

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

Statement of Compatibility

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

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, the Honourable Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women, make this statement of compatibility with respect to amendments to be moved during consideration in detail of the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 (Bill).

In my opinion, the amendments are compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the 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.

To ensure the Bill is consistent with the TG Act as amended, provide further clarity regarding the interaction between the Bill and the TG Act and respond to stakeholder feedback regarding the proposed closure powers in the Bill, the amendments detailed below are required. The amendments also make minor amendments to the *Hospital and Health Boards Act 2011* as discussed below.

Vaping amendments

Personal use defence

The Commonwealth Bill, as introduced, 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. Prior to passage, this offence was replaced with a new, more targeted, possession offence. New section 41QD of the TG Act now applies only to a retailer at a retail premises. A retailer charged with an offence under section 41QD of the TG Act is entitled to claim a personal use exception if they possess no more than the ‘permitted quantity’ of vaping goods. ‘Permitted quantity’ is defined in the *Therapeutic Goods Regulation 1990* (Cth) (TG Regulation) to mean two vaping devices, four vaping accessories and 60mL of a vaping substance that is a liquid.

Section 161A of the Tobacco and Other Smoking Products Act, as inserted by clause 17 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.

To ensure the Bill is consistent with the TG Act, the amendments provide that the personal use defence does not apply if the illicit nicotine products are vaping goods and the person possesses more than the ‘permitted quantity’. ‘Permitted quantity’ is defined in new section 161A(8) to mean the quantity prescribed by regulation. The amendments amend the *Tobacco and Other Smoking Products Regulation 2021* to prescribe the ‘permitted quantity’ as two vaping devices, four vaping accessories and 60mL of a vaping substance, to align with the definition in the TG Regulation.

Minor amendments to improve clarity

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 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 amendments amend new section 109A, which relates to the advertising, display, and promotion of illicit nicotine products, to refer to chapter 5, part 5-1A of the TG Act, which regulates advertising of vaping goods. The amendments also amend new section 161A to reference the exceptions in section 41QB of the TG Act in relation to the supply of vaping goods, 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 products.

Commencement

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.

Closure powers

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 for landlords.

Amendments to section 209B provide that if a lease of premises subject to a closure order ends, including, for example, because the lease is terminated, the closure order ends when the lease ends. However, if the premises are leased to the same lessee within the closure order period, the order is reinstated and ends on the last day of the period stated in the order.

The amendments also require an application and an order to be served both on the owner of the premises, and the person apparently in charge unless it is not reasonably practicable to do so. Finally, the amendments insert a note to clarify that an order under section 209B may be evidence of a breach of a term of a lease.

Amendment to the Hospital and Health Boards Act 2011

Section 85A of the Hospital and Health Boards Act 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 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.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights that are relevant to the amendments to be moved during consideration in detail of the Bill are:

- property rights (section 24)
- right to privacy and reputation (section 25)
- right to liberty and security of person (section 29)

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*).

1. Personal use defence for possession of vaping goods

Section 161A(2) of the Bill provides that a person must not, as part of a business activity, store or otherwise be in possession of an illicit nicotine product at the premises where the business activity is conducted, or at another premises connected with the premises where the business activity is conducted. The maximum penalty for this offence is 12 months imprisonment, or 1,000 penalty units, or both.

The amendments to the Bill provide 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. However, if the illicit nicotine product is vaping goods, the personal use defence does not apply if the quantity of vaping goods is more than the ‘permitted quantity’, as prescribed by regulation.

The amendments to the Bill amend the Tobacco and Other Smoking Products Regulation to prescribe ‘permitted quantity’ as two vaping devices, four vaping accessories and 60mL of vaping substance.

(a) the nature of the right

Property rights

Every person has the right to own property alone or in association with others and must not be arbitrarily deprived of their property (section 24, Human Rights Act). Case authority suggests that ‘arbitrary’ in this context refers to conduct that is capricious, unpredictable, or unjust, and also refers to interferences which are not proportionate to a legitimate aim that is sought.

