



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

**Report No. 10, 57th Parliament
Health, Environment and Agriculture Committee
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Committee

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All web address references are current at the time of publishing.

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Chair's foreword

This report presents a summary of the Health, Environment and Agriculture Committee's examination of the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

On behalf of the committee, I thank the individuals and organisations who made written submissions to the committee's inquiry. I also thank our Parliamentary Service staff and Queensland Health.

I commend this report to the House.



Aaron Harper MP
Chair

Recommendations

Recommendation 1	5
The committee recommends the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 be passed.	5

Executive Summary

This report presents the Health, Environment and Agriculture Committee's examination of the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 (Bill). The Bill responds to concerns about the public health effects of vaping and the supply of illicit tobacco in Queensland.

The primary objectives of the Bill are to:

- ensure Queensland can enforce the Commonwealth ban on the supply and possession of vaping goods
- give effect to the government's response to recommendations made by the former Health and Environment Committee, in its report, *Vaping: An inquiry into reducing rates of e-cigarette use in Queensland*¹
- remedy deficiencies in the state's existing regulatory environment.

To achieve these objectives the Bill proposes a range of amendments to the *Tobacco and Other Smoking Products Act 1998*. It also proposes amendments to the *Waste Reduction and Recycling Act 2011*.

The committee received 30 submissions to its inquiry and held a public briefing and a public hearing in Brisbane.

The evidence received indicates that many submitters are supportive of the Bill's objectives and how it seeks to achieve them. Most strongly endorsed the regulatory approach that the Commonwealth and Queensland have taken to restrict access to illicit nicotine products. However, some stakeholders raised concerns that certain changes proposed by the Bill could have unintended consequences.

Having considered the policy objectives of the Bill, its compliance with the *Legislative Standards Act 1992* and the *Human Rights Act 2019*, and the views of stakeholders, the committee recommends that the Bill be passed.

In recommending that the Bill be passed, the committee has considered several issues of fundamental legislative principle raised by the Bill, as well as the potential of the Bill to limit human rights. The committee is satisfied that the Bill has sufficient regard to fundamental legislative principles, and that the limits it places on human rights are reasonable and justified in the circumstances.

The committee is also satisfied that the explanatory notes and statement of compatibility tabled with the Bill explain its purpose, the issues it raises in relation to fundamental legislative principles, and its potential impact on human rights. Further analysis of the human rights issues associated with some provisions would have assisted the committee in its consideration of the Bill's compatibility with human rights.

¹ Health and Education Committee, *Report No. 38, 57th Parliament - Vaping: An inquiry into reducing rates of e-cigarette use in Queensland*, August 2023.

1 Introduction

1.1 Policy objectives of the Bill

The objective of the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 (Bill) is to ensure Queensland can enforce the Commonwealth ban on the supply and possession of vaping goods, and to give effect to the government's response to the former Health and Environment Committee's recommendations arising from its report, *Vaping: An inquiry into reducing rates of e-cigarette use in Queensland* (see section 1.2 below).

To achieve these objectives, the Bill proposes amendments to the *Tobacco and Other Smoking Products Act 1998* (TOSPA) including the following:

- insert a definition of 'illicit nicotine products', capturing within that term, vaping goods (that is, vaping devices, substances and accessories), as well as products containing nicotine or another substance detrimental to health that have been prescribed by regulation
- remove the definition of 'personal vapouriser' 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 s 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 a 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 from which illicit tobacco or illicit nicotine products are being supplied as part of a business activity, or from which a 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 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 working in the business) to supply illicit tobacco or illicit nicotine products in retail and 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.²

² Explanatory notes, p 1.

To help address vape littering, the Bill also proposes to amend the *Waste Reduction and Recycling Act 2011* to create a dangerous littering offence for depositing a vaping device or vaping accessory.³

1.2 Background

Vaping has become a significant public health concern in Australia. Evidence suggests that vaping poses serious health risks, including respiratory illness, cardiovascular problems, and addiction to nicotine. Of particular concern is the rapid uptake of vaping by children and young people. Furthermore, recent research shows that for the first time in 30 years, there has been an increase in young people's susceptibility to smoking.⁴

In 2023, the growing concern around vaping led to a commitment from the Australian Government to end recreational vape use across Australia and triggered a parliamentary inquiry in Queensland undertaken by the former Health and Environment Committee.⁵

The supply and commercial possession of illicit tobacco (illegally imported cigarettes and loose-leaf tobacco known as 'chop-chop') is also prohibited by state and federal laws. According to the explanatory notes, recent increases in enforcement efforts have revealed concerning information about the state of the illicit tobacco and vape trade, including tactics involved in illegal supply. Gaps in state and national enforcement frameworks are being exploited by serious organised crime groups, highlighting the lack of deterrence under the current framework.⁶

1.2.1 Australian Government legislation

On 27 June 2024, the Australian Parliament passed the Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024. On assent, this Act amended the *Therapeutic Goods Act 1989* (Cth) (TG Act) to provide a national framework to regulate the importation, domestic manufacture, supply, commercial possession and advertisement of all vapes, irrespective of nicotine content or therapeutic claims.⁷

By extending the national system of controls for therapeutic goods under TG Act, the *Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Act 2024* (Cth) established a federal cooperative scheme between the Commonwealth, states and territories for vaping regulation. Under the national framework, states and territories are responsible for enforcing the ban on supply, commercial possession and advertising of recreational vapes.⁸

The changes include restricting the supply of vapes. From 1 July 2024, vapes are only available in pharmacies and it is illegal for retailers such as tobacconists, vape shops and convenience stores to supply any type of vape in any circumstances. The regulations require that:

- until 30 September 2024, patients need a prescription to purchase vapes containing nicotine or a zero-nicotine substance
- from 1 October 2024, patients 18 years or over can purchase therapeutic vapes with a nicotine concentration of 20mg/mL or less from pharmacies without a prescription (a pharmacist will

³ Statement of compatibility, p 3.

⁴ Statement of compatibility, p 1.

⁵ Explanatory notes, p 1; Hon A Palaszczuk MP, Premier and Minister for the Olympic and Paralympic Games, Record of Proceedings, 14 March 2023, pp 309-310.

⁶ Explanatory notes, p 2.

⁷ Parliament of Australia, 'Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024', https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7169.

