

# Tobacco and Other Smoking Products Amendment Bill 2023

## Statement of Compatibility

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

In accordance with section 38 of the *Human Rights Act 2019*, I, Yvette D’Ath, Minister for Health and Ambulance Services and Leader of the House make this statement of compatibility with respect to the Tobacco and Other Smoking Products Amendment Bill 2023 (the Bill).

In my opinion, the Bill is 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 Bill

The object of the *Tobacco and Other Smoking Products Act 1998* (the Act) is to improve the health of the public by reducing their exposure to tobacco and other smoking products. Initiatives implemented under the Act have included restricting the supply of smoking products to children, limiting their advertising and promotion, reducing public exposure to second-hand smoke and establishing a framework for compliance, monitoring and enforcement activities.

The effects of smoking products are a significant public health concern in Queensland. No other single risk factor contributes as greatly to the burden of preventable death and disease. The cost of smoking on the Queensland community is significant, including actual medical and social costs such as hospitalisation, inequitable health outcomes, welfare and funeral expenses, in addition to intangible costs such as pain and suffering, and the value of lives lost.

In recent years, quit smoking campaigns and community education efforts have been successful at reducing the smoking rate. However, the Queensland Government recognises that further reductions in smoking would significantly benefit the health of Queenslanders.

The Bill introduces a suite of amendments to the Act to implement Queensland Government commitments to strengthen Queensland’s tobacco legislation and further reduce the rates of smoking. In particular, the Bill will:

- improve oversight of the smoking product industry in Queensland, by licensing wholesale and retail sellers of smoking products;
- enhance monitoring and enforcement activities, by introducing new offences and high penalties, and by giving authorised persons expanded powers to make enquiries, share information with other enforcement agencies and take immediate action to prohibit unlawful activities;
- introduce new restrictions on the supply and use of smoking products, to assist smokers to quit the habit and reduce opportunities for children to access smoking products at home, in retail outlets and at liquor licensed premises;

- introduce new restrictions in designated outdoor smoking areas (DOSAs) at liquor licensed venues, to prohibit children remaining in a DOSA and require smoke-free buffer zones between a DOSA and the enclosed venue areas;
- modernise the advertising, display and promotion provisions in the Act, including clearer regulation of the display of smoking product-related signage, images and business names and for online marketing of smoking products;
- limit exposure to direct and second-hand smoke at places where families and communities gather, including outdoor eating or drinking places and outdoor markets;
- protect children from direct and second-hand smoke at and near school facilities and at organised children's activities; and
- make other minor and technical amendments to improve the operation of the Act.

## Human Rights Issues

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

In my opinion, the human rights that are relevant to the Bill are:

- right to recognition and equality before the law (section 15);
- right to freedom of movement (section 19);
- right to freedom of expression (section 21);
- right to property (section 24);
- right to privacy and reputation (section 25);
- right to the protections of families and children (section 26); and
- cultural rights (section 27).

For the reasons outlined below, I am of the view the Bill engages the following human rights. The Bill actively supports and promotes several rights, but where rights are potentially limited by the Bill, this is identified and an analysis and justification of any potential limitations is provided.

### Human Rights potentially limited by strengthening regulatory compliance and acting on illicit tobacco

The Bill introduces a range of reforms designed to increase regulatory compliance with the Act and complement Commonwealth legislation on the identification and reduction of illicit tobacco. These reforms include the introduction of a licensing scheme, improvement of monitoring and enforcement provisions, and the modernisation of the advertising, display and promotion provisions in the Act.

The Bill establishes a licensing scheme for wholesale and retail sellers of smoking products. The scheme will enable Queensland Health to identify and monitor the number, type and location of wholesale and retail outlets, which will facilitate compliance activities and targeted industry education and engagement. As part of the proposed licensing framework, the chief executive must be satisfied the person is a fit and proper person to hold a licence.

