

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

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, Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women make this statement of compatibility with respect to the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

Vaping has emerged as a significant public health concern, particularly among children and young adults. Mounting evidence suggests that vaping poses serious health risks, including respiratory illness, cardiovascular problems, and addiction to nicotine. In 2023, results from the Australian Secondary Students' Alcohol and Drug Survey confirmed there has been a rapid uptake of vaping among adolescents, with use in the 2022/23 survey quadrupling since data was last collected in 2017. Thirty percent of people aged 12-17 have tried vaping. For the first time in 30 years, the survey shows young people's susceptibility to smoking has increased.

In 2023, in response to these serious concerns, the Commonwealth Government announced decisive action to end the recreational use of vaping products across Australia. As of 4 June 2024, the legislative reforms completed by the Commonwealth prohibit the importation of certain types of vapes. On 21 March 2024, the Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024 (Commonwealth Bill) was introduced in the Commonwealth Parliament. If passed, the Commonwealth Bill will amend the *Therapeutic Goods Act 1989* (Cth) (Commonwealth Therapeutic Goods Act) and other legislation to ban the importation, manufacture, supply, and commercial possession of all disposable single use and recreational vapes. States and territories will be primarily responsible for enforcing the ban on supply and commercial possession.

Also in 2023, the former Health and Environment Committee held an inquiry into vaping in Queensland. The Committee made 14 recommendations in its report *Vaping: An inquiry into reducing rates of e-cigarette use in Queensland*, which were all accepted by the Government. In response to the Committee's report, the Government committed to tackling the vaping crisis and supporting the implementation of the Commonwealth Government's vaping amendments. This includes discontinuing the sale of vaping products in retail settings, bolstering Queensland's resources and capabilities for compliance monitoring and enforcement activities, and progressing legislative amendments as necessary.

Against the backdrop of the growing public health crisis, recent increases in enforcement efforts, including joint operations with co-regulators of illicit tobacco and vaping products, have revealed alarming information about the state of the illicit tobacco and vape trade and the tactics involved in illegal supply. Gaps in state and national enforcement frameworks are being systematically exploited by serious organised crime groups, exposing the lack of meaningful deterrence under current laws.

The Bill amends the *Tobacco and Other Smoking Products Act 1998* (TOSPA) to remedy deficiencies within Queensland's existing regulatory environment, assist Queensland in appropriately enforcing the impending Commonwealth ban on the supply and possession of vaping goods, and ensure that Queensland can take strong and decisive action against vaping.

In particular, the Bill amends TOSPA to:

- insert a definition of illicit nicotine products, capturing within that term, vaping goods (that is, vaping devices, substances and accessories, as defined in the Commonwealth Bill) and products containing nicotine or another substance detrimental to health prescribed by regulation;
- remove the definition of 'personal vaporiser' and incorporate relevant aspects of it within the definition of vaping device;
- insert new offences relating to the supply and possession of illicit nicotine products;
- amend section 161 to provide that a person must not as part of a business activity, supply or possess illicit tobacco, to align it with the new provision regulating the supply and possession of illicit nicotine products;
- increase the current penalties for persons who supply and possess illicit tobacco as part of business activity;
- clarify that the prohibition on commercial possession extends to an off-site premises, such as a storage shed or vehicle, if the premises is used for the purpose of storing or possessing illicit tobacco or illicit nicotine products;
- create a power for the chief executive to order the interim closure of a premises where illicit tobacco or illicit nicotine products are being supplied as part of a business activity, or where the business is being carried on without a licence, and for the Magistrates Court to order closure for a longer stated period of up to six months, and create ancillary offences relating to violating closure orders;
- create a power for the District Court to grant an injunction against a person who supplies illicit tobacco or illicit nicotine products as part of a business activity;
- create a new offence for an employee or a person acting on behalf of another person (for example, a family member or friend of the business owner) to supply illicit tobacco or illicit nicotine products in retail or wholesale outlets;
- create a new offence relating to adults who supply illicit nicotine products to children outside of a business activity;
- create new offences relating to displaying, advertising and promoting illicit nicotine products;
- increase penalties for providing false or misleading information and failing to give information about an offence;

- introduce executive liability offences, to ensure that executive officers of corporations who supply illicit tobacco and illicit nicotine products, and commit other key offences under TOSPA, can be held liable;
- include additional circumstances where an authorised person may, without the occupier’s consent or a warrant, enter a place;
- support enforcement through other minor amendments that:
 - amend the long title and objects of TOSPA to capture illicit nicotine products;
 - amend relevant references to ‘smoking product’ to also reference ‘illicit nicotine product’;
 - provide that ice pipes and bongs, which are prohibited items under TOSPA, may be forfeited after seizure;
 - replace the current requirement for seized goods to be returned within six months with a requirement that they be returned within 12 months;
 - clarify that for enforcing the illicit tobacco and illicit nicotine product provisions, police officers may exercise all the powers of an authorised person under TOSPA;
 - clarify that section 234 of TOSPA, which provides that only the chief executive of Queensland Health may commence a proceeding, refers to prosecutions, not other enforcement powers; and
 - insert relevant definitions.

According to the 2023 Clean Up Australia Report, vapes were collected at 22 percent of surveyed sites, an increase from 2022 where vapes were found at only 10 percent of surveyed sites. Litter audits across more than 300 sites in Queensland also indicate that between November 2022 and October 2023, the occurrence of vape littering has doubled in metropolitan areas, with the highest concentration occurring in car parks, residential areas, near waterways and along highways.

To help address the issue of vape littering, the Bill also amends the *Waste Reduction and Recycling Act 2011* to create a specific dangerous littering offence for depositing a vaping device or vaping accessory (as defined under TOSPA).

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 Bill are:

- Right to freedom of movement (section 19)
- Right to property (section 24)
- Right to privacy and reputation (section 25)
- Right to liberty and security of person (section 29)
- Right to a fair hearing (section 31)
- Rights in criminal proceedings (section 32)

Where rights are potentially limited by the Bill, I have provided an analysis of the justification.

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. Human rights potentially limited by the prohibition on supply and commercial possession of illicit nicotine products

The Bill will prohibit the commercial supply and possession of illicit nicotine products, being vaping goods (that is, vaping devices, substances and accessories) and other prescribed products (for example, products such as nicotine pouches, which are becoming more widespread in Queensland).

The Bill clarifies that a person must not, as part of a business activity, supply an illicit nicotine product. The maximum penalty for non-compliance is 2 years imprisonment, or 2,000 penalty units, or both.