⁸ Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024 (Cth), Explanatory Memorandum, p 1.

need to be satisfied it is clinically appropriate, and meet several other conditions, to supply a vape without a prescription)

- patients under 18 will still need a prescription to access vapes, where state and territory laws allow it
- only vapes included in the Therapeutic Goods Administration's list of notified vapes can be dispensed by pharmacies.⁹

1.2.2 Vaping in Queensland

On 14 March 2023, the Legislative Assembly agreed to a motion that the former Health and Environment Committee (former committee) inquire into and report on reducing rates of e-cigarette use (vaping) in Queensland. The former committee's inquiry made the following findings:

- e-cigarette use is increasing among Queensland adults, especially young adults and children
- there is strong evidence that e-cigarettes pose serious risks to the health of individuals, often exposing them to nicotine and a range of harmful chemicals, heavy metals, and carcinogenic substances
- the availability of e-cigarettes containing high levels of nicotine, despite many claiming to be 'nicotine free', magnifies the health risks associated with e-cigarettes and reduces their potential value as a smoking cessation tool
- while acknowledging the objections of adult e-cigarette users about losing access to products they choose to use, the committee found that the dangers of toxic chemicals and high nicotine content in illegally supplied products, particularly disposable devices, are significant, particularly as the long-term effects of e-cigarettes on health are not known at this stage
- e-cigarettes are already having a negative impact on the community and the health system
- vaping by young people has become a challenging situation in schools, and schools, students and parents highlighted the need for an organised approach to increasing awareness about e-cigarettes, as well as more vaping specific teaching resources, and specific approaches for students in schools to manage addiction and support quitting
- a coordinated national public awareness campaign and preventive activities will be important for changing the community's understanding about the health issues and laws related to vaping
- the committee supported the plan announced by the Australian Government in May 2023 to reduce e-cigarette use by introducing stronger regulation and enforcement, including banning disposable e-cigarettes, prohibiting the sale of e-cigarettes in retail stores, and imposing new controls on importation, contents and packaging for prescription only e-cigarettes, and found that there is community support for these measures
- support services to help people to manage withdrawal and quit vaping, in places and via modes that reach e-cigarette users, are essential, and will be particularly important during the transition away from purchasing potentially illegal products at retail stores
- government may need to take steps to reduce the environmental impact of e-cigarettes, even with the implementation of the proposed ban on disposable e-cigarettes, and investigating the feasibility of a scheme for recycling and safe disposal of e-cigarettes would be worthwhile
- many stakeholders called for greater enforcement of existing laws regulating e-cigarettes, especially the illegal sale of e-cigarettes to people under 18 years of age, and emphasised that the focus must be on the retailers supplying illegal vaping products to minors, rather than on punishing e-cigarette users

⁹ Australian Government, Therapeutic Goods Administration, *Vapes: information for pharmacists*, <https://www.tga.gov.au/products/unapproved-therapeutic-goods/vaping-hub/vapes-information-pharmacists>.

- the committee encouraged the Queensland Government to assign resources where necessary to support compliance monitoring and enforcement activities.

The former committee made 14 recommendations which were all accepted by the Queensland Government.

1.2.3 Current regulatory environment in Queensland

Regulation of smoking products in Queensland currently occurs under the TOSPA and the *Medicines and Poisons Act 2019* (MPA). This includes:

- enforcement under TOSPA for offences relating to the supply and possession of illicit tobacco and supply of smokeless tobacco products
- enforcement under MPA for offences relating to the possession of non-tobacco nicotine products without a prescription.

As the explanatory notes outline, enforcement powers under MPA and TOSPA are different and the MPA is not suited to investigating and prosecuting an illicit product.¹⁰ For example, search of an entire premises is possible under TOSPA, but not under MPA without consent or a warrant. Similarly, penalty infringement notices can be issued for certain offences under TOSPA but cannot be issued under MPA. Prosecutions under MPA require evidence to be obtained that the vapes or other products seized contain nicotine.¹¹

Queensland Health explained that a significant focus of the Bill is on aligning this legislation:

...to locate all of the vaping prohibitions within TOSPA itself so that you have one act where authorised persons have clear guidance as to what their powers are, what the prohibitions are, you have clear prohibitions on vaping products, and you have appropriate enforcement tools so that those authorised persons can go into retail establishments.

...Those powers will then be complemented under the bill by a range of other enforcement tools and making sure that TOSPA itself has adequate enforcement powers such as, for example, closure orders where that is appropriate, stiff penalties with imprisonment and an escalating penalty and enforcement framework.¹²

1.3 Legislative compliance

The committee's deliberations included assessing whether the Bill complies with the Parliament's requirements for legislation as contained in the *Parliament of Queensland Act 2001*, *Legislative Standards Act 1992* (LSA) and the *Human Rights Act 2019* (HRA).

1.3.1 Legislative Standards Act 1992

Our assessment of the Bill's compliance with the LSA identified potential issues of fundamental legislative principle¹³ in relation to some proposed provisions regarding:

- penalties for offences
- the onus of proof for executive liability offences of selling without a licence or to children
- restrictions on business activities
- administrative power to order interim closure of premises

¹⁰ Public briefing transcript, Brisbane, 24 June 2024, p 3.

¹¹ Explanatory notes, p 2.

¹² Public briefing transcript, Brisbane, 24 June 2024, p 3.

¹³ Fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. These principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament. *Legislative Standards Act 1992* (LSA), s 4.

- the delegation of legislative power to prescribe certain matters by regulation.

These issues are discussed in section 2 of this report.

1.3.1.1 Explanatory Notes

Committee comment

The explanatory notes tabled with the Bill contain the information required by Part 4 of the LSA and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

1.3.2 Human Rights Act 2019

Section 39 of the HRA requires portfolio committees to report to the Legislative Assembly if the Bill is not compatible with human rights and about the statement of compatibility tabled for the Bill.

We consider that the Bill is compatible with the HRA. The proposed changes to the entry powers of authorised officers in cl 20 of the Bill potentially limit a human right. However, the committee is satisfied that the limit is reasonable and demonstrably justifiable in accordance with s 13 of the HRA. This issue is discussed in section 2 of this report.

1.3.2.1 Statement of compatibility

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA.

Committee comment

For the most part, the statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights. Further analysis of the human rights issues associated with the power of entry (cl 20) and liability of executive officers of corporations (cls 10, 17) provisions would have assisted consideration of the Bill's compatibility with human rights.

1.4 Should the Bill be passed?

The committee is required to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 be passed.

2 Examination of the Bill

This section discusses key issues raised during the committee's examination of the Bill. It does not discuss all consequential, minor or technical amendments.

The majority of submitters supported the Bill, with many expressing strong support for the proposed amendments including a nationally consistent approach to illegal vaping products, recognising police officers as authorised persons under TOSPA, and the introduction of littering offences for vaping devices and accessories. Additional issues raised by submitters included:

- the need for enforcement of the new regulatory framework
- destruction of seized goods
- the impact of closure of tenant businesses on landlords
- the need for measures to manage disposal of devices
- the need for awareness campaigns and education, and services to support quitting

- a ban on political donations from the tobacco and vaping industry
- monitoring and evaluation of the reforms to assess effectiveness.

Submitters' concerns with the Bill generally or specific provisions of the Bill related to:

- preference for a harm reduction approach rather than restrictive regulation
- support for use of vapes for smoking cessation for young people
- concerns that personal use of vapes would be criminalised
- rejection of prescription and dispensing of vapes to people under 18 years of age
- provisions which potentially allow entry to a private home without consent or warrant
- access to vapes for legal medical marijuana
- a need for harsher penalties to deter sales of illicit tobacco and vapes.

