence by proclamation. However, at the time of introduction, there was uncertainty regarding the passage of the corresponding Commonwealth Bill and the subsequent implementation of enforcement measures.

As the Commonwealth Bill has been passed, the amendments remove the commencement clause at clause 2 of the Bill. The effect of this change is that the Bill will commence on assent. This ensures that the Bill's provisions can be put into action without unnecessary delay.

Closure powers

Section 209B of the Bill allows the chief executive to apply to the Magistrates Court for an order to close a premises for up to six months if the magistrate is satisfied that illicit tobacco or illicit nicotine products have been, or are likely to be, supplied at the premises as part of a business activity, or that an unlicensed business has been carried on at the premises.

Section 209B(3) requires that the application be served on the owner of the premises unless it is not reasonably practicable to do so. Subsection (4) requires that the order be served on the owner, unless it is not reasonably practicable to do so, and posted in a conspicuous place on the premises.

During the Health, Environment and Agriculture Committee's review of the Bill, the Shopping Centre Council of Australia (SCCA) expressed concerns about the potential impact on a landlord of a longer-term closure order issued on the premises under new section 209B. The SCCA submitted that the primary concern would be 'the ability to regain control of a tenancy in such circumstances as it is an undesirable and unacceptable outcome that a tenancy would remain idle for up to 6 months.'

To ensure the closure orders function effectively without unduly impacting landlords who have not been complicit in, or turned a blind eye to, a lessee's offending, the amendments provide that a closure order made under section 209B automatically ends if the lease ends, including, for example, if the lease is terminated. This ensures landlords are not bound by a closure order beyond the term of a lease, allowing them to lease the premises to a new lessee. The amendments clarify that if the premises is re-leased to the same lessee within the period stated in the order, the order is reinstated and ends on the last day of the period stated in the order. This prevents lessees or complicit landlords from deliberately circumventing the closure order

by terminating the lease only to enter into another lease with the offending lessee for the same premises.

The amendments also include a note in the new section 209B, indicating that a closure order issued under this section may serve as evidence of a breach of a term of a lease. This recognises that most commercial leases contain clauses requiring lessees to comply with laws and legal requirements concerning the premises and their use and occupation, and non-compliance may result in termination of the lease.

To ensure procedural consistency with section 209A and ensure all relevant parties are informed of the sought or ordered closure, the amendments also update new section 209B to require that an application and an order for a long-term closure must be served on the person apparently in charge of the premises, unless it is not reasonably practicable to do so. This is in addition to the requirements for an application and an order for a long-term closure to be served on the owner of the premises under sections 209B(3) and 209B(4) respectively.

Amendment to the Hospital and Health Boards Act 2011

The amendments to section 85A of the Hospital and Health Boards Act ensure that all employment and contracting arrangements applicable to health professionals working in the department, a Hospital and Health Service or private health facility are covered. A minor amendment is also made to clarify that a health professional's chief executive may disclose information from a QAC to make, or to enable another person to make, a notification under the Health Practitioner Regulation National Law (Queensland), part 8, division 2.

Alternative Ways of Achieving Policy Objectives

There are no alternative ways of achieving the policy objective of ensuring alignment with the TG Act. The amendments to the personal use defence in new section 161A and the specific references to the Commonwealth exceptions are necessary to ensure the Queensland legislation is consistent with the Commonwealth framework and to improve the clarity of the Bill.

There are no alternative ways of ensuring the Bill's provisions can be put into action without unnecessary delay other than commencing on assent, rather than by proclamation.

Section 209B of the Bill authorises the magistrate to order the closure of premises which are being used, or are likely to be used, to supply illicit tobacco or illicit nicotine products, or are operating unlicensed. The policy objective of amending this provision is to ensure that the long-term closure order does not unfairly impact landlords by operating beyond the term of the lease and preventing the landlord from re-leasing the premises during the term of the order. An alternative way of achieving this policy objective would be to provide that a lease is automatically terminated if a closure order is issued, or because of earlier enforcement efforts. However, this would raise significant natural justice issues, as the lessee would not be afforded their rights under the lease in relation to the proposed termination.

There are no alternative ways to achieve the policy objective of the amendments to the Hospital and Health Boards Act.