The Bill amends the Act to prohibit the supply of smoking products not complying with Commonwealth requirements, that is, illicit tobacco. This will extend the existing powers of authorised persons under the Act to take the necessary monitoring and enforcement action in relation to illicit tobacco, including seizing noncompliant smoking products.

The Bills modernises provisions to ensure that controls to restrict advertising, display and promotion are a good fit for the contemporary retail context. This approach aims to retain the original intent of the Act while ensuring that new provisions can comprehensively apply to new types of smoking products and marketing strategies.

To support these tighter regulatory controls, the Bill introduces a commensurate increase in the powers of authorised persons to enforce compliance with the Act. In particular, the Bill introduces new information-sharing powers to allow for better communication between State and Commonwealth regulatory agencies.

(a) the nature of the right

*Right to property*

Every person has the right to own property alone or in association with others and must not be arbitrarily deprived of their property.

‘Property’ includes all real and personal property interests recognised under general law. Real property interests encompass interests in land and fixtures upon the land. Personal property interests encompass corporeal items (such as chattels or goods), and incorporeal legal rights, (such as copyright and other intellectual property rights, shares in a corporation, and contractual rights, such as a debt). Incorporeal legal rights are created by statute and may include rights such as the right to use, licence and restrict access to a thing.

The Bill limits the wholesale and retail supply of smoking products to only licence holders, by establishing a new licensing scheme. Clause 9 of the Bill prohibits the wholesale or retail sale of smoking products without a licence.

Clause 7 (new section 7I) provides that only a fit and proper person can hold a licence. In determining whether a person is a fit and proper person the chief executive must have regard to certain matters in the new section 7ZC, including:

- the person holds or has previously held a retail or wholesale licence;
- the specific conditions of any retail or wholesale licence held or previously held by the person;
- whether a retail or wholesale licence held or previously held by the person is or has been suspended or cancelled;
- whether or not the person has contravened a law of the Commonwealth or a State that regulates the supply of smoking products or any chemicals commonly used in smoking products;
- whether the person has been convicted of an indictable offence relating to fraud, dishonesty, or tax or customs evasion;
- if an individual has been an insolvent under administration or disqualified from managing corporations under the Corporations Act;
- if a corporation has been placed into administration, receivership or liquidation; and
- any other matter they consider relevant.

These restrictions on persons to hold a wholesale or retail licence limit the right to property by preventing any person who isn’t a fit and proper person as determined under Clause 7 (new section 7I) from selling tobacco products as a wholesaler or retailer.

The Bill establishes new monitoring and enforcement provisions that allow authorised persons to take action to ensure compliance with the Act. These provisions include the offence of supplying illicit tobacco (clause 50) and the issuing of improvement notices to stop behaviour which poses a public health risk (clause 57). These provisions limit the right to property by allowing authorised persons to seize products not in compliance with Commonwealth requirements and prohibit activities (including sales) where there is a serious risk to health. Clause 56 also empowers the chief executive to decide a seized thing is forfeited to the State if satisfied the thing is illicit tobacco.

Clauses 20 and 49 of the Bill includes new restrictions on the advertising, display and promotion of smoking products. These include the modernisation of the advertising, display and promotion provisions, and amendments in relation to the sale and display of hookahs. These reforms limit the right to property by limiting the ability of a business to display and advertise their products.

#### *Privacy and Reputation*

The right to privacy and reputation protects a person from not having their privacy unlawfully or arbitrarily interfered with or their reputation unlawfully attacked. The scope of this right also includes the protection of personal information and data collection.

The new licensing scheme introduced at clause 7 (new section 7I) may limit the right to privacy and reputation, as a person will only be granted a licence if assessed to be a fit and proper person, which includes providing the chief executive with personal details. Also, once licensed, the person's business and personal details will be recorded on a register of licensees.

The information-sharing provisions at clause 60 (new section 52A) may limit the right to privacy by allowing Queensland Health to share information about licence holders and compliance activity undertaken under the Act to other Queensland and Commonwealth Government regulatory bodies.