Opposition to the Bill, based on inconsistency between the proposed legislation and laws regulating cigarettes which make them widely available, was also expressed by some submitters,¹⁴ as well as concerns with the process to develop the Bill.¹⁵

2.1 Harm reduction vs restricted use

The Queensland Network of Alcohol and Other Drugs Agencies (QNADA) submitted that it does not support prohibiting vaping goods or other nicotine products, stating that 'by fixating on the enforcement of a vaping product ban, government is closing off policy avenues for access to effective harm reduction, with potentially serious public health consequences'.¹⁶ QNADA argued:

- there is strong evidence that law enforcement strategies are ineffective in reducing both rates of use and intentions to use for people who use substances
- many of the potential harms of vaping use are associated with a poorly regulated market and a lack of quality testing
- experience shows that attempts to outright ban products are likely to heighten current risks associated with illicit drug supplies, increase the profitability of an unregulated market, and will have limited impact on actual use in the community
- the Bill is out of step with existing tobacco control legislation and broader trends in illicit drug policy in Australia
- evidence strongly points to the harm reduction potential of nicotine vaping products and their association with success in smoking cessation
- the Bill's definition of 'illicit nicotine products' including nicotine pouches is concerning considering the body of evidence which suggests their harm reduction potential
- the amendments may have the effect of encouraging existing users of e-cigarettes to transition or return to use of traditional tobacco products
- the approach is inconsistent with the regulation of other nicotine containing products in the community, with cigarettes available to those over the age of 18 years and nicotine replacement products readily available without prescription.¹⁷

In response to this argument, Queensland Health stated:

The Bill mirrors Commonwealth controls which restrict supply of vaping goods to a pharmacy setting where products can be dispensed under clinical supervision. This allows vaping goods to form a part of

¹⁴ Submissions 4, 10.

¹⁵ Submission 4.

¹⁶ Submission 10, p 3.

¹⁷ Submission 10, pp 2-3.

the continuum of available options for reducing the harms of smoking product use, noting that clinical guidelines do not support these products as a first line treatment.

There is no clear evidence that nicotine products such as vaping goods assist smokers to quit smoking and reduce harm. There is evidence that these products are often used alongside tobacco products leading to a continuation in nicotine dependency rather than cessation. There is strong evidence that vaping goods increase harms for young people including acting as a gateway to the use of tobacco products.¹⁸

The Alcohol and Drug Foundation (ADF) strongly supported the amendments to restrict the supply of unregulated vaping products through retail outlets, particularly ‘given significant concerns about widespread sales of vaping products containing nicotine by sellers operating with little to no oversight’.¹⁹ While ADF supported the Bill ‘as the sale of these products to young people has emerged as a key public health and regulatory concern’, the ADF recommended that measures are needed to ensure that young people experiencing nicotine dependence can access vaping products as a smoking cessation tool.²⁰

Most submitters strongly endorsed the regulatory approach of the Commonwealth and Queensland to restrict access to nicotine products.

The National Centre for Aboriginal and Torres Strait Islander Wellbeing Research (NCATSIWR) also highlighted the ‘extensive health, social and economic harms’ from commercial tobacco use on Aboriginal and Torres Strait Islander peoples and Australians more broadly, and the need to ‘learn from these errors when developing, implementing and evaluating vaping policy’.²¹ NCATSIWR submitted that Aboriginal and Torres Strait Islander peoples are disproportionately harmed by commercial tobacco use, and that ‘the current uptake of vaping among youth is a significant risk to the success of Aboriginal and Torres Strait Islander tobacco control which has seen significant declines in smoking prevalence over the last two decades’.²²

NCATSIWR provided evidence that commercial vaping proponents ‘continue to contact Aboriginal and Torres Strait Islander leaders and public health figures, as recently as late 2023, requesting support to promote vaping among Aboriginal and Torres Strait Islander peoples and communities’,²³ and stated that by regulating access the Commonwealth legislation and the Bill will minimise the exposure to vaping-generated harms.²⁴

Committee comment

The committee supports the approach of the Commonwealth and state governments to prohibit the supply of dangerous unregulated vaping and nicotine products, particularly to young people and children. Without measures to limit the use of these products, serious impacts on the health of some in our community and on the health system are likely.

We note that the Bill will allow for the supply of therapeutic vaping devices for smoking cessation and nicotine dependence by pharmacists and other health professionals in accordance with the *Therapeutic Goods Act 1989* (Cth).

¹⁸ Queensland Health, correspondence, 9 July 2024, p 3.

¹⁹ Submission 6, p 1.

²⁰ Submission 6, p 1. See also submission 30.

²¹ Submission 25, p 1.

²² Submission 25, p 6.

²³ Submission 25, p 5.

²⁴ Submission 25, p 5.

2.1.1 Criminalisation of personal users

QNADA submitted its concern that the proposed amendments ‘will undermine the harm reduction potential of some nicotine products leading to adverse public health effects’, and ‘risks creating a criminalised environment for individuals who use vaping and nicotine products’.²⁵

QNADA stated that it is ‘strongly opposed to any policies which either intentionally or inadvertently focus on criminalising personal possession’.²⁶ While acknowledging that the intent of the amendments is to prevent the importation, manufacture, and supply of vaping devices and products, rather than targeting individual users, QNADA submitted that ‘this intention could be strengthened by removing threshold amounts which define possession for personal use and replacing these with broader personal use exemptions that are not contingent on the quantity of vaping devices or products a person possesses’.²⁷

ADF and the Queensland Catholic Education Commission (QCEC) also emphasised that possession of products containing nicotine for personal use should not be criminalised.²⁸

Queensland Health confirmed that the Bill does not criminalise personal possession, as the offences in s 161A relating to the possession of illicit nicotine products ‘apply only to a person who possesses those goods as part of a business activity and specific defences are included in those offences relating to personal use’.²⁹

Further, Queensland Health noted:

The Bill does not set threshold quantities for personal use of illicit nicotine products. As such, a person could technically claim the personal use exception for any quantity of illicit nicotine products. Various factors would be relevant as to whether the offence is made out and whether the defence of personal use is available including, for example, the number of products held, the condition of the products (for example, are they new and labelled with price tags, or used), whether the person has a prescription, and other evidence of intent to supply commercially (for example, advertisements and communications relating to proposed supply). The Tobacco and Other Smoking Products Regulation 2021 prescribes "commercial quantity" of illicit tobacco. The Bill does not alter this definition.³⁰

The fact that possession of vaping products containing nicotine without a prescription remains an offence under the MPA was raised by ADF.³¹

Queensland Health acknowledged that an offence exists under the MPA for the possession of nicotine (an S4 medicine) without a prescription, advising that ‘this issue is outside the scope of the Bill. However, it is noted that Queensland Health officers and Queensland Police Service take an educative approach in relation to the Medicines and Poisons Act offence’.³²

Committee comment

As of 1 July 2024 there is a national framework in place to regulate vaping goods through a cooperative scheme involving the Commonwealth, states and territories. Under this framework, the Queensland Government is responsible for enforcing the ban on supply, commercial possession and advertising of vapes in Queensland.