Estimated Cost for Government Implementation

There is no cost to Government to implement the amendments to the Bill.

Consistency with Fundamental Legislative Principles

The amendments are generally consistent with fundamental legislative principles in the *Legislative Standards Act 1992*. However, the amendments may impact on particular principles. The potential departures from fundamental legislative principles are discussed below and are considered justified. All departures have been carefully considered and wherever possible, the impact of the potential departures have been minimised.

Whether the proposed legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act, s 4(3))

Personal use defence

The list of examples in the Legislative Standards Act is not exhaustive when determining whether legislation has sufficient regard to the rights and liberties of individuals. Although not specifically enumerated in the Legislative Standards Act, where legislation imposes liability on a person, consideration should be given as to whether the legislation provides appropriate defences for the liability. This is essential to ensure that resulting legislation will be fair and just.¹

Amendment 4 provides that a person may claim a defence in relation to the possession offence in section 161A(2) of the Bill, if the person possesses the vaping goods for their personal use and the quantity is not more than the 'permitted quantity'. The amendment limits the availability of the personal use defence under section 161A, where it is being claimed in relation to possession of vaping goods, by limiting it to a 'permitted quantity'.

The Bill regulates the possession of vaping goods as part of a business activity, with the intent not to criminalise or otherwise prohibit personal possession. It is only possession linked to a business activity that is prohibited. If an individual is suspected of possessing vaping goods as part of a business activity and possesses a quantity of vaping goods for personal use of not more than the 'permitted quantity' of two vaping devices, four vaping accessories, and 60mL of vaping substance, the individual may be entitled to claim the personal use defence.

The Bill does not penalise an individual possessing above the permitted quantity for personal use if the possession is not connected to a business activity. The context and circumstances surrounding the possession, such as whether it occurs in a retail setting or vaping goods are available for supply to consumers, will likely determine whether the possession is part of a business activity.

These amendments are necessary to align Queensland legislation with the TG Act and appropriately reflect the personal use exception available in a retail setting, as outlined in section 41QD of the TG Act. Therefore, the amended defence is considered appropriate, and the amendments are considered fair and just.

¹ See, e.g., *Fundamental Legislative Principles*, The OQPC Notebook, p. 125 - 126 (updated Jan 2008).

Whether the legislation has sufficient regard to the institution of Parliament (Legislative Standards Act 1992, s 4(4))

Under section 4(2)(b) of the Legislative Standards Act, legislation must have sufficient regard to the institution of Parliament. In considering whether the proposed amendments have sufficient regard to the institution of Parliament, the following issues are relevant.

Delegation of Legislative Powers

Section 4(4)(a) states that legislation will have sufficient regard to the institution of Parliament if it provides for the delegation of legislative power only in appropriate cases and to appropriate persons.

The amendments provide that the *permitted quantity*, for vaping goods, means the quantity prescribed by regulation. It is necessary and appropriate for the quantity of a kind of vaping goods that would amount to a permitted quantity to be prescribed by regulation to:

- ensure the Queensland definition of ‘permitted quantity’ aligns with the definition in the TG Regulation and can be updated in a timely manner if the Commonwealth definition is changed;
- ensure flexibility to change the permitted quantity in line with professional standards and legislative requirements applying to supervising health professionals;
- ensure the permitted quantity is adaptive to new and emerging design specifications;
- allow quantities to be amended efficiently, if necessary, in response to illicit trade of vaping goods to ensure that the offence and civil penalty provisions in the Tobacco and Other Smoking Products Act continue to act as a sufficient deterrent; and
- maintain a workable connection between the quantity of vaping goods permitted for personal use and acceptable volumes or quantities of therapeutic vaping goods.

Therefore, the amendments allowing the permitted quantity to be prescribed by regulation are considered to have sufficient regard to the institution of Parliament.

Consultation

During the Health, Environment and Agriculture Committee's review of the Bill, the SCCA expressed concerns about the potential impact on a landlord of a longer-term closure order issued to a lessee under new section 209B.