#### *Freedom of Expression*

The right to freedom of expression provides that every person has the right to hold and express an opinion, through speech, art, writing (or other forms of expression) and to seek to impart information and ideas of all kinds.

The new restrictions on advertising, display and promotion of smoking products limits the right to freedom of expression by restricting how smoking and tobacco products are advertised and prohibiting some methods of advertising.

(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

#### *Right to property*

The purpose of the property rights limitation under the new licensing scheme is to restrict the ability to sell smoking products to licensed businesses operated by fit and proper persons. This allows Queensland Health to ensure only appropriate persons sell smoking products, monitor compliance with legal obligations and minimum standards, engage with the industry and design

targeted health and community education initiatives. This will ensure there is public confidence and trust in relation to the supply of smoking products. Ultimately, the licensing scheme will provide Queensland Health with greater visibility of the retail smoking industry and support the monitoring and compliance framework in the Act.

The purpose of the limitations prohibiting the supply of illicit tobacco, and allowing illicit tobacco to be seized and forfeited, is to prevent these products being used to commit further offences and to protect the community from the potential harm arising from their use. Illicit tobacco includes smoking products which are illegally imported, sold cheaply (since there is no payment of excise taxes) and do not have the health warnings or correct packaging required under Commonwealth law. As these and other smoking products may be manufactured in unsafe or uncontrolled conditions, they are also unlikely to meet Australian safety standards in relation to ingredients and concentrations and may contain dangerous toxins.

These reforms are not considered significant as they are intended to close technical loopholes, clarify operation of the Act in relation to advertising, display and promotion, and give better effect to prohibitions already in place under Commonwealth law.

#### *Privacy and Reputation*

The purpose of the privacy limitation in the new licensing scheme is to assess licence applications to determine if the applicant is a fit and proper person. This may include consideration of their diligence, honesty and observance of the law. Although a negative assessment may be regarded as reflecting poorly on a person's character, Queensland Health considers the assessment process is necessary to prevent unsuitable applicants from becoming licensed. Also, all business and personal information collected during the application process and included on the register must be handled securely and only be used for internal licensing, education and monitoring purposes.

The purpose of the limitation on the right to privacy and reputation in relation to the information-sharing provisions is to improve cross-agency and interjurisdictional compliance measures for combatting trade in illicit tobacco.

#### *Freedom of Expression*

The purpose of the limitations is generally to ensure that smoking products are not advertised or promoted and that customers are advised about addiction programs and health warnings. These reforms are not considered significant as they are intended to close technical loopholes, clarify operation of the Act in relation to advertising, display and promotion, and give better effect to prohibitions already in place under Commonwealth law.

(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

#### *Right to property*

The limitations in relation to the new licensing scheme achieve their purpose and do so only to the extent necessary. The licensing scheme will allow Queensland Health oversight into the smoking products industry which will better enable the enforcement of smoking product regulation to keep the community safe from the dangers of smoking. The restrictions imposed under the licensing framework are consistent with standard requirements for general business

activity and are aligned with requirements of licensing frameworks for smoking product supply in other jurisdictions in Australia.

The limitations in relation to the supply of illicit tobacco will achieve the purpose of making it an offence under Queensland law to sell tobacco products which do not meet the minimum Commonwealth requirements. As a State law, authorised persons may then be empowered under the Act to seize the non-compliant products. The limitations in relation to seizure and forfeiture of illicit tobacco will achieve the purpose of empowering the chief executive to decide, following a show cause process, to forfeit those products. The forfeiture of seized illicit tobacco prevents it being used to commit further offences, as the illicit tobacco would not be in the possession of the supplier, and also removes potentially harmful smoking products from the marketplace. A supplier can appeal a forfeiture decision to a Magistrates Court and the court may either confirm the original decision, substitute another decision for the original decision or set aside the original decision and return the matter to the chief executive with directions.