²⁵ Submission 10, p 2.

²⁶ Submission 10, p 3.

²⁷ Submission 10, p 4.

²⁸ Submissions 6, 13.

²⁹ Queensland Health, correspondence, 9 July 2024, p 8.

³⁰ Queensland Health, correspondence, 9 July 2024, p 9.

³¹ Submission 6, p 1.

³² Queensland Health, correspondence, 9 July 2024, p 8.

As recommended by the former Health and Environment Committee in 2023, we support the introduction of stronger regulation and enforcement to reduce vaping in Queensland.

The committee notes that the Bill does not criminalise personal possession of illicit nicotine products and will enable patients to access vaping products from a pharmacy where clinically appropriate.

2.2 Prescription and dispensing of vapes to under 18s

The Australian Medical Association Queensland (AMAQ) expressed concern that the regulatory framework introduced by the Australian Government which allows for prescription and pharmacy dispensing of vapes, will ‘inadvertently legitimise vaping and other smoking products as proven cessation therapies when no such reliable evidence exists’.³³

Doctors consistently advise they reject vapes as either legitimate or proven health products and would be unlikely to prescribe them at all, particularly given there are far more effective, proven, reliable and safe alternatives readily available.³⁴

Further, AMAQ rejected the proposal to enable prescribing or dispensing of vaping products to people under 18 years of age, contending there is ‘policy incoherence’ in enabling children to vape when the Queensland Parliament has recently amended TOSPA to ban smoking in and around schools and at organised children’s activities and to prohibit children from being in designated outdoor smoking areas.³⁵

Queensland Health noted in response to the AMAQ’s opposition to prescribing vapes to children:

The *Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Act 2024* (Cth) amends the TG Act to allow pharmacists and other health professionals to supply therapeutic vaping products for smoking cessation and nicotine dependence. The TG Act does not limit this exception to adults.

Evidence is currently unclear as to whether it is ever clinically appropriate for therapeutic vaping devices to be prescribed to children. Further time is required to consider whether medical practitioners should be categorically prohibited from prescribing any therapeutic vaping products to children, or whether this matter is more appropriately dealt with in professional guidelines.

If there is a need to expressly legislate prescribing restrictions, Queensland Health considers this should occur under the traditional Medicines and Poisons regulatory framework, not by subjecting medical practitioners to criminal offences under the *Tobacco and Other Smoking Products Act 1998*.³⁶

2.3 Enforcement

As described in section 1 above, the Bill introduces amendments to implement and enforce at the state level the Commonwealth ban on supply, commercial possession and advertising of recreational vapes. To provide a stronger deterrent for businesses continuing to trade in illegal tobacco products which are already prohibited by state and federal laws, the Bill also increases penalties for supplying and commercially possessing illicit tobacco, to align with the higher penalties proposed for illicit nicotine products.

In their support for the measures contained in the Bill, some submitters emphasised the need for more enforcement action.³⁷ TSG Franchise Management for example stated:

The illicit nicotine market in Queensland is out of control and our current laws are simply not sufficiently enforced. Already, almost 1 in 3 tobacco products sold in Queensland are illegal (28.6%). The approach to licensing is commendable but the government must concede that without appropriate enforcement, these efforts will do little to curb the influence of illicit tobacco and vape product sales in the Queensland

³³ Submission 14, p 1.

³⁴ Submission 14, p 1.

³⁵ Submission 14, pp 1-2.

³⁶ Queensland Health, correspondence, 9 July 2024, p 3.

³⁷ See for example, submissions 7, 11, 15, 19, 27.

community. QLD Health is inadequately resourced to provide investigative and enforcement services to the already out-of-control illicit tobacco and vape market.³⁸

Similarly, with concern that current enforcement is not deterring the illegal trade in illicit tobacco and vapes, tobaccoist, Ms Pam Wright, called for confiscation of goods and closure of stores selling illegal products, heavy fines, imprisonment, charging staff who are paid cash with tax evasion, and charging complicit landlords for taking proceeds of crime.³⁹

Some submitters recommended transitioning enforcement responsibility away from Queensland Health to an agency with expertise in licence-based enforcement, such as Business Queensland which is responsible for liquor and gaming licensing enforcement, noting a recent similar change in enforcement responsibilities in South Australia.⁴⁰

Other submitters suggested there was a need for greater funding from the Commonwealth Government to support Queensland's enforcement measures.⁴¹

Queensland Health provided the following information in response to these issues:

Queensland is progressing an uplift in enforcement action. In 2023-2024, the Queensland Government provided an additional \$1.73 million to enhance compliance and enforcement in smoking product retail supply settings, ... with a further \$4.5 million in recurring funding (from 2024) provided to directly to enforcement teams.

The increase in funding has bolstered the number of officers authorised to undertake enforcement of controls on the supply of illicit tobacco and vaping products. In addition, a centralised team has been established to bolster enforcement action and support compliance capability and activity around the state.

Queensland Health is also working closely with law enforcement agencies to enhance the response at both the state and national level, including planning and executing joint enforcement activity.⁴²

2.4 Entry powers

TOSPA empowers an authorised person to enter a place with consent or in accordance with a warrant (s 181(1)). An authorised person may, without the occupier's consent or a warrant, enter a public place when the place is open to the public, or an outlet of a supplier of a smoking product or liquor licensed premises when it is open for carrying on a business (s 181(2)).

The Bill (cl 20) amends s 181(2) to also allow an authorised person to enter a place without the occupier's consent or a warrant if the place is:

- premises at which illicit nicotine products are available for sale by retail when the premises are open for carrying on a business
- premises for which a closure order is in effect under new division 4A, or
- premises for which an injunction is in effect under new division 4B.

The explanatory notes state that the amendment will ensure authorised persons may enter a place without the occupier's consent or a warrant if a closure order is in place to seize illicit tobacco or illicit nicotine products.⁴³

³⁸ Submission 7.

³⁹ Submission 19.

⁴⁰ Submissions 11, 15.

⁴¹ Submissions 7, 11, 27.

⁴² Queensland Health, correspondence, 9 July 2024, p 5.

⁴³ Explanatory notes, p 27.

While some submitters supported the proposed increased powers of entry for enforcement officers to investigate and act on information about illegal activity,⁴⁴ others were concerned about the proposed changes to the search powers of authorised officers under s 181(2), seeking the continuation of existing right of entry safeguards under TOSPA for the proposed new provision.⁴⁵

2.4.1 Human Rights Act 2019 – section 25 – right to privacy

The proposed amendments to s 181 (cl 20) when read with other provisions in the Bill, would allow for entry/search of non-retail premises (residential premises/homes) without a magistrate-ordered search warrant or other form of judicial oversight. This is because of the applicability of entry powers to premises subject to interim closure orders, which are made by the chief executive (cl 27).