The person must also 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 – for example, a storage shed or vehicle. The maximum penalty for this offence is 12 months imprisonment, or 1,000 penalty units, or both.

It is a defence to the possession offence for a person to prove that the illicit nicotine product was:

- for personal use by the person or an employee of the person, including, for example, under a prescription for the product held by the person or employee; or
- possessed on behalf of another person for whom the product had been lawfully supplied.

The defences place a legal burden on the defendant, meaning that the defendant must prove the existence of the matter on the balance of probabilities.

The supply and possession offences also do not apply if, under the Commonwealth legislation, the person would be able to claim an exception for the same conduct – for example, a pharmacist would be able to claim an exception for supplying a therapeutic vaping device pursuant to a prescription.

For a person to avail themselves of the Commonwealth exceptions, they must adduce evidence that suggests a reasonable possibility that the relevant matter in each subsection of the Commonwealth Therapeutic Goods Act (relevant to the supply and possession of vaping goods) exists or does not exist.

The offences do not apply to a person who is acting as an employee or otherwise on behalf of another person – for example, an employee of a tobacco retailer, or a friend or family member of the retailer working in the store without payment.

As with illicit tobacco, seized illicit nicotine products would be able to be forfeited without prosecution if likely to be used to commit further offences if returned to the owner.

(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 (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 Bill will limit the right to property by prohibiting the supply and commercial possession of illicit nicotine products, as well as authorising the seizure and forfeiture of illicit nicotine products in specified circumstances.

Right to privacy and reputation

The right to privacy (section 25, Human Rights Act) protects individuals against unlawful or arbitrary interferences with their privacy, family, home, or correspondence. Privacy is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law. The concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable, or disproportionate. The right protects privacy in the sense of personal information, data collection and correspondence.

The right to privacy will be limited by the proposal to enable searches to be carried out in pursuit of locating a wider class of items (that is, illicit nicotine products, as well as illicit tobacco) which may mean that searches could be carried out more frequently.

It will also be limited by the proposal to apply the possession offence to premises outside the where the business activity is conducted, such as storage sheds and vehicles, as those places can also be searched. However, this proposal is discussed separately below.

Right to liberty and security

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.

The Bill will limit the right to liberty and security by attaching terms of imprisonment to offences relating to the supply and possession of illicit nicotine products.

Right to a fair hearing

The right to a fair hearing (Human Rights Act, section 31) affirms the right of all individuals to procedural fairness when coming before a court. It also guarantees that such matters must

be heard and decided by a competent, impartial and independent court. In the criminal law context, an initial requirement is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so the criminal justice system can operate in a way that is predictable to the defendant.

The Bill will limit this right by reversing the onus of proof. It places a legal burden on the defendant to prove defences relevant to the supply and possession offences, meaning that the defendant must prove the existence of the relevant defence on the balance of probabilities.

(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 prohibiting vaping goods and other novel nicotine products is to protect public health from the harmful effects of these products. This includes protecting the health of adults and young people who choose to vape or use other products such as nicotine pouches, but also protecting children from accidental exposure to harmful substances that may be contained in these products, to the greatest extent possible.

Protecting the health of the community, particularly children and young people, is a purpose that is clearly 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 limitation achieves its purpose by prohibiting the supply of harmful vaping and other products to the public. The possession and supply of these products as part of business activities will be proscribed and criminalised. This will limit and restrict access to these harmful goods by deterring businesses from possessing and supplying them and by physically removing them from the market through seizure and forfeiture powers. Reducing the current ease of access, including for children and young people, is expected to reduce usage, which will result in improved public health outcomes.

In December 2023, the World Health Organisation issued a “call to action” to Governments, noting that strong and decisive action to prevent uptake of e-cigarettes (vapes), which are harmful to health, should be taken to protect children, as well as non-smokers and minimise health harms to the population.

As a party to the World Health Organisation Framework Convention on Tobacco Control, the Australian Government has legal obligations to develop and implement effective policies not only to prevent and reduce tobacco consumption and exposure, but also to prevent and reduce nicotine addiction. The Bill’s amendments will assist the Australian Government to meet these obligations.

International approaches to the public health vaping crisis have varied. The import and sale of vaping goods in Thailand has been banned since 2015, primarily to protect youth from addiction. A 2019 study found that the current use of vapes amongst young people in Thailand had not increased in the four years since the ban, unlike jurisdictions where vapes were legal

such as the United States, where youth use had almost tripled in the same time frame.¹ The authors found that this was consistent with previous studies indicating that the change in prevalence of e-cigarette use among countries where the products were banned was slower than the countries where the products were allowed.

Analogously, many studies have shown that cigarette use in Australia (and other jurisdictions) is negatively associated with price or affordability – that is, as access is limited through increased prices, cigarette use decreases.² The Bill proposes to limit access through prohibition, rather than increased prices of licit products, however it is expected that the result of limited access will be the same.

(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 by Queensland Health.

The first alternative is to rely only on the use of investigative and enforcement powers to be prescribed in the Commonwealth Bill and delegated to State authorities. These delegated powers are intended to enable Queensland to take immediate action to enforce the national vaping ban. However, these enforcement powers differ significantly from, and are more limited than, the powers available to Queensland authorised persons when investigating and enforcing offences under TOSPA. The procedures for investigating and prosecuting offences under TOSPA are also more straightforward and more familiar to Queensland public health officers, police, and prosecutors than the Commonwealth enforcement framework.

Furthermore, before Queensland officers will be practically able to enforce the Commonwealth ban on vaping products, several arrangements require formalising. These include agreements between the Queensland Police Service and Queensland Health about agency roles, training, resourcing, and the administrative structures needed to support enforcement of federal laws.

Additionally, complexities in prosecuting the Commonwealth offences, and the much higher penalties imposed by those offences, mean that the Commonwealth legislation will be appropriate for the most egregious breaches, but may not provide a realistic avenue of enforcement for less serious offences. This may reduce prosecutions for less serious offences, negating their deterrence effect and incentivising non-compliance. As such, relying solely on the Commonwealth legislation would not be effective in achieving the purpose of the Bill.

The second alternative is the use of current enforcement powers under the *Medicines and Poisons Act 2019* for offences relating to the possession of nicotine (excluding tobacco prepared and packed for smoking) without a prescription. This would capture disposable pre-filled recreational vapes and products, such as nicotine pouches.

However, the enforcement powers under the Medicines and Poisons Act differ to those under TOSPA and are less suited to efficient monitoring and enforcement of prohibitions on vaping goods. For example, penalty infringement notices can be issued for certain offences under

¹ Patanavanich R, Aekplakorn W, Glantz SA, Kalayasiri R. *Use of E-Cigarettes and Associated Factors among Youth in Thailand*. *Asian Pac J Cancer Prev*. 2021 Jul 1;22(7):2199-2207. Doi: 10.31557/APJCP.2021.22.7.2199.