The restrictions on advertising, display and promotion will achieve the purpose by closing loopholes in the regulatory framework that allow advertising of smoking products in a way that is contrary to the Act's intention. The limitations do not extend beyond what is necessary to ensure proper operation of the provisions of the Act to ensure smoking products are not unlawfully advertised to the community or children.

#### *Privacy and Reputation*

The introduction of the licensing scheme establishes that the selling of smoking products must only be entrusted to legitimate businesses and business operators. The limitation will achieve the purpose by facilitating information to be collected so the fit and proper person test may be conducted.

The smoking product industry is regulated by several regulatory bodies in Queensland and by the Commonwealth Government. To ensure effective management of this regulatory framework, information sharing is necessary. The limitation on privacy and reputation will help achieve the purpose by facilitating information sharing across the regulatory framework. The operation of this provision is limited to sharing information with entities with functions relating to the supply of smoking products or law enforcement.

#### *Freedom of Expression*

The limitation on the right to freedom of expression will achieve its purpose by closing loopholes in legislation that are being used by businesses to advertise, despite the prohibition in the Act. For example, suppliers of smoking products are registering multiple business names and displaying multiple permitted and mandatory signs as a way to circumvent the advertising restrictions. Although businesses will still be able to undertake these activities, they will only be permitted to do so as originally intended by the Act.

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

Less restrictive and reasonable alternatives have not been identified that would achieve the purposes of the Bill to strengthen regulatory compliance and act on illicit tobacco.

(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

In my opinion, the amendments in the Bill which strengthen regulatory compliance within the Act and combat illicit tobacco strike a balance between competing rights that is reasonable and demonstrably justifiable in a free and democratic society.

The public health risks associated with the use of smoking products is well established as the single greatest risk factor contributing to preventable death and disease. Increased regulatory controls that are established through the new licensing scheme, illicit tobacco enforcement, and advertising restrictions, will ensure the Act remains fit for purpose in contemporary times. These amendments strike a balance between the importance of continued effectiveness of smoking product legislation and an individual's rights to property, right to privacy and reputation, and freedom of expression.

(f) any other relevant factors

Nil.

### **Human Rights potentially limited by protecting children from the dangers of smoking and second-hand smoke**

The Bill introduces a range of reforms designed to protect children from the dangers of smoking and second-hand smoke, and to help prevent children from ever taking up smoking.

The new suite of reforms in the Bill include:

- prohibiting the supply of smoking products by children;
- prohibiting the supply of smoking to children by parents and guardians;
- prohibiting smoking at or near children's organised activities; and
- prohibiting smoking at school community carparks.

(a) the nature of the right

#### *Recognition and equality before the law*

The 'recognition and equality before the law' rights include that every person is equal before the law and is entitled to the equal protection of the law without discrimination.

Clause 10 of the Bill may limit this right by prohibiting the sale and handling of smoking products by children, which may be considered discrimination against the worker based on their age.

#### *Privacy and reputation*

Privacy and reputation rights protect a person from not having their privacy unlawfully or arbitrarily interfered with or their reputation unlawfully attacked.

Clause 17 of the Bill may limit this right by removing an exemption which allows responsible parents and guardians to supply smoking products to children. Removing the exemption restricts the ability of parents and guardians to act in their private capacity.

### *Freedom of movement*

Freedom of movement provides that every person lawfully in Queensland has the right to move freely within Queensland, to enter and leave it and to have the freedom to choose where they live in Queensland.

Clauses 31 and 47 of the Bill limit a person's freedom of movement if the person is smoking at a school community carpark or at an organised children's activity.

### *Cultural rights*

Cultural rights include that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language. This provision promotes the right to practise and maintain shared traditions and activities. It is also aimed at the survival and continued development of cultural heritage.

Clauses 31 and 47 of the Bill limits a person's cultural rights if the person is smoking at a school community carpark or at an organised children's activity.

(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 purpose of the limitations on the rights to recognition and equality before the law, privacy and reputation, freedom and movement, and cultural rights are to protect children from the dangers of smoking and second-hand smoke to achieve the public health outcomes.