Clause 20 should be read in light of cl 17 (proposed provisions ss 161 and 161A) prohibiting the possession of illicit tobacco and vaping products as part of a business activity at either:

- 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.

These provisions mention a storage shed or vehicle by way of illustration/example. The Bill does not explicitly state that the supply and enforcement provisions cover the home as ‘premises’. However a home may be captured under the provisions. This may, for example, apply where:

- the business operates as an online business from a home, or
- the business operates as a physical business in a retail shop, but extra stock is store at a home.

While in most cases a closure order is likely to be made in relation to retail premises such as shops/mobile ‘pop ups’, the use of online businesses to sell tobacco/vaping products means that residential premises would potentially be included under the Bill’s supply prohibition and entry powers.

The explanatory notes acknowledge the application of the provisions to online businesses, stating ‘the Bill provides that a person must not, as part of a business activity, supply illicit nicotine products. This is intended to capture all commercial operations, including retail and wholesale businesses as well as online businesses, that are involved in the supply of illicit nicotine products in some capacity’.⁴⁶

Thus the provisions raise the right to privacy, with a focus on interference with an individual’s home.

The HRA protects fundamental human rights drawn from international human rights law.⁴⁷ Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Section 25 of the HRA states that a person has the right not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and not to have the person’s reputation unlawfully attacked.

It should be noted that privacy is highly contextual. Thus, whether an interference with privacy is permissible will depend on whether there is a reasonable expectation of privacy in the circumstances. For example, a person will have a greater expectation of privacy in relation to their home than in

⁴⁴ See for example, submission 21.

⁴⁵ See for example, submission 20.

⁴⁶ Explanatory notes, p 6.

⁴⁷ The human rights protected by the HRA are set out in sections 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

relation to their workplace. This is relevant because the supply prohibition and entry/search/seizure provisions proposed by the Bill are worded in such a way that they encompass residential premises.

It is also significant that s 25 of the HRA protects unlawful or arbitrary interferences only. The United Nation Human Rights Committee has said that a law which authorises interference with privacy must be precise and circumscribed so that governments are not given broad discretions in authorising an interference with privacy.⁴⁸ In relation to the home specifically, a General Comment by the United Nations Human Rights Committee has stated that searches of a person's home should be restricted to those for necessary evidence and should not be allowed to amount to harassment.⁴⁹

The right to the privacy of a person's home is considered particularly important. However, it can be limited where necessary and reasonable.

The proposed new sections are aimed at facilitating stronger enforcement of illicit tobacco/vaping regulation. Specifically, a broadening of supply prohibitions and entry/search powers to non-retail premises has been introduced in recognition that much of the illicit trade is being facilitated by storage of products off-site (not on traditional business premises like retail shops). The provisions are aimed at allowing relevant governmental agencies and law enforcement bodies to do the acts necessary for the enforcement of existing legislation. The potential impact of the provisions for individual's residential premises/home do not appear to be addressed in the explanatory notes or statement of compatibility.

The purpose of the limitation – which is to bolster enforcement of the legislative regime and to stop evasion of the legislation by suppliers – is reflected in the wording of the proposed provisions. Therefore, there is a link between the limitation and its purpose – the expansion of scope of supply prohibition and search of premises will ensure that authorised officers can properly enforce the prohibition regime for illegal tobacco/vaping products.

Less restrictive ways to achieve the purpose would be to require all entry to be either by way of consent or judicially-approved warrant.

The statement of compatibility does not engage with whether a magistrate should be involved in all non-consensual search warrants. It states that a warrant or consent will be required to enter a private premises (storage facility, vehicle or home) and that 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'.⁵⁰

As noted above, injunctions must be granted by the District Court so there will be judicial oversight of this decision. However, interim closure orders can be made by the chief executive (cl 27). They do not have to be made by a magistrate. Presumably if an online tobacco/vaping business is being operated from a home, then a closure order would be applied to the online business itself (the website/online platform). However, it is feasible that entry/search may need to be taken of a home to obtain evidence linking the person to the online business (computers etc). It is preferable that searches of an

⁴⁸ United Nations Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, [4].

⁴⁹ United Nations Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, [8].

⁵⁰ Statement of compatibility, p 14.

individual's home be approved by the judiciary (e.g. magistrate). This is generally required under police power provisions in Queensland.⁵¹

Precedents from other jurisdictions have highlighted the importance of the right to privacy, but also that limitations on the right which are specified and proportionate are permitted. For instance, the European Court of Human Rights (ECHR) has acknowledged that, in order to secure physical evidence on certain offences, authorities may consider it necessary to implement measures which entail entering a private home.⁵²

Relevantly for the matters raised by this Bill, the ECHR has found the following to be legitimate aims of searches in homes:

- seeking circumstantial and material evidence in criminal cases, for example involving forgery, breach of trust and the issuing of uncovered cheques⁵³
- drug trafficking⁵⁴
- illegal trade in medicines.⁵⁵

The enforcement of prohibitions on illegal tobacco and vaping products would be viewed as a legitimate aim. However, the question is whether there are appropriate safeguards to prevent the authorities from taking arbitrary action and whether judicial approval of a warrant should be required. Judicial oversight is provided in some parts of the scheme, but not the application to interim closure orders.

Committee comment

The committee has carefully considered the significant limitation on human rights associated with the proposed amendment of s 181(2) of TOSPA which would allow authorised persons to enter a premises subject to interim closure orders without the occupier's consent or a warrant.

On balance, we consider that the potential for authorised persons to enter and search a residential premises without a warrant is justified by the public health objectives of the Bill. Preventing illegal activity which has links with serious and organised crime and is a significant risk to the community is a legitimate aim of the provision. The committee considers the enforcement of illicit tobacco and vaping legislation provides an adequate countervailing reason to justify the limitation. We consider the requirement for interim closure orders to be issued by the chief executive is a safeguard from arbitrary action.

The committee considers this limitation on the right to privacy in clause 20 of the Bill is reasonable, justifiable and proportionate in these circumstances.

2.4.2 Safety of authorised officers entering premises

Environmental Health Australia (EHA), which represents the professional interests of environmental health professionals including authorised officers under various legislation, welcomed the proposed increased powers of entry for enforcement officers and penalties for illegal activity. However, the

⁵¹ Ordinarily a warrant must be obtained for police entry into a home, unless there is a significant countervailing reason is required (such as to prevent the commission of a serious crime or to obtain possession of a fire-arm).