² See for example, Wilkinson, Anna & Scollo, Michelle & Wakefield, Melanie & Spittal, Matthew & Chaloupka, Frank & Durkin, Sarah. *Smoking prevalence following tobacco tax increases in Australia between 2001 and 2017: an interrupted time-series analysis*. *The Lancet Public Health*. 4. 2019. Doi: 10.1016/S2468-2667(19)30203-8.

TOSPA (negating the need to prosecute in most instances) but cannot be issued under the Medicines and Poisons Act. Prosecutions under the Medicines and Poisons Act require evidence that the vape or other product seized contain nicotine. Analysis of nicotine content is slow and resource intensive.

Also, Queensland Health officers cannot concurrently exercise powers under TOSPA and the Medicines and Poisons Act. This has resulted in a dual enforcement approach requiring at least four Queensland Health officers to be involved in inspections of tobacco and vape retailers. This is inefficient and resource intensive. It is also well established that the current penalties do not effectively compel compliance in relation to vaping products. As such, relying on Queensland's current enforcement framework also would not effectively achieve the purpose of the Bill in protecting public health against the harms of vaping.

A further alternative, which may be less restrictive, would be to regulate illicit nicotine products similarly to tobacco products. However, this option is not available due to the impending Commonwealth ban on vaping products. It also does not align with the Queensland Government's commitment to taking decisive action to respond to the sale of illegal vaping goods in Queensland.

An alternative to reversing the onus of proof in relation to the defences would be to place the burden on the prosecution to disprove the existence of the defence as well as establish the elements of the offence or civil penalty provision. It would be significantly more difficult, costly, and burdensome for the prosecution to disprove the defence than for the defendant to establish it, noting the civil standard of proof. The person seeking to rely on the defence will likely hold the evidence to substantiate the lawful status of the goods with respect to possession, for example, the prescription or written authority to possess the illicit nicotine product.

Accordingly, there are no less restrictive, reasonably available ways of achieving the limitation's objective.

The Bill contains a number of safeguards to ameliorate the impact of the limitation on the above rights. In response to the right to property, the Bill allows for the seizure of illicit nicotine products only in accordance with the requirements of part 11, division 4 of TOSPA. This includes a requirement that an item may only be seized if the authorised person reasonably believes it is evidence of an offence against TOSPA and is within the scope of the relevant warrant or consent to entry (sections 197 and 198), or may be used to commit a further offence. Additionally, the authorised person must give a receipt for the seized item (section 202).

Forfeiture of seized illicit nicotine products must be in accordance with the requirements in section 205 – that is, the chief executive must provide a notice to the owner regarding the proposed forfeiture and provide the owner with an opportunity to respond. Before forfeiting the seized illicit nicotine products, the chief executive must consider all responses, and give written notice of the decision and the reasons for the decision. Section 225 provides a right of appeal against forfeiture decisions, and section 226 ensures that the court has the power to stay the operation of the forfeiture decision.

Additionally, the limitation is not arbitrary because it is not capricious, unpredictable or unjust. It relates to property that is illicit and dangerous, and applies only in circumstances of

wrongdoing that significantly contribute to harms to the health of the community, particularly young people and children.

The limitation on the right to liberty and security, which arises by attaching terms of imprisonment to offences relating to the supply and possession of illicit nicotine products, is mitigated by the defences included in the provision. Under new section 161A, it is a defence to the possession offence for a person to prove that the illicit nicotine product was:

- for personal use by the person or an employee of the person, including under a prescription; or
- possessed behalf of another person for whom the product has been lawfully supplied.

These defences give effect to the intention to not criminalise possession of illicit nicotine products for personal use. The context and surrounding circumstances in which the illicit nicotine products are for personal use will likely be the primary factor which will determine whether this exception is available, such as whether the possession is in a retail setting. The Bill does not prescribe a commercial quantity for illicit nicotine products, meaning the personal use defence is technically available for any quantity. However, the larger the quantity possessed, the less likely it is that a person could prove it is for their personal use. This is particularly the case in a retail or wholesale environment.

The Bill also provides that the supply and possession offences do not apply if the person would be entitled to claim an exception under the law of the Commonwealth, other than an exception relating to personal use. These exceptions include, for example, if the person is a pharmacist, medical practitioner, or nurse practitioner who is the holder of a relevant licence. The Commonwealth personal use exception is deliberately excluded, as this is already appropriately captured by the Bill's personal use defences.

Furthermore, the offences do not apply to employees or persons otherwise acting on behalf of another (for example, a family member of the business owner working in the store without payment).

As such, the offences in section 161A will only limit a person's right to liberty and security in circumstances where an individual breaches the offence provision, is found guilty of the offence after due process in accordance with Queensland's judicial system (noting the available defences), and sentenced to imprisonment by a judicial officer.

- (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

Mounting evidence suggests that vaping poses significant health risks. Vaping involves inhaling a mixture of chemicals, including heavy metals such as nickel and chromium, and chemical by-products produced during heating such as formaldehyde, nitrosamines, acetone, and acrolein. Nicotine derivatives are known to be carcinogenic in humans, and the International Agency for Research on Cancer considers some of the other chemicals inhaled during vaping to be 'probably carcinogenic'.

Studies have shown that vaping can lead to respiratory disease, severe burns, nicotine addiction, poisoning, acute nicotine toxicity, seizures, and increased uptake of cigarette smoking.

Vaping goods pose a particular risk to children. The variability in concentration and toxicity of active ingredients increases the risk that children who consume these ingredients may ingest a fatal dose or suffer severe adverse effects. Recent media has also noted a significant increase in calls to poisons hotlines by parents and carers of children under five years of age, who have swallowed liquid intended for use in vaping devices.³ As little as one millilitre of a highly concentrated nicotine solution, such as those contained in vaping device refill bottles, can be lethal if ingested by a child.⁴

In December 2023, results released from the Australian Secondary Students' Alcohol and Drug Survey confirmed that there has been a rapid uptake of vaping amongst adolescents, with use in the 2022/23 survey quadrupling since data was last collected prior to the COVID-19 pandemic, in 2017. Thirty percent of people aged 12-17 have tried vaping. Suppliers of vaping goods are known to specifically target young people, with stores located near schools, and vaping goods sold alongside confectionary and soft drinks. Colours and flavours of vaping goods further contribute to the appeal of vaping goods and their uptake among children and young adults. Vaping goods are frequently designed to look like other objects such as pens, lipsticks and toys. The designs use colours, illustrations and cartoons that are deliberately attractive to children and may lead to misconceptions that vaping goods are harmless. Studies also show that vapes are heavily marketed on a range of online platforms that typically appeal to younger audiences, such as YouTube and TikTok.