To ensure that closure powers do not extend beyond the term of a lease, potentially binding the landlord or future lessees, the amendments provide that a closure order issued under section 209B will automatically terminate if the offending lessee's lease ends – for example, because it is terminated. The amendments also clarify that if the premises is re-leased to the same lessee within the period specified in the order, the order will be reinstated and will end on the last day of that period. This prevents complicit landlords from circumventing the closure order by terminating the lease to extinguish the closure order and immediately letting the premises to the same lessee, thereby frustrating the purpose of the closure order.

To expressly acknowledge the rights of landlords, the amendments include a note in the new section 209B, clarifying that a closure order issued under section 209B may serve as evidence

of a breach of a term of a lease. Additionally, the amendments require that the chief executive serve a copy of the application for a closure order on the owner of the premises, unless it is not reasonably practicable to do so. This will afford the owner the opportunity to seek to join the relevant proceedings and make representations to the court where appropriate.

An interim closure order under section 209A is effective for only 72 hours and is unlikely to significantly impact landlords. Consequently, section 209A remains unchanged.

The amendment to the Hospital and Health Boards Act is minor and technical and principally relates to clarifying employment arrangements for health professionals working in public health facilities. No consultation with stakeholders was required.

Consistency with legislation of other jurisdictions

The amendments will align Queensland's framework with the Therapeutic Goods Act, supporting and complementing the Commonwealth's vaping ban. As of 6 September 2024, South Australia has introduced offences to reinforce the Commonwealth's vaping restrictions, while Tasmania has announced plans to introduce legislation aimed at curbing the use and uptake of vapes.

New South Wales, Victoria, Western Australia, the Northern Territory, and the Australian Capital Territory have not introduced or announced plans to introduce corresponding state level offences specifically prohibiting the supply and commercial possession of vaping goods or other nicotine products such as nicotine pouches. However, most jurisdictions prohibit the supply and possession of nicotine products without a prescription through medicines and poisons legislation, similar to Queensland's current framework.

The amendments to the Hospital and Health Boards Act are specific to Queensland.

Notes on provisions

Amendment 1 omits clause 2 of the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024. Omitting this clause, which provides that the Bill will commence by proclamation, will have the effect of providing that the *Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Act 2024* commences on assent.

Amendment 2 inserts part 1A (Amendment of Hospital and Health Boards Act 2011) in the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024.

Part 1A consists of clauses 2A and 2B.

Clause 2A states that part 1A amends the *Hospital and Health Boards Act 2011*.

Clause 2B amends section 85A of the Hospital and Health Boards Act. Section 85A provides for Quality Assurance Committees (QACs) to disclose information in limited circumstances to allow rapid responses to identified patient safety issues at a local level.

Clause 2B(1) amends section 85A(4)(a) to replace the reference to ‘a prescribed Service’ with ‘a Service’. This change reflects the fact that no Hospital and Health Services are currently ‘prescribed Services’ under section 20(4) of the Hospital and Health Boards Act and ensures all Hospital and Health Services are covered by this term.

Clause 2B(2) amends section 85A(4)(a)(ii) and (b)(ii) to replace ‘making’ with ‘making, or enabling another person to make’. This change clarifies that if the chief executive who receives information from a QAC is not required to make a notification under part 8, division 2 of the Health Practitioner Regulation National Law (Queensland), they can provide the information from the QAC to another person (such as the health professional’s employer or a registered health practitioner) to enable the other person to make the notification. Under this provision, the chief executive may also make the notification themselves if they are required to do so.

Clause 2B(3) replaces the definition of chief executive in section 85A(5) to ensure it covers all of the employment and contracting arrangements applicable to health professionals working in the department, a Hospital and Health Service or private health facility.

Paragraphs (a), (b) and (c) relate to health professionals who work in or are engaged by Hospital and Health Services. Paragraph (a) refers to ‘a health service employee or public service officer in the department working for a Service’. The phrase ‘working for a Service’ has a specific meaning, as it is defined in the dictionary to the Hospital and Health Boards Act. For the health professionals described in paragraphs (a), (b) and (c), the ‘chief executive’ for the purpose of section 85A is the chief executive of the Hospital and Health Service, commonly referred to as the health service chief executive.

Paragraph (d) relates to health professionals who work in or are engaged at private health facilities. For these health professionals, the ‘chief executive’ for the purpose of section 85A is the licensee of the facility.