⁵² *Dragan Petrović v. Serbia*, 2020, [74]. The Court also assesses the relevance and adequacy of arguments to justify measures, compliance with the proportionality principle, and whether the legislation provide appropriate and relevant safeguards to prevent the authorities from taking arbitrary action (*Gutsanovi v. Bulgaria*, 2013, [220]; *Iliya Stefanov v. Bulgaria*, 2008, [38-39]; *Smirnov v. Russia*, 2007, [44]).

⁵³ European Court of Human Rights, *Van Rossem v. Belgium*, 2004, [40].

⁵⁴ European Court of Human Rights, *Işıldak v. Turkey*, 2008, [50].

⁵⁵ European Court of Human Rights, *Wieser and Bicos Beteiligungen GmbH v. Austria*, 2007, [55].

safety of authorised officers entering these businesses is a concern to EHA as ‘the introduction of imprisonment options would pose a significantly new risk to enforcement officer safety’ in light of the reported connection between selling illicit tobacco products and organised crime. EHA submitted that ‘a stronger coordination mechanism and more resources are required to improve engagement and collaboration among local, state, and federal authorities to manage criminal illicit tobacco activity’.⁵⁶

EHA stated that resources and training for Commonwealth enforcement officers is commensurate with their role but advocated for ‘the adequate and proportionate increase of enforcement officers and the additional training and support that these officers require as State legislation is aligned to Commonwealth legislation’.⁵⁷

Queensland Health advised that:

Queensland has increased enforcement to assist with the implementation of vaping reforms. A series of risk mitigation strategies and resources have been provided to current and recently onboarded officers. In addition, a centralised intelligence and reporting function has been established to coordinate enforcement efforts, and this, along with maturing relationships with law enforcement agencies, is assisting in ongoing monitoring and response to risk assessment. Queensland enforcement officers will be provided with training on both the reforms in the Bill and the Commonwealth legislation.⁵⁸

2.5 Destruction of seized goods

TOSPA currently allows for the forfeiture of illicit tobacco. The Bill (cls 24 and 25) would also allow for the forfeiture of seized illicit nicotine products and prohibited products such as ice-pipes and bongs. The Bill (cl 26) amends s 208(1) to provide that if a seized product is not forfeited, it must be returned within 12 months, instead of the current 6 month period.

TSG Franchise Management, which represents tobacconist franchises in Queensland and Australia, supported the Bill but recommended this provision be amended to allow for the destruction of seized goods within 60 days, as storing seized goods for 12 months may place ‘an undue burden on the state’, and returning products to their source could lead to ‘further incriminating acts under the legislation’.⁵⁹

Queensland Health advised that cl 26, requiring seized goods to be retained for 12 months rather than 6 months, would apply to products other than illicit tobacco, illicit nicotine, ice-pipes and bongs, such as flavoured cigarettes and smokeless tobacco products which are only forfeited following prosecution, and that the proposed timeframe was intended to align with the timeframe for prosecution. Queensland Health stated that this would enable ‘robust consideration of the merits of commencing a prosecution without unnecessary time pressures’ and ‘that the products are only returned if the matter does not proceed to prosecution, or if the court orders the products to be returned’.⁶⁰

2.6 Impact of closure orders on landlords

The Shopping Centre Council of Australia (SCCA) supported the objective of the Bill but expressed concern about the potential impact on a landlord of a longer-term closure order issued to a tenant under proposed new s 209B (cl 27). SCCA submitted that the primary concern would be ‘the ability to regain control of a tenancy in such circumstances as it is an undesirable and unacceptable outcome that a tenancy would remain idle for up to 6 months’ and recommended amending the Bill ‘so that landlords are informed about any intent to issue a closure order’, and ‘to enable a landlord to

⁵⁶ Submission 21, p 1.

⁵⁷ Submission 21, pp 1-2.

⁵⁸ Queensland Health, correspondence, 9 July 2024, p 6.

⁵⁹ Submission 7, p 2.

⁶⁰ Queensland Health, correspondence, 9 July 2024, p 4.

terminate a lease for continued or egregious breaches of the TOSPA Act prior to a closure order being served'.⁶¹

Queensland Health advised that it 'has committed to working with SCCA to ensure landlords are given appropriate notice of offending behaviour by their tenants and are able to exercise contractual powers of termination where appropriate'.⁶²

Australian Lottery and Newsagents Association, the Australian Association of Convenience Stores, and MGA Independent Businesses Australia (AACS, ALNA & MGA) suggested that landlords should rely on provisions in most leases which allow for a lease to be terminated if a tenant conducts the sale of a product or service outside the permitted usage of the tenancy. Further they submitted that landlords who allow non-compliant retailers to continue to sell illicit nicotine on their premises 'are profiting from businesses flouting the law'.⁶³ AACS, ALNA & MGA suggested the government 'explore a process where landlords are notified when tenants are caught contravening illicit nicotine laws', 'better educate landlords about overlooking illicit trade', and consider penalties for landlords for ignoring a notification of illegal activities.⁶⁴

2.7 Littering and safe device disposal

The Bill amends s 103 of the *Waste Reduction and Recycling Act 2011* (WR&R Act) to create a specific dangerous littering offence for depositing a vaping device or vaping accessory (as defined under TOSPA), with a maximum penalty of 40 penalty units (\$6,452).⁶⁵

While amendment of the WR&R Act was supported by several submitters,⁶⁶ No More Butts and the Local Government Association of Queensland (LGAQ) noted that the Bill did not propose measures to manage disposal of devices.

No More Butts noted 'with concern that neither the Commonwealth, or State government has introduced any legal instrument or scheme to deal with vaping disposal'.⁶⁷ No More Butts pointed out that while the Bill creates an offence for littering their vapes, consumers still do not have options available to them:

They cannot be binned, they cannot be sent to council e-waste in all jurisdictions and they cannot be deposited into a B-Cycle bin. If this cannot be legislated in the current Amendments, separate action must be accelerated. Without a coordinated, advertised disposal scheme, the current situation of truck, bin and facility fires will only continue. ...This would be especially relevant for pharmacies with the recently approved Commonwealth legislation around ready access to vaping devices in pharmacies from October 1st 2024.⁶⁸

LGAQ emphasised that local governments deal with the impacts of the improper disposal of vapes on a daily basis and state and federal governments need to continue to support improvements to the way batteries, including those contained in single-use vapes, are collected and treated. LGAQ submitted that it 'seeks the support of the State Government to advocate for the further expansion of the National Return and Disposal of Unwanted Medicines Program (NatRUM), to include vaping

⁶¹ Submission 24, pp 1-2.

⁶² Queensland Health, correspondence, 9 July 2024, p 4.

⁶³ Submission 27, p 3.

⁶⁴ Submission 27, p 3.

⁶⁵ From 1 July 2024, a penalty unit is \$161.30. Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, ss 5, 5A.

⁶⁶ Submissions 9, 17, 26, 29.

⁶⁷ Submission 17, p 1.