The amendments will deliver benefits to the entire community now and into the future, through improved health outcomes and reduced health costs. The limitations will primarily impact individuals and criminal organisations who knowingly possess and supply harmful illicit products to the community. The limitations on rights effected by the amendments are mitigated to the greatest degree possible.

In my opinion, the amendments strike an appropriate balance between the public health protection objectives of the Bill and limitation on human rights that is reasonable and demonstrably justifiable in a free and democratic society.

(f) any other relevant factors

Nil.

2. Human rights potentially limited by increased penalties for illicit tobacco

The Bill increases the penalties relating to supplying illicit tobacco from a maximum of 300 penalty units to a maximum of 2 years imprisonment, or 2,000 penalty units, or both. The penalty for possession will be increased from a maximum of 140 penalty units to a maximum of 12 months imprisonment, or 1000 penalty units, or both. This aligns with the maximum penalties for supplying and possessing illicit nicotine products.

³ Sanders S. *Vapes drive rise in calls to poison hotline from parents of children exposed to nicotine*. ABC News, 23 April 2024. www.abc.net.au/news/2024-04-23/rise-in-vaping-e-cigarette-related-child-poisoning-reports/103751212.

⁴ Swannell, C. *Nicotine in e-cig liquids a poisoning risk for kids*, Med J Aust, 2019. www.mja.com.au/journal/2019/nicotine-e-cig-liquids-poisoning-risk-kids.

(a) the nature of the right

Right to liberty and security

As above, 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.

The Bill will limit the right to liberty and security, by attaching terms of imprisonment to offences relating to the supply and possession of illicit tobacco.

(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 significantly increasing the penalties relating to the supply and commercial possession of illicit tobacco is to protect public health from the harmful effects of illicit tobacco. Tobacco products have caused enormous harm globally. Poor health related to the use of these products has reduced the practical capacity of countless individuals to exercise other human rights, including the rights to freedom of movement, to take part in public life, and to live with dignity. Nicotine addiction and associated harms are in no way necessary for, and do not contribute positively to, the functioning of 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 proposal helps to achieve the purpose of protecting public health from the harmful effects of illicit tobacco by imposing high penalties and possible terms of imprisonment for the supply and commercial possession of illicit tobacco. The proposed penalties are expected to have a far stronger deterrent effect than current penalties.

Profit margins for retailers of illicit tobacco and vaping goods are high, with seized point-of-sale data demonstrating around \$40,000 cash turnover per day in a single store. Queensland has continued to see growth in the illegal trade of tobacco and vapes. Since 2022, Queensland Health has been conducting surveillance of suspect tobacco and vape ‘pop-up’ stores, using spatial and temporal tracking, through a joint project with CSIRO and the University of Queensland. This data shows continued growth in the suspect stores, with an average of 12 new stores opening every month in Queensland. The rate of growth has been steady and sustained since recent amendments and enforcement of section 161 of TOSPA, indicating little deterrent effect of the existing fines. One retailer referred to the current fine for supplying illicit tobacco as "the Queensland Health subscription fee", demonstrating its minimal impact.

Higher penalties and terms of imprisonment achieve the purpose not only through deterring non-compliance, but also by potentially removing key players from the marketplace, reducing the number of suppliers and the current ease of access to illicit tobacco. Reduced access is directly linked with reduced usage.

(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 by Queensland Health.

An alternative is to retain the current penalty levels. However, it is clear from the current enforcement environment that these penalties are simply insufficient to act as a deterrent. There are no terms of imprisonment attached, removing any ability to eliminate key players from the supply network.

Accordingly, there are no less restrictive, reasonably available ways of achieving the limitation's objective.

The limitation on the right to liberty and security is ameliorated by the fact that it will only apply where an individual breaches the offence provision, is found guilty of the offence after due process in accordance with Queensland's judicial system and is sentenced to imprisonment by an independent judicial officer.

(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

Use of smoking products is well established as the single greatest risk factor contributing to preventable death and disease.

Illicit tobacco includes smoking products which are illegally imported, sold cheaply (since there is no payment of excise taxes) or do not have the health warnings or correct packaging required under Commonwealth law. As these products may be manufactured in unsafe or uncontrolled conditions, they are unlikely to meet Australian safety standards in relation to ingredients and concentrations and may contain dangerous toxins.

The amendments will deliver benefits to the entire community now and into the future, through improved health outcomes and reduced health costs. The limitations will primarily impact individuals and criminal organisations who knowingly possess and supply harmful illicit products to the community. The limitations on rights caused by the amendments are mitigated to the greatest degree possible.

In my opinion, the amendments strike an appropriate balance between the public health protection objectives of the Bill and the limitation on human rights that is reasonable and demonstrably justifiable in a free and democratic society.

(f) any other relevant factors

Nil.

3. Human rights potentially limited by prohibiting commercial possession in 'other premises'

Section 161(2) of TOSPA currently prohibits suppliers from storing or otherwise possessing commercial quantities of illicit tobacco at a premises where the supplier supplies smoking products. 'Premises' is defined broadly in Schedule 1 of TOSPA to include both buildings and

vehicles. However, the section 161 prohibition does not currently extend to premises other than premises where the supply occurs, such as associated storage sheds and vehicles.

The Bill inserts a new section 161 which, also provides that a person must not, as part of a business activity, store or possess illicit tobacco at:

- the premises where the business activity is conducted; or
- another premises, including, for example, a storage shed or vehicle, connected with the premises where the business activity is conducted.

The penalty will be 1,000 penalty units, or 1 year's imprisonment, or both.

The Bill also inserts new section 161A, which provides that a person must not, as part of a business activity, supply an illicit nicotine product. The maximum penalty is 2,000 penalty units or 2 years imprisonment, or both.

New section 161A also provides that a person must not, as part of a business activity, store or possess an illicit nicotine product at:

- the premises where the business activity is conducted; or
- another premises, including, for example, a storage shed or vehicle, connected with the premises where the business activity is conducted.

The penalty will be 1,000 penalty units, or a maximum of 1 year's imprisonment, or both.

(a) the nature of the right

Right to privacy and reputation

The nature of the right to privacy is outlined above.