‘Property’ includes all real and personal property interests recognised under general law (for example, interests in land, contractual rights, money and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).

The amendments may limit property rights by limiting the availability of the personal use defence for the offence of possession of illicit nicotine products to the ‘permitted quantity’ if the products are vaping goods.

Right to liberty and security of person

The right to liberty and security (section 29, Human Rights Act) protects personal liberty and requires that due process be followed when state authorities exercise their powers of arrest and detention. The right protects against deprivation of liberty that is arbitrary or unlawful. The right is relevant whenever a person is placed at risk of imprisonment.

As described above, the amendments limit the availability of the personal use defence to a permitted quantity of vaping goods, which may place a person at greater risk of imprisonment if they are charged with an offence under new section 161A(2) than if the personal use defence was available for any quantity of vaping goods.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The immediate purpose of the limitations outlined above is to ensure the Bill is consistent with the TG Act. This is to ensure that Bill can operate alongside the Commonwealth framework, enabling a tiered enforcement framework which will be more effective in addressing the public health harms caused by vaping. Accordingly, the ultimate purpose of the amendments is to protect the health of the public from the harms of vaping. This is a purpose that is consistent with a free and democratic society based on human dignity, equality, and freedom.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

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, defined to mean two vaping devices, four vaping accessories and 60mL of a vaping substance that is a liquid.

The Bill was drafted with the intention to complement the Commonwealth reforms by ensuring there are corresponding state-level offences and enforcement powers available. The limitations arising from the amendments help achieve the purpose of promoting consistency with the TG Act by providing that the personal use defence in the Bill operates in the same manner as the relevant exception in the TG Act – that is, cannot be claimed in relation to possession of more than the permitted quantity. This will ensure that the Bill can operate effectively in conjunction with the Commonwealth framework, to achieve the purpose of protecting the health of the public from the harms of vaping.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The availability of less restrictive alternatives has been considered, including not making the amendment. However, not making the amendment would result in clear inconsistency with the TG Act, and cause confusion for the community, business, and enforcement officers. This would not achieve the purpose of ensuring the Bill is consistent with the TG Act and the two frameworks can operate effectively together to protect public health. For these reasons, the only reasonably available way to achieve this purpose is to limit the personal use defence for vaping goods to a ‘permitted

quantity,’ thereby harmonising the commercial possession offence in the Bill with the new retail possession offence in the TG Act.

The amendment is no more restrictive than necessary to achieve this purpose. First, as a practical matter, the amendment is unlikely to materially change the scope of the possession offence in the Bill, which remains narrowly tailored to the possession of vaping goods as part of a business activity. While section 161A(5), as introduced, did not specify a maximum quantity for the personal use defence, which technically allowed the defence to apply to any quantity of vaping goods in a person's possession, in practice, as the quantity of vaping goods increased, it would have become increasingly difficult for a defendant to claim 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.

Second, the personal use defence will only be relevant in prosecutions involving the commercial possession of vaping goods. The Bill does not criminalise the possession of vaping goods—even in amounts greater than the permitted quantity—if the possession is not linked to a business activity. The context and circumstances surrounding the possession, such as whether it occurs in a retail setting or if vaping goods are available for supply to consumers, will likely determine whether the possession is part of a business activity.

Finally, the amendment is no broader than necessary to ensure consistency with the TG Act. Section 41QD of the TG Act entitles a retailer to claim a personal use exception if the retailer possesses no more than the permitted quantity of vaping goods. Therefore, the Bill only limits the personal use defence to a ‘permitted quantity’ for vaping goods, not for other illicit nicotine products.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Vaping is linked to a variety of significant health risks, including respiratory issues, nicotine addictions, cardiovascular issues, severe burns, mental health concerns and potential for toxicity. The health impacts on children and young people are particularly concerning, with a rapid uptake in vaping by adolescents over the last five years. By ensuring the Bill can operate effectively alongside the Commonwealth framework, the limitations imposed by the amendments will deliver benefits to the community through improved health outcomes and reduced health costs.