⁶⁸ Submission 17, p 1.

devices, both legal and illicit, and provide a safe collection and disposal environment' for vaping products'.⁶⁹

Queensland Health advised that the issue of device disposal was outside the scope of the Bill. However, it noted that 'the Therapeutic Goods Administration has made transitional arrangements to allow for retailers to return or surrender lawfully imported goods for a short period'.⁷⁰

Committee comment

The provision in the Bill for a new dangerous littering offence for incorrectly depositing a vaping device or vaping accessory is a step forward in minimising the impact of vaping product waste.

The committee agrees with the recommendation of the former Health and Environment Committee's vaping inquiry in 2023, that the Queensland Government investigate the feasibility of introducing a return and recycling scheme for vaping products, and the introduction of requirements that would facilitate recycling and/or safe disposal of vaping devices and their batteries. We note that the government supported this recommendation and committed to exploring options with stakeholders to develop a framework for a possible national scheme that could include the application of a single-use plastic item ban and a product stewardship arrangement for reusable vapes. The government also committed to exploring options for safe disposal of vaping devices that are seized during compliance and enforcement action.

We encourage the Queensland Government to progress work to support vaping device waste disposal.

2.8 Offences, restrictions on business activities, closure of premises, definitions of matters to be prescribed by regulation

2.8.1 Penalties for offences

The Bill proposes to make the supply or possession of illicit tobacco and illicit nicotine products as part of a business activity an offence with maximum penalties of up to 2,000 penalty units (\$322,600) or 2 years imprisonment, or both.⁷¹

2.8.1.1 Fundamental legislative principles – rights and liberties of individuals - penalties

The proposed penalties in relation to the supply or possession of illicit tobacco products or illicit nicotine products as part of a business activity are a significant increase from existing penalties in TOSPA.

Currently there is one offence in TOSPA with a maximum penalty of 1,000 penalty units, i.e. s 51 where the licensee for a wholesale licence must not sell a smoking product to a retailer unless the retailer holds a retail licence. There are no offence provisions with a maximum penalty of 2,000 penalty units, and none with a maximum penalty including a period of imprisonment.

To have sufficient regard for the rights and liberties of individuals, the consequences of legislation should be relevant and proportionate. In line with this, a penalty should be proportionate to the offence, and penalties within legislation should be consistent with each other.⁷²

According to the explanatory notes the current penalties in TOSPA are not proportionate to the risk and public health consequences of illicit tobacco and significant increase in the penalties is necessary.⁷³ The explanatory notes state that the penalties proposed by the Bill allow for a tiered

⁶⁹ Submission 23, pp 1-2.

⁷⁰ Queensland Health, correspondence, 9 July 2024, p 5.

⁷¹ Bill, cl 17 (amending ss 161(1), 161(2); proposed new ss 161A(1), 161A(2)).

⁷² Office of the Queensland Parliamentary Counsel (OQPC), 'Fundamental legislative principles: the OQPC Notebook' (Notebook), p 120. See also LSA, s 4(2)(a).

⁷³ Explanatory notes, p 21.

enforcement response, by introducing lesser penalties than the Commonwealth legislation, permitting enforcement teams to select the most efficient and effective option ensuring a proportionate and timely enforcement response.⁷⁴

Further, the explanatory notes state that the penalties are appropriate and proportionate to the prescribed conduct, in light of the high profit margins associated with these products and the need to curb the black market.⁷⁵ The offences are intended to provide an effective deterrent and reflect the serious impact non-compliance has on public health.⁷⁶

In response to a concern raised by the Queensland Nurses and Midwives' Union (QNMU) that the Bill should provide adequate consideration and safeguards to ensure that enforcement action is only taken against individuals, such as employees, who *knowingly* supply illicit products,⁷⁷ Queensland Health advised that it 'intends to take an educative approach in the first instance in relation to this offence, focusing on informing and educating before moving to penalties. Penalties would only be applied where a person has first been warned and then continues supplying'.⁷⁸

Similar penalties are contained in a range of other Acts.⁷⁹

Committee comment

The committee considers the penalties proposed by the Bill are consistent with other penalties and proportionate to the offences, particularly considering the public health risks associated with the use of illicit tobacco and illicit nicotine products and the impacts on the community of the illegal trade in these products.

2.8.2 Onus of proof for executive liability offences

The Bill includes executive liability offences relating to selling smoking products without a licence or to children, ensuring employees do not sell smoking products to children, and the supply or possession of illicit tobacco and illicit nicotine products as part of business activities.⁸⁰ An executive officer of a corporation commits an offence if the corporation commits an offence against an executive liability provision and the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.⁸¹

2.8.2.1 Fundamental legislative principles – rights and liberties of individuals – reversal of onus of proof

The proposed amendments raise fundamental legislative principle issues in relation to the reversal of the onus of proof.⁸²

Legislation requiring executive officers of a corporation to ensure the corporation complies with a law and providing that, if the corporation commits an offence, each executive officer also commits an

⁷⁴ Explanatory notes, pp 6 and 9.

⁷⁵ Explanatory notes, pp 6 and 9.

⁷⁶ Explanatory notes, p 6.

⁷⁷ Submission 20, p 5.

⁷⁸ Queensland Health, correspondence, 9 July 2024, p 4.

⁷⁹ For example, *Fisheries Act 1994*, (ss 78, 79, 79A, 81, 88A), *Food Act 2006* (s 32), *Biosecurity Act 2014* (ss 36, 116, 126, 133, 284), *City of Brisbane Act 2010* (s 86), *Waste Reduction and Recycling Act 2011* (s 265), *Animal Care and Protection Act 2001* (ss 17, 18), *Explosives Act 1999* (s 32), *Fire and Emergency Services Act 1990* (ss 104C, 104D, 104E).

⁸⁰ Bill, cl 31. Executive liability provisions are defined in proposed s 230A(5) to include ss 65, 66, 67, 161, 161A.

⁸¹ Bill, cl 31 (proposed new s 230A). Explanatory notes, pp 19-20.

⁸² LSA, s 4(3)(d). OQPC, '*Principles of good legislation: OQPC guide to FLPs: Reversal of onus of proof*', p 20.

offence, effectively reverses the onus of proof. This is because under law, a person generally cannot be found guilty of an offence unless he or she has the necessary intent.⁸³

The explanatory notes do not raise the issue and do not provide any justification for the reversal of the onus of proof in relation to the executive liability provisions.⁸⁴ However, the explanatory notes do consider these amendments in the context of procedural fairness and state that the purpose of creating executive liability offences is to protect public health by allowing enforcement action to be taken against executive officers. Further, this is intended to deter non-compliance and address current tactics of ‘bad actors’ who regularly change corporate structures and business arrangements to avoid prosecution and continue trading.⁸⁵

Similar provisions are contained in a range of other Acts.⁸⁶

Committee comment

The committee is satisfied that the executive liability provisions of the Bill pay sufficient regard to the rights and liberties of individuals, considering the purpose of the amendments is to protect public health and deter non-compliance with TOSPA.