These amendments will engage the right to privacy because they will result in authorised persons entering and inspecting premises other than smoking product supply premises to enforce the relevant offences. Authorised persons will also be able to enter stores that do not sell smoking products (for example, stores that sell only vapes, and not cigarettes) and associated premises such as storage facilities and vehicles where products may be stored.

(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 limitation is to protect public health from the harmful effects of illicit tobacco and illicit nicotine products by reducing commercial supply of those products. As noted above, this purpose 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 current public health crisis is exacerbated by the deliberate exploitation of gaps in the State and National enforcement frameworks by serious organised crime groups, reducing the deterrent effect of current laws. Tactics of these groups include limiting the financial deterrent effect of product seizures by keeping increasingly small amounts of illicit tobacco and vaping

goods in a retail premises, keeping stock in adjacent dwellings or cars that are not subject to the offence, and frequently restocking the retail premises. This results in suppliers not being able to be prosecuted for the possession offence, notwithstanding that commercial quantities are held nearby and made available for supply.

The proposal helps to achieve the purpose of protecting public health by addressing those tactics and ensuring that the possession offences apply to illicit tobacco and illicit nicotine products that are stored in connected premises. This will enhance enforcement abilities, resulting in increased prosecutions and a stronger deterrence effect, which will reduce access and use, promoting public health.

(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 by Queensland Health.

An alternative is to continue to apply the commercial possession offence only to the premises in which smoking products are sold (status quo). However, as explained above, this is being deliberately exploited, reducing enforcement capabilities and resulting in continued ease of access to illicit nicotine products for consumers. It also would not capture stores that sell only illicit nicotine products and not smoking products. It therefore would not achieve the purpose of protecting health.

Accordingly, there are no less restrictive, reasonably available ways of achieving the limitation's objective.

The limitation on the right to privacy is ameliorated by the limited powers of entry in TOSPA. Under part 11, division 2, an authorised person may only enter a place that is not open to the public (for example a vehicle or storage facility) with consent or a warrant. The Bill extends this to a limited degree to include places that are subject to a closure order or injunction. This means authorised persons do not have a right to enter private premises whenever they choose – appropriate permissions must be obtained either from the occupier or a Magistrate via a warrant, or a closure order or injunction must be in force. Section 219 also provides a right of compensation which may apply if a person incurs loss or expense because of the exercise or purported exercise of a power under part 11. A court may order compensation to be paid only if it is satisfied it is just to make the order in the circumstances of the particular case.

(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

The amendments will deliver benefits to the entire community now and into the future, in terms of improved health outcomes and reduced health costs. The right to privacy which is limited by the proposed increase penalties is important, but the limitation is ameliorated by legislative safeguards. The limitations will primarily impact individuals and criminal organisations who knowingly possess and supply harmful illicit products to the community. The limitations on rights effected by the amendments are mitigated to the greatest degree possible.

In my opinion, the amendments strike an appropriate balance between the public health protection objectives of the Bill and limitation on human rights that is reasonable and demonstrably justifiable in a free and democratic society.

(f) any other relevant factors

Nil.

4. Human rights potentially limited by offence prohibiting adults from supplying illicit nicotine products to children

The Bill prohibits an adult from supplying illicit nicotine products to a child (a relevant person). The maximum offence is 140 penalty units. It is a defence for the adult to prove that at the time of the offence that adult reasonably believed that the relevant person was an adult.

This offence applies outside the retail or wholesale environment or therapeutic environment and aligns with section 82 of TOSPA which prohibits an adult from supplying a smoking product to a child.

(a) the nature of the right

Right to a fair hearing

The nature of the right to a fair hearing is outlined above. The Bill will limit this right by reversing the onus of proof by placing a legal burden on the defendant to prove the defence, meaning that the defendant must prove the existence of the defence on the balance of probabilities.

(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 limitation is to protect children from the harmful effects of illicit nicotine products. This purpose 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 proposal helps to achieve the purpose of protecting children from the harmful effects of illicit nicotine products by prohibiting the non-retail supply of these products by adults to children.

(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 by Queensland Health.

An alternative is to rely on the supply offences applying to retail or wholesale environments to protect the health of children. These offences are intended to reduce the current ease of access to illicit nicotine products through retail means. However, this still leaves it open for children to obtain illicit nicotine products from an adult who was able to purchase them, either legally

(for example, under a prescription) or illegally. It therefore would not achieve the purpose of protecting children.

The amendment aligns with the current prohibition relating to adults supplying smoking products to children. The offence does not apply if the adult reasonably believed the relevant person was a child. It is appropriate for the defendant to have to prove this fact, as it is within the knowledge of the defendant.

Accordingly, there are no less restrictive, reasonably available ways of achieving the limitation's objective.

(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

As noted above, nicotine products pose a particular risk to children. Nicotine exposure during the teenage years can harm brain development, which continues until about age 25. It can impact learning, memory and attention, and increase risk for future addiction to other drugs. It is critical to disrupt and prevent the current paths of access to children, including supply on a non-retail basis by friends, family and other adults.

The limitation on the right to a fair hearing is minor and will only apply in circumstances where an adult supplies such a product to a child outside of a commercial environment. It is open to a defendant to assert that they believed the child was an adult and the objective facts of the case will be considered to determine whether that belief was reasonable.

In my opinion, the amendments strike an appropriate balance between the public health protection objectives of the Bill and limitation on human rights that is reasonable and demonstrably justifiable in a free and democratic society.

(f) any other relevant factors

Nil.

5. Human rights potentially limited by the closure power

The Bill proposes to provide the chief executive with the power to order that a stated premises be closed for up to 72 hours. The chief executive must reasonably suspect the supply of illicit tobacco or illicit nicotine products is occurring at the premises as part of a business activity or be satisfied that a smoking product business is being carried on at the premises without a licence.

The Bill also authorises a Magistrate to order closure of such a premises for a longer stated period, but not for longer than six months.

It will be an offence for a person to supply smoking products at the premises, or work in a business involving the supply of smoking products at the premises, while a closure order is in effect. The maximum penalty will be 200 penalty units. For a court-ordered closure, failure to comply may constitute contempt of court under the *Magistrates Court Act 1921*, punishable by a maximum penalty of 200 penalty units or 3 years imprisonment.

(a) the nature of the right

Right to freedom of movement

The right to move freely within Queensland (Human Rights Act, section 19) means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular place. The right includes freedom from physical and procedural barriers, like requiring permission before entering a public park or participating in a public demonstration in a public place. The right may be engaged where a public entity actively curtails a person's freedom of movement.

The proposal may limit the right because it will prevent persons from entering the store when the store is subject to a closure order.