The limitations will only impact upon individuals who are charged with the offence of possessing illicit nicotine products that are vaping goods, as part of a business activity. The limitations on rights affected by the amendments are mitigated to the greatest degree possible.

In my opinion, the amendments strike a fair balance between the benefits gained by ensuring the Bill is consistent and operates effectively with the TG Act to protect public health, and the potential impact on individuals caused by the limitation of the rights identified above.

(f) any other relevant factors

Nil.

2. Amendments to the *Hospital and Health Boards Act 2011*

The right to privacy and reputation is engaged by the amendments to the Hospital and Health Boards Act which expand the ability for a Quality Assurance Committee (QAC) to disclose information to a health professional's chief executive where there is a serious risk of harm to patient safety, to apply to contractors as well as employees of the department, a Hospital and Health Service or private health facility.

(a) the nature of the right

Section 25 of the Human Rights Act provides that a person has the right not to have their privacy arbitrarily or unlawfully interfered with. The scope of the right is very broad; it extends to personal information and data as well as an individual's private life generally. Any interference with privacy that is unreasonable, unnecessary or disproportionate would limit the right to privacy and reputation.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The primary purpose of allowing a QAC to disclose information in relation to a health professional to the professional's chief executive is to protect and promote the health and safety of members of the community by ensuring information about a health professional's health, conduct or performance can be shared and immediate action can be taken to address patient safety concerns.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The amendment provides for a QAC to disclose information that forms the basis of a reasonable belief that a health professional's health, conduct or performance poses a serious risk of harm to a person to the relevant chief executive, which will ensure that action can be taken to ensure patient safety. The health professional may be engaged by the department, a Hospital and Health Board or private health facility as either an employee or contractor under a contract for services. The limitation on a person's right to privacy will help to achieve the purpose of protecting the health and safety of the community as it will enable appropriate disciplinary or other appropriate action to be taken where a health professional's health, conduct or performance poses a serious risk to patient safety.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill.

The amendment is the least restrictive way of protecting and promoting patient safety in response to serious risks identified by QACs. The amendment will only allow sharing of identifying information to the health professional's chief executive and only in situations where a QAC has formed a reasonable belief that a health professional's health, conduct or performance poses a serious risk of harm to a person. This high threshold protects against unreasonable, unnecessary or disproportionate information sharing and minimises the risk of any arbitrary limitations on the right to privacy. In addition, the Hospital and Health Boards Act provides that a QAC must have regard to the rules of natural justice so far as they are relevant to the functions of a committee. Finally, the Bill puts in place restrictions on further disclosure of the information by the chief executive. The chief executive must not further disclose the information, other than to the extent necessary for appropriate disciplinary or

other action to be taken or to make or enable another person to make a notification under part 8, division 2 of the Health Practitioner Regulation National Law (Queensland). With these safeguards in place, the amendments are the least restrictive and reasonably available way to achieve the purpose of promoting patient safety. The purpose can only be achieved with legislative amendment.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, any limitations to the right to privacy and reputation are considered reasonable and justifiable. The guiding principles of the Hospital and Health Boards Act include that the best interests of users of public sector health services should be the main consideration in all decisions and actions under the Act and that there is a commitment to ensuring quality and safety in the delivery of public sector health services. If information that is critical to ensuring the safety of patients in health facilities in Queensland cannot be appropriately disclosed, the Act's functions and objects and public confidence in Queensland public and private health facilities, cannot be achieved. Provisions restricting privacy rights to allow disclosure of personal information for a purpose permitted or required by law are common in Queensland legislation. Such provisions effectively balance the individual right to privacy and public interest factors. The amendments strike a fair balance between the public benefit of increasing patient safety and quality improvement against an individual's right to privacy and reputation. In cases where a person's privacy is limited, preventing patient harm and serious clinical incidents sufficiently achieves the purpose of the amendments and promotes the right to life (section 16). Any impacts on human rights are only to the extent reasonable and demonstrably justifiable in accordance with the Human Rights Act.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the amendments to be moved during consideration in detail of the Bill are compatible with human rights under the Human Rights Act because they limit the identified human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act.

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