A significant driver of smoking reduction in Queensland has been decreased smoking uptake by young people. These reforms are designed to target places where children may be exposed to smoking regularly, including at work, in the home, at organised activities and at school.

(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

### *Recognition and equality before the law*

The limitation achieves its purpose and does not extend further than necessary. The limitation will reduce familiarisation with smoking products and lower the risk of smoking initiation by minors. Preventing children from supplying these products also reduces the risk that young workers will be involved in enforcement activities by authorised persons. In addition, where children are relied on for unsupervised supply at a retail store, there is a risk they may access smoking products for their own use or face peer pressure to supply smoking products to other children.

### *Privacy and Reputation*

The limitation will help achieve the purpose by restricting the ways children are exposed to smoking, in this instance, in their own home, which in turn lowers the likelihood they will take up long-term smoking.

### *Freedom of movement*

The limitation achieves its purpose and does so only to the extent necessary. This limitation will ensure children do not see smoking at or near an organised event, or while at school, and will help de-normalise smoking behaviour and disincentivize children from starting to smoke. The places where smoking is restricted are only where members of the public and children congregate.

### *Cultural rights*

The limitation achieves its purpose and does so only to the extent necessary. This limitation will ensure children do not see smoking at or near an organised activity they are attending, or while at school, and will help de-normalise smoking behaviour and disincentivize children from starting to smoke. The places where smoking is restricted are only where members of the public and children congregate.

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

While the limitation imposes boundaries on the areas where smoking is permitted and places where children are exposed to smoking products, a less restrictive and reasonably available alternative has not been identified to achieve the public health purpose.

#### (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

In my opinion, these amendments in the Bill to further protect children from the dangers of smoking and second-hand smoke, and help prevent uptake of smoking by children, strike a balance between competing rights that is reasonable and demonstrably justifiable in a free and democratic society.

#### (f) any other relevant factors

Nil.

### **Human Rights potentially limited by protecting patrons at licensed venues**

The Bill introduces a range of reforms to further protect patrons at liquor licenced venues.

The option to provide a DOSA is available to liquor licensed premises that hold a commercial hotel, community club, or special facility (casino) licence. No eating, gaming or entertainment can occur at a DOSA, however smoking and drinking is permitted. Legislated requirements for DOSAs also limit the permitted size of a DOSA, impose buffers with other areas and require a smoking management plan.

Smoking products are also available at some liquor licensed premises, generally through vending machines, and this further contributes to smoking which occurs at these venues.

It is proposed to amend the Act to reform DOSAs, by prohibiting children remaining in a DOSA, requiring smoke-free buffer zones between a DOSA and the enclosed venue areas, and restricting supply of smoking products at liquor licensed premises to service areas. These

reforms will reduce exposure to second-hand smoke, prevent smoking uptake, and support current smokers and recent quitters to become nicotine free.

(a) the nature of the right

*Freedom of movement*

Freedom of movement provides that every person lawfully in Queensland has the right to move freely within Queensland, to enter and leave it and to have the freedom to choose where they live in Queensland. This right means that public entities cannot act in a way that would unduly restrict freedom of movement.

Clauses 42 and 43 amend the Act in relation to DOSAs which limit a person's right to freedom of movement. This is done by expanding buffer zones between a DOSA and the other parts of the liquor licenced premises and restricting a person's ability to enter a DOSA if they are a child.

*Cultural rights*

Cultural rights include that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language. This provision promotes the right to practise and maintain shared traditions and activities. It is also aimed at the survival and continued development of cultural heritage.

The proposed reforms to DOSAs at clauses 42 and 43 limit a person's cultural rights through the restriction of smoking and entering a DOSA in certain circumstances, which may prevent people carrying out cultural practices which involve smoking.

*Property rights*

Property rights protect a person's right to own property and to not be arbitrarily deprived of their property.