Right to property

The nature of the right to property is outlined above. Property includes economic interests.

The proposal may limit the right to property by authorising the chief executive or Magistrate to order that a stated premises be closed if they reasonably suspect the supply of illicit nicotine products or illicit nicotine is occurring at the premises as part of a business activity, or if satisfied that a smoking product business is being carried on at the premises without a licence.

For a longer-term closure of a premise operated under a commercial lease, the closure may also restrict landlord's ability to lease the property to another tenant or generate income from the premises while the closure order is in force.

Right to liberty and security

The nature of the right to liberty and security is detailed above. The Bill may limit this right, as it may place offenders at risk of imprisonment if they fail to comply with a closure order issued by a Magistrate, or commit an offence under section 209C.

(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 this proposal to protect public health from the harmful effects of illicit tobacco and illicit nicotine products. As noted above, this purpose 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

TOSPA does not provide any power to order the closure of a retail or wholesale business that has been found to supply illicit tobacco products. While the illicit tobacco products can be seized and forfeited (and the Bill will also allow for the seizure and forfeiture of illicit nicotine products), this does not provide sufficient deterrence. Suppliers, particularly those associated with organised crime groups, simply restock the relevant products and continue trading, meaning that public health harm continues to grow.

The limitation on the above rights will achieve the purpose of protecting public health from the harmful effects of illicit tobacco and illicit nicotine products by ensuring that non-compliant

retailers cannot continue trading at the premises. This is expected to significantly disrupt illegal trade and provide further enforcement tools to particularly target non-licensed retailers who cannot be sanctioned through the licensing system. This will reduce access to illicit tobacco and illicit nicotine products, thereby reducing use and the associated detrimental health impacts.

(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 by Queensland Health.

Limiting the power to a Magistrate is unlikely to achieve the desired objective because the time taken to obtain a Magistrate's order will reduce the regulator's ability to respond in a timely way to changing circumstances, for example, to close short-term 'pop-up' premises.

Retaining the status quo (inability to force closure) means that businesses will continue trading at the premises, ensuring continued widespread access to illicit tobacco and illicit nicotine products.

As such, these alternatives do not represent less restrictive, reasonably available ways of achieving the purpose.

Safeguards are built into the amendments. That is, the chief executive may only issue an interim closure order if the chief executive reasonably suspects illicit tobacco or illicit nicotine products are being supplied at the premises as part of a business activity or is satisfied that an unlicensed business is being carried on at the premises. The closure order must be served on the person apparently in charge, or posted in a conspicuous place at the premises. The order cannot take effect for more than 72 hours and no more than one interim closure order may be made for the same premises in a period of seven days.

A long-term closure order can only be made by a Magistrate, who must be satisfied there has been or is likely to be the supply of illicit tobacco or illicit nicotine products at the premises as part of a business activity or the business is engaging in unlicensed supply. The chief executive, if reasonably practicable, must serve the closure application on the owner of the premises. The order, once made, must also be served on the owner of the premises, if reasonably practicable, and posted in a conspicuous place. A Magistrate cannot order closure of a premises for more than six months. The closure order powers are also intended to be a method of last resort, to deal with recidivist offenders. Prior to a closure order being issued, it is likely that various other enforcement measures against the person were taken, including the issuing of warnings and penalty infringement notices. The restrictions are therefore justified and necessary to deter traders from supplying illicit 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

The purpose of the limitation is to protect public health from the harmful effects of illicit tobacco and illicit nicotine products by preventing the supply of illicit tobacco and illicit nicotine products. The public health harms caused by those products are well established. The

limitation on the right to property will only apply in respect of the premises to which the order applies and is mitigated by the relevant time limits on the closure orders.

While the limitation on the right to movement will impact members of the public, the limitation is not significant. Individuals are restricted only in relation to the closed premises.

The limitation on the right to liberty and security will only apply in circumstances where an individual breaches section 209C or a Magistrate issued closure order, is found guilty, and a term of imprisonment is imposed.

Accordingly, the amendments appropriately balance the purpose of the limitation and the limitation on the rights to property, liberty and security, and freedom of movement. Any impact is narrowly tailored and proportionate to the objective of protecting public health from the harms associated with vaping. As such, I consider that the amendments strike an appropriate balance between the public health protection objectives of the Bill and limitation on human rights that is reasonable and demonstrably justifiable in a free and democratic society.

(f) any other relevant factors

Nil.

6. Human rights potentially limited by the injunction power

The Bill proposes to introduce a power for the District Court to grant an injunction in relation to a person who has engaged, is engaging or is proposing to engage in the supply of illicit tobacco or illicit nicotine products as part of a business activity.

(a) the nature of the right

Right to property

The nature of the right to property is outlined above. This amendment would limit the right to property by restraining the economic freedom of the subject of the injunction, according to the terms of the injunction.

(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 limitation is to protect public health from the harmful effects of illicit tobacco and illicit nicotine products by reducing commercial supply of those products. The injunctive power is intended to target recidivist unlicensed operators who continue to offend, including those likely to quickly set up new stores after another has been closed down. As noted above, this purpose 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 limitation will allow the District Court to preclude a person from engaging in the supply of illicit tobacco and illicit nicotine products as part of a business activity. The limitation will

ensure that if the person again engages in the proscribed activity, they will be liable for contempt of court, in addition to any criminal penalties.

The limitation will apply only if:

- a person has engaged, is engaging or is proposing to engage in the supply of illicit tobacco or illicit nicotine products as part of a business activity;
- the chief executive has reasonable grounds to believe an injunction is necessary in the public interest and applies for an injunction; and
- the District Court grants the injunction.

The Court will have discretion to grant an injunction in the terms it sees fit. This is appropriate for a judicial body exercising an administrative function.

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

This proposal is intended to protect public health from the harmful effects of illicit tobacco and illicit nicotine products by providing an additional way to deter recalcitrant non-compliant traders from supplying these products.

TOSPA (as amended to include the current proposals) will provide a wide suite of measures to prevent unlawful supply of illicit tobacco and illicit nicotine products. There will be relevant offences for unlawful possession and supply of illicit products, including for front line sales employees. The Bill also creates executive liability provisions to overcome individuals using corporate structures to shield themselves from criminal liability.

The power to order an injunction is intended to be a last resort tool to deal with those who continue to be non-compliant and when all other enforcement mechanisms have been exhausted. It will restrain those operators from continuing to trade in illicit tobacco and illicit nicotine products pending the outcome of proceedings under TOSPA, noting the harm that can result in intervening months.