Paragraph (e) relates to any other health professional, including those who work in or are engaged by the Department. For these health professionals, the ‘chief executive’ for the

purpose of section 85A is the chief executive of the department (that is, the Director-General of Queensland Health).

Amendment 3 amends section 109A in the *Tobacco and Other Smoking Products Act 1998*, as inserted by clause 15 of the Bill.

The amendment inserts ‘, chapter 5, part 5-1A’ in new section 109A(4), which now provides that section 109A does not apply if the act constituting the offence is authorised or permitted under the *Therapeutic Goods Act 1989* (Cwlth) (TG Act), chapter 5, part 5-1A.

Amendment 4 amends section 161A of the Tobacco and Other Smoking Products Act, as inserted by clause 17 of the Bill.

The amendment omits subsections (4) and (5) and replaces them with new subsections (4) – (8).

New section 161A(4) provides that section 161A(1) does not apply in relation to the supply of an illicit nicotine product if:

- the illicit nicotine product is vaping goods; and
- were the person to be charged with an offence under the TG Act, section 41QB in relation to the supply of the illicit nicotine product, the person would be entitled to claim an exception in relation to supply under that section.

New section 161A(5) provides that section 161A(2) does not apply in relation to the possession of an illicit nicotine product if:

- the illicit nicotine product is vaping goods; and
- were the person to be charged with an offence under the TG Act, section 41QC or 41QD in relation to the possession of the illicit nicotine product, the person would be entitled to claim an exception in relation to possession under section 41QC(12), (13) and (14), or section 41QD(6), (7) and (8) of the TG Act.

New section 161A(6) provides that it is a defence to a charge under section 161A(2) for the person to prove that the illicit nicotine product is stored or possessed for personal use by the person or an employee of the person.

New section 161A(7) provides that if the illicit nicotine product is vaping goods, the personal use defence under section 161A(6) does not apply if the quantity of vaping goods is more than the permitted quantity.

New section 161A(8) inserts a definition of *permitted quantity* for section 161A. *Permitted quantity*, for vaping goods, means the quantity prescribed by regulation for this definition.

Amendment 5 amends section 209B in the Tobacco and Other Smoking Products Act, as inserted by clause 27 of the Bill.

The amendment amends section 209B(3) by inserting ‘, and the person apparently in charge’ after the word ‘owner’. The effect of this change is that an application for a closure order made under section 209B must be served on both the owner of the premises and the person apparently in charge of the premises, unless it is not reasonably practicable to do so.

Amendment 6 amends section 209B in the Tobacco and Other Smoking Products Act, as inserted by the Bill.

The amendment amends section 209B(4) by inserting ‘, and the person apparently in charge’ after the word ‘owner’. The effect of this change is that an order made under section 209B must be served on both the owner of the premises and the person apparently in charge of the premises, unless it is not reasonably practicable to do so.

Amendment 7 amends section 209B in the Tobacco and Other Smoking Products Act, as inserted by clause 27 of the Bill.

The amendment inserts new section 209B(4A) and 209B(4B). New section 209B(4A) provides that if a lease of premises subject to a long-term closure order under section 209B ends, including, for example, because the lease is terminated, the order ends when the lease ends. A note is included to under new section (4A) to clarify that an order under section 209B may be evidence of a breach of a term of a lease. New section 209B(4B) provides that if the premises are leased to the same lessee within the period stated in the order, the order is reinstated and ends on the last day of the period stated in the order.

Amendment 8 inserts part 2A (Amendment of Tobacco and Other Smoking Products Regulation 2021) in the Bill.

Part 2A consists of clauses 35A and 35B.

Clause 35A provides that part 2A amends the *Tobacco and Other Smoking Products Regulation 2021*.

Clause 35B inserts new section 15AA in the Tobacco and Other Smoking Products Regulation, by prescribing the *permitted quantity* for illicit nicotine product under section 161A(8) of the Tobacco and Other Smoking Products Act. The quantity prescribed is:

- if the vaping goods are a vaping substance – 60mL; and
- if the vaping goods are a vaping accessory – 4 vaping accessories; and
- if the vaping goods are a vaping device – 2 vaping devices.

Amendment 9 amends the long title of the Bill to include reference to the Hospital and Health Boards Act.

Amendment 10 amends the long title, to include reference to the Tobacco and Other Smoking Products Regulation.