Clause 14 of the Bill limits the right to property by restricting the location of smoking product vending machines to service areas of liquor licenced premises. Clause 14 requires these smoking products only be accessible to employees of the premises.

(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

*Freedom of movement and cultural rights*

The purpose of the limitation to freedom of movement and cultural rights is to reduce the areas permitted to be used for a DOSA by introducing smoke-free buffer zones and thereby further contribute to the reduction in second-hand smoke exposure for patrons and the prominence of DOSAs.

Similarly, the purpose of restricting access to DOSAs to adults only is to reduce exposure to second-hand smoke for children, reduce the uptake of smoking by children, and to reduce the appeal of DOSAs for patrons at liquor licenced venues with responsibilities for caring for children.

*Property rights*

The purpose of the limitation to property rights is to ensure that children are not permitted access to tobacco products. Also, relocation of smoking product vending machines to service areas of liquor licensed premises reduces exposure to second-hand smoke for people who have recently quit or are attempting to quit and thereby removes a stimulus which may trigger a relapse.

Although those wishing to smoke will still be able to access smoking products at the liquor licensed premises, they will need to buy them from an employee of the premises.

(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

*Freedom of movement and cultural rights*

These limitations will help achieve these purposes by ensuring the regulatory framework for the use of, and access to, DOSAs in liquor licensed premises comprehensively reduces the risk of exposure to second-hand smoke for patrons and children and makes the use of DOSAs less desirable for smokers.

*Property rights*

The limitation achieves its purpose and does not extend further than is necessary. The limitation will reduce the risk that children will take up smoking, to minimise cumulative harmful effects and consequential costs of treating smoking-related illness, by ensuring they cannot access smoking products at liquor licenced venues.

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

Less restrictive and reasonable available alternatives have not been identified to achieve the purpose.

*Freedom of movement and cultural rights*

To ensure the new prohibition on children remaining in a DOSA is less restrictive in relation to how people move through the premises, the Bill will allow children to pass through a DOSA where required. Also, the proposed reforms to DOSAs were identified as gaps in the operation of the Act. The purpose of a DOSA is to reduce exposure to second-hand smoke, prevent smoking uptake, and support current smokers and recent quitters to become nicotine free. By allowing DOSAs to be directly adjacent to indoor areas and by allowing children in DOSAs, these objectives were undermined.

*Property rights*

In relation to accessing smoking products at liquor licensed premises, South Australia and New South Wales require a staff intervention mechanism on smoking product vending machines. It is considered this would have the same effect as requiring the vending machines be located in areas that only staff can access and would be less restrictive.

- (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

In my opinion, the amendments in the Bill relating to protecting patrons from the dangers of smoking and second-hand smoke strike a balance between competing rights which is reasonable and demonstrably justifiable in a free and democratic society.

These amendments are also likely to strengthen another right, to protect families and children, by reducing the exposure of children to the harmful effects of second-hand smoke.

#### *Freedom of movement and cultural*

The potential limitations on the freedom of movement and cultural rights are balanced with the public health objective of reducing smoking and the harm caused by smoking and second-hand smoke. Further, the proposed reforms are very limited in scope as they only apply in DOSAs. Any potential limitation on human rights is therefore considered minor and justified.

#### *Property Rights*

On balance, these limitations are considered to be reasonable and justifiable. Despite the importance of the right to own property, in this situation it is outweighed by the need to protect public health, prevent children from easily obtaining tobacco products and discourage smokers from smoking while drinking.

- (f) any other relevant factors

Nil.

### **Human Rights potentially limited by increasing smoke-free public places**

The Bill introduces new reform to increase smoke-free public places and better protect the community in outdoor settings.

The Act prohibits smoking at an outdoor eating or drinking place, being an open-air place where persons may consume food or drink provided from an on-site food service. It is proposed to strengthen the existing prohibition, by imposing a five-metre buffer zone around the perimeter of the outdoor eating or drinking place. Although it will be an offence for patrons to smoke in the buffer zone, the person in charge of the outdoor eating or drinking place will not be held liable for contraventions of these provisions.