However, in some cases it may be appropriate to also seek the Court's active intervention. There is no reasonably available alternative way of achieving this.

(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

As outlined above, illicit tobacco and illicit nicotine products are harmful, and there has been a proliferation in their use by children and young people. They are heavily marketed at young people, and existing penalties are insufficient. There is continued growth in the industry, with new stores opening regularly. Research led by Cancer Council reveals that 87 percent of

teenagers aged 14 -17 find access to vapes easy.⁵ Stronger measures are needed to deal with this immediate and growing health crisis.

The limitation enlivened by the injunctive relief power will apply only in the circumstances outlined above. The Court will determine the terms of injunction in each case, within the scope of the injunctive power.

Accordingly, the proposed measures appropriately balance the purpose of the limitation and the limitation on the right to property. Any impact on property is narrowly tailored and proportionate to the objective of protecting public health from the harms associated with unscrupulous supply of illicit products.

(f) any other relevant factors

Nil.

7. Human rights potentially limited by new advertising and promotions provisions

TOSPA currently imposes a number of requirements that apply to the advertising, promotion and display of smoking products. However, illicit nicotine products are excluded from the definition of smoking products. The Bill therefore specifically prohibits the advertising, promotion and display of illicit nicotine products.

(a) the nature of the right

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 Bill limits the right to freedom of expression by prohibiting advertising, promotion and display of illicit nicotine products.

(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 limitation is to protect public health from the harmful effects of vaping and other prescribed harmful products. As noted above, 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 emergence of vaping goods in recent years has increased efforts by retailers and manufacturers to find avenues to advertise and promote these products. Vaping goods are currently widely stocked by retailers that sell tobacco including tobacconists, convenience stores, petrol stations, but are also available at other stores such as specialist e-cigarette stores, discount and gift stores.

⁵ Cancer Council, *Alarming new data reveals 9 in 10 teens find access to illegal vapes easy*, 2023. www.cancer.org.au/media-releases/2023/alarming-new-data-reveals-9-in-10-teens-find-access-to-illegal-vapes-easy.

Promotion of vaping goods is primarily targeted at children and young adults with the goal of increasing demand. For young people particularly, exposure to advertising and promotions can reduce risk perceptions and stimulate curiosity, increasing susceptibility to use.

The limitation on the freedom of expression imposed by the Bill will achieve the purpose of protecting public health by ensuring action can be taken against those who advertise and promote illicit nicotine products with the aim of increasing and normalising their use. This prohibition is intended to reduce the prevalence and effectiveness of these promotional activities, reduce the perception that illicit nicotine products are ‘cool’ and harmless, and ultimately reduce their use and the resultant adverse public health impacts.

(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 in improving public health by prohibiting the advertising, promotion and display of illicit nicotine products.

The prohibition will not apply to advertising or promotion of therapeutic vaping goods that is lawful under the Commonwealth Therapeutic Goods Act.

(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

An international study of more than 4,000 people aged 15-30 showed that the most common physical settings where the Australian respondents saw advertising were vape shops, tobacconists and general retailers like supermarkets, corner shops and petrol stations.⁶ Social media is playing an increasing role – many respondents had seen advertisements for vaping goods on TikTok, Instagram, Snapchat, Facebook and YouTube.

A recent report by VicHealth looking into the online marketing tactics of the vaping industry identified the following concerning facts:

- over 18 billion social media posts are tagged with vaping related hashtags;
- there are more than 18,000 Australian ‘influencer’ profiles on Instagram solely dedicated to promoting vaping;
- vaping social media content encourages young people to explore vape flavours, presenting vaping as normal, sexy, funny and cool; and
- vape stores have created content giving tips to young people on how to hide their vapes at school or at home.⁷

The purpose of the limitation is to protect public health by preventing manufacturers, suppliers and others from advertising and promoting illicit nicotine products with the aim of increasing their use in the community, particularly for children and young people. The limitation will

⁶ Pettigrew S, et al. *Exposure to e-cigarette advertising and young people’s use of e-cigarettes: A four-country study*. Tobacco-Induced Diseases. 2023; The George Institute for Global Health, media release: *Most young people exposed to vaping ads, despite restrictions*.

⁷ VicHealth, *How vaping advertisers target young people*, 2023. <https://www.vichealth.vic.gov.au/news-publications/research-publications/how-vaping-advertisers-target-young-people>

apply only when a person, as part of a business activity, advertises, displays or promotes illicit nicotine products. Individuals are free to express themselves in any other way.

Accordingly, the proposed measures appropriately balance the purpose of the limitation and the limitation on the freedom of expression. Any impact on this right is narrowly tailored and proportionate to the objective of protecting public health from the harms associated with increased community and individual use of illicit and harmful products.

(f) any other relevant factors

Nil.

8. Human rights potentially limited by executive liability offences

The Bill will insert an executive liability provision, to provide that an executive officer of a corporation can be taken to have committed the following offences in TOSPA committed by a corporation:

- section 65 (unlicensed supply – to commence 1 September 2024);
- section 66 (supplier must not supply smoking products to children);
- section 67 (supplier must ensure employees do not supply smoking products to children);
- section 161 (supply or possession of illicit tobacco); and
- section 161A (supply or possession of illicit nicotine products).

(a) the nature of the right

Right to a fair hearing

Rights in criminal proceedings

The right to a fair hearing (Human Rights Act, section 31) affirms the right of all individuals to procedural fairness when coming before a court. It also guarantees that such matters must be heard and decided by a competent, impartial and independent court. In the criminal law context, an initial requirement is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so the criminal justice system can operate in a way that is predictable to the defendant.

The rights in criminal proceedings (Human Rights Act, section 32) set out a number of minimum guarantees for persons charged with criminal offences. Many of these rights also assist in establishing a fair trial, including a person's right to be presumed innocent until proven guilty and the onus on the prosecution to prove the offence beyond a reasonable doubt.

The Bill limits these rights by creating executive liability provisions. These provisions provide that executive officers can be taken to have committed the offences of their corporate entity. Provisions of this type create a presumption of guilt or responsibility, and effectively relieve the prosecution of the obligation to prove the elements of the offence for the person taken to have committed it.

- (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 limitation is to protect public health. As noted above, 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 limitation achieves its purpose of protecting public health by allowing enforcement action to be taken against executive officers of a corporation if a corporation commits an offence against a deemed executive liability provision. This is intended to deter non-compliance and address current tactics of bad actors who change corporate structures and business arrangements to avoid prosecution.