For smoking-only areas contained within outdoor eating and drinking areas, it is proposed to amend the Act to impose a two-metre buffer zone between an on-site food service and any smoking area. It will be an offence for patrons to smoke in the buffer zone. As smoking areas are wholly contained within an outdoor eating and drinking place, the person in charge of the place will be held liable for any such contravention.

It is proposed to amend the Act to prohibit smoking within an outdoor market (clause 46). Smoking will also be prohibited within a five-metre buffer zone from any clearly-defined entrance and/or exit to the market. Examples of entrances or exits include a point where patrons queue for a ticket or where they pass through on their way in or out. To assist with the management of markets, it is proposed to allow the option to set aside an area where smoking

may occur. No food or drink would be permitted to be supplied or consumed in these smoking areas.

(a) the nature of the right

*Freedom of movement*

The right to freedom of movement recognises that every person lawfully in Queensland has the right to move freely within Queensland, to enter and leave it and has the freedom to choose where they live in Queensland. This right means that public entities cannot act in a way that would unduly restrict freedom of movement.

The proposed introduction of buffer zones around eating and drinking areas and within smoking areas at clause 39 limits a person's freedom of movement by restricting them from entering the five-metre buffer zone of an outdoor eating and drinking area while they are smoking and within the two-metre buffer zone of a smoking-only area.

*Cultural rights*

Cultural rights include that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language. This provision promotes the right to practise and maintain shared traditions and activities. It is also aimed at the survival and continued development of cultural heritage.

Clause 39 of the Bill limits a person's cultural rights if the person is smoking near an outdoor eating and drinking place and smoking is related to a cultural practice.

(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

*Freedom of movement and cultural rights*

The Act currently allows for an area as part of an outdoor eating and drinking area to be nominated as an area where no food or drink may be taken or consumed, but where smoking may occur. As a result, smoking occurs directly adjacent to, or in some instances within, the venue areas. This exposes patrons to second-hand smoke. The purpose of these limitations is to limit the exposure to second-hand smoke by introducing a five-metre no-smoking buffer at outdoor eating and drinking places, and a two-metre buffer around nominated smoking-only areas.

Although the Act does not specifically regulate outdoor markets, the varied nature of markets will mean some smoking restrictions may apply in certain situations. The purpose of the limitation is to remove any uncertainty about the application of the Act to outdoor markets, to effectively reduce exposure to second-hand smoke for persons attending or working at a market.

- (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

*Freedom of movement and cultural rights*

The limitations on freedom of movement and cultural rights will achieve the purpose of reducing second-hand smoke exposure to patrons of outdoor eating and drinking places and outdoor markets by requiring smokers to be further away from patrons through the use of buffers.

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

*Freedom of movement and cultural rights*

A less restrictive and reasonable available alternative has not been identified to achieve the purpose. Any less restrictive means of reducing smoking at outdoor eating and drinking places and to stop smoking at outdoor markets would not achieve the purpose to reduce second-hand smoke exposure for persons attending or working at these places.

- (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, the limitations are considered to be reasonable and justifiable. The public health benefits in ensuring that members of the public, children and staff working at outdoor markets and outdoor eating and drinking places are not exposed to the harmful effects of smoking justifies the limitation. Further, the scope of the limitation is considered minor as the two-metre buffer zone is only applicable within the footprint of the place and the five-metre buffer zone is only applicable on the perimeter of the place.

This proposal is also likely to strengthen another right, to protect families and children by reducing the exposure of children to the harmful effects of second-hand smoke.

- (f) any other relevant factors

Nil.

## **Conclusion**

In my opinion, the Tobacco and Other Smoking Products Bill 2023 is compatible with human rights under the Human Rights Act because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

**THE HONOURABLE YVETTE D'ATH**  
MINISTER FOR HEALTH AND AMBULANCE SERVICES