Executive officers who are directly involved in or participate in the management of a corporation should be required to ensure the corporation complies with the requirements of TOSPA and should not be able to ‘hide’ behind the corporation. The limitation will achieve its purpose of protecting public health by ensuring enforcement action can be taken against executive officers who authorise, permit, or are knowingly concerned in a corporation’s conduct constituting an offence under the Bill, whether it be supply and possession of illicit tobacco or illicit nicotine products, supply of smoking products to children, or operating without a licence.

These are key offences within TOSPA. Prohibiting the supply and commercial possession of illicit tobacco and illicit nicotine products reduces access to those products, thereby making it more difficult for individuals, particularly children and young people, to use the products. Prohibiting the supply of smoking products to children ensures that these licit products are used only by adults, reducing the risk of harm to children. Ensuring that businesses are licensed allows proper oversight of the industry and facilitates action being taken against unlicensed operators who often have ties to serious criminal organisations.

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

No less restrictive or reasonably available alternatives have been identified. The proposal is limited in scope, as it only attaches executive liability for key offences.

- (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

The proposed measures appropriately balance the purpose of the limitation on the right to a fair hearing and rights in criminal proceedings. Any impact on these rights is narrowly tailored and proportionate to the objective of protecting public health from the harms associated with illicit tobacco, illicit nicotine products, unlicensed businesses and the supply of smoking products to children.

(f) any other relevant factors

Nil.

9. Human rights potentially limited by forfeiture of ice pipes and bongs

The Bill will empower the chief executive to decide a seized thing is forfeited to the State if satisfied the thing is an ice pipe or bong. The ice pipe or bong may be forfeited without first taking prosecution action. This is correcting a current legislative deficiency which requires seized ice pipes and bongs to be returned to their owner, notwithstanding that they are prohibited items under part 9 of TOSPA.

The Bill also inserts a transitional provision to provide that the power of the chief executive to forfeit ice pipes and bongs will apply to ice pipes and bongs seized before commencement.

(a) the nature of the right

Right to property

The nature of the right to property is detailed above. The proposal will limit the right to property, by authorising the forfeiture of ice pipes and bongs in specified circumstances.

(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 limitation is to protect public health. As noted above, this 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

Limiting the right to property by allowing ice pipes and bongs to be forfeited protects public health by ensuring that these objects cannot be sold and used for the consumption of illicit drugs, including methamphetamine. It reduces exposure to drug use because the items cannot be displayed in retail stores accessible by children and young people.

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

There is no less restrictive, reasonably available alternative. This provision is not intended to capture individuals possessing ice pipes or bongs for personal use. The forfeiture provision is only enlivened if there is an illegal sale, supply or display of ice pipes and bongs under sections 158 and 159 of TOSPA. Given the objective elements of the offence, the chief executive is able to make an informed decision that they are satisfied the seized thing is an ice pipe or bong.

Queensland Health's officers need clear, strong and decisive powers to ensure ice pipes and bongs are removed from the community and not used in the commission of further offences. To require prosecution action every time a seized ice pipe or bong is forfeited would be inefficient and require significant agency resources. However, to ensure procedural fairness, forfeiture may only occur after a show cause process and any decision of the chief executive to forfeit is subject to review.

Under new section 205A, the supplier will be issued a show cause notice, giving the supplier an opportunity to respond to the chief executive's belief that the item seized is an ice pipe or bong and that keeping the item is necessary to prevent it being used to commit the offence for which it was seized. The outcome of the show cause process also gives the supplier a clear decision and reasoning, which may be used in any subsequent judicial review process. A supplier is also able to 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.

- (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

The public health risk associated with smoking dangerous drugs, such as methamphetamine, is well established. Increasing regulatory controls by introducing a forfeiture power will aim to reduce this public health risk. Accordingly, the proposed measures strike a balance between an individual's right to property and the objective of protecting the public from the harms associated with drug use.

- (f) any other relevant factors

Nil.

10. Human rights potentially limited by extension of time for retaining a seized item that is not subject to forfeiture

The Bill also proposes to amend the current requirement in section 208 of TOSPA for seized goods to be returned within six months if not forfeited, or at the end of a proceeding for an offence if the proceeding is commenced within six months. Under section 52 of the *Justices Act 1886*, a prosecution for an offence under TOSPA must occur within 12 months. The requirement to return seized goods within six months means that section 208 of TOSPA is incompatible with the requirement within the Justices Act, and that public health units may be in breach of TOSPA for retaining seized goods in circumstances where a prosecution is intended, but has not yet been commenced. Seized goods must be retained as evidence if a prosecution is intended.

The Bill lengthens the time by which seized goods (that are not subject to forfeiture) must be returned from six months to 12 months. The Bill inserts a transitional provision to provide that the new requirement to return seized goods within 12 months applies to things seized before commencement of the Act.

(a) the nature of the right

Right to property

The nature of the right to property is discussed above. The proposal will limit the right to property, by allowing seized property that is not subject to forfeiture to be held for a period of 12 months, instead of the current six month period.

(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 limitation is to protect public health. As noted above, this 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

Extending the period in which seized goods can be retained, from six months to 12 months, will achieve the purpose of protecting public health by ensuring that seized goods do not need to be returned prior to a decision being made about the merits of the case. This ensures consistency between TOSPA and the Justices Act, and enables robust consideration of the merits of commencing a prosecution without unnecessary time pressures, leading to improved enforcement. Improved enforcement will deter non-compliance, which will reduce access and ultimately reduce use of illicit products.

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

There is no less restrictive, reasonably available alternative. Retaining the current six-month period means that there is an inconsistency with the prosecution timeframes in the Justices Act, which results in seized goods needing to be returned prior to the expiration of the prosecution timeframe. This does not support robust consideration of the merits of each case or support effective enforcement.

TOSPA includes safeguards in relation to the seizure powers. This includes the requirement for the authorised person to provide a receipt relating to the seizure, and a requirement for the authorised person to allow the owner to inspect the seized item. At the end of the seizure period, the seized items would need to be returned to the owner.

(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

There are clear benefits to the community in protecting public health by ensuring appropriate enforcement. This requires robust consideration to be given to the merits of any prosecution commenced by Queensland Health under TOSPA. This outweighs the minor imposition of having seized items held for an additional period of time, noting that the seized things are things that are evidence of an offence against TOSPA. Accordingly, the proposed measures strike an appropriate balance between an individual's right to property and the objective of protecting public health.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 is compatible with human rights under the Human Rights Act because it limits the identified human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act.

THE HONOURABLE SHANNON FENTIMAN
MINISTER FOR HEALTH, MENTAL HEALTH and AMBULANCE SERVICES
and MINISTER FOR WOMEN

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