2.8.3 Restrictions on business activities

The Bill includes provisions which may restrict ordinary activities which are part of conducting a business, including:

- prohibiting the supply or possession of illicit tobacco and illicit nicotine products as part of a business activity⁸⁷
- prohibiting the display, advertising and promotion of illicit nicotine products⁸⁸
- interim and long-term closure order provisions⁸⁹
 - giving the chief executive the power to order the interim closure of a premises for 72 hours if the chief executive reasonably suspects a business at the premises is supplying illicit tobacco or illicit nicotine products or is satisfied a business is selling smoking products without a licence under TOSPA⁹⁰
 - giving the chief executive the power to apply to a magistrate to order premises be closed for not more than 6 months if the magistrate is satisfied that a business at the premises is supplying illicit tobacco or illicit nicotine products or is satisfied a business is selling smoking products without a licence under TOSPA⁹¹
- giving the District Court the power to grant an injunction restraining a person from carrying on a business involving the supply of smoking products or illicit nicotine products.⁹²

⁸³ OQPC, *Principles of good legislation: OQPC guide to FLPs: Reversal of onus of proof*, p 20.

⁸⁴ Explanatory notes, pp 26, 29-30.

⁸⁵ Explanatory notes, p 29.

⁸⁶ For example, *Betting Tax Act 2018* (s 60), *Electricity Act 1994* (s 240A), *Food Act 2006* (s 260A), *Medicines and Poisons Act* (s 214), *Private Health Facilities Act 1999* (s 143), *Queensland Heritage Act 1992* (s 160A), *Radiation Safety Act 1999* (s 205A), *Waste Reduction and Recycling Act 2011* (s 268) and *Water Act 2000* (s 828).

⁸⁷ Bill, cl 17 (amends s 161 and proposed new s 161A).

⁸⁸ Bill, cl 15 (proposed new s 109A). See explanatory notes, pp 11-12, 24.

⁸⁹ See explanatory notes, pp 10-11, 22.

⁹⁰ Bill, cl 27 (proposed new s 209A).

⁹¹ Bill, cl 27 (proposed new s 209B).

⁹² Bill, cl 27 (proposed new ss 209E-209G).

2.8.3.1 Fundamental legislative principles – rights and liberties of individuals – restrictions on ordinary activities

Legislation should not, without sufficient justification, unduly restrict ordinary activities.⁹³ This includes the right to conduct business without interference. The extent of interference in the right to conduct business must be rational, proportional and reasonably necessary so that the interference does not do more harm than good.⁹⁴

The explanatory notes state that the restrictions that interfere with a person's ability to conduct a business can be justified, 'particularly if the rationale for the restrictions is in the public interest or for the health and safety of the public'.⁹⁵ Specifically:

- The prohibition on the supply or possession of illicit tobacco and illicit nicotine products as part of a business activity are appropriate restrictions as they recognise that illicit nicotine products pose serious health risks to the health of individuals and aim to address the current vaping public health crisis by ending the commercial supply of vaping products.⁹⁶
- The prohibition on displaying, advertising and promoting illicit nicotine products is justified to protect public health by preventing a person who as part of a business activity advertises, displays or promotes illicit nicotine products with the aim of increasing their use in the community, particularly among children and young adults.⁹⁷
- The powers to order the closure of business premises found to supply illicit tobacco or illicit nicotine products are justified to protect public health and to stop the supply of these products in Queensland,⁹⁸ as seizure of illicit tobacco does not provide sufficient deterrent and in many cases suppliers associated with organised crime groups restock and continue trading.⁹⁹ The explanatory notes state that closure orders are intended to be a method of last resort to be used against recidivist offenders and after various other enforcement measures have been taken.¹⁰⁰
- The power to grant injunctions is justified on the basis that it is intended to protect public health from the harmful effects of illicit tobacco and illicit nicotine products by providing a last resort tool to deter 'recalcitrant non-compliant traders', who often have links to serious and organised crime, which will restrain these operators from continuing to trade in illegal products pending the outcome of proceedings under TOSPA.¹⁰¹

Committee comment

The committee considers the restrictions placed on ordinary business activities are justified in light of the public health risks of illicit nicotine products, and the fact that the restrictions are placed on people dealing with illegal tobacco or illegal nicotine products, often in the context of organised crime groups.

⁹³ OQPC, Notebook, p 18. See also LSA, s 4(2)(a).

⁹⁴ OQPC, Notebook, p 138. Regulation of business is an intervention in a right to conduct business in the way in which the persons involved consider appropriate (OQPC, Notebook, p 18).

⁹⁵ Explanatory notes, p 24.

⁹⁶ Explanatory notes, p 23.

⁹⁷ Explanatory notes, pp 24, 12.

⁹⁸ Explanatory notes, p 25.

⁹⁹ Explanatory notes, p 10.

¹⁰⁰ Explanatory notes, p 25. The closure orders apply in relation to a person who supplies illicit tobacco or illicit nicotine products as part of a business activity or a business that is being conducted in contravention of the licensing requirements of TOSPA.

¹⁰¹ Explanatory notes, pp 11 and 25. The injunction powers apply in relation to a person who supplies illicit tobacco or illicit nicotine products as part of a business activity and the chief executive has reasonable grounds to believe an injunction is necessary in the public interest (Bill, cl 27).

2.8.4 Administrative power to order or apply for closure of premises

As noted above, the Bill proposes to give the chief executive the power to order the interim closure of a premises for 72 hours if the chief executive reasonably suspects a business at the premises is supplying illicit tobacco or illicit nicotine products or is satisfied a business is selling smoking products without a licence.¹⁰²

The Bill also proposes to give the chief executive the power to apply to a magistrate to order premises be closed for not more than 6 months if the magistrate is satisfied that a business at the premises is supplying illicit tobacco or illicit nicotine products or is satisfied a business is selling smoking products without a licence under TOSPA.¹⁰³

2.8.4.1 *Fundamental legislative principles – rights and liberties of individuals – administrative power*

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.¹⁰⁴

The explanatory notes state that:

- the provisions to order the closure of premises are intended to ensure rapid response for premises conducting illicit business operations
- the power and circumstances of exercising the power are clearly set out, i.e. the chief executive reasonably suspects that the supply of illicit tobacco and nicotine products is occurring on the premises or is satisfied that a smoking product business is being carried out on a premises without a licence
- the power is interim in nature, lasting a maximum of 72 hours.¹⁰⁵

The power is clearly defined in the proposed provisions of the Bill which include the basis for making the decision, how the interim closure order is to be served on the person and posted on the premises, as well as the period that the order has effect.

The Bill does not include a requirement for the chief executive to give reasons for making the interim closure order and there are no appeal or review rights. However, past committees have considered the absence of appeal rights was ‘probably not objectionable’ in relation to interim decisions (being a one step on the way to a final decision).¹⁰⁶

The administrative power to make an interim closure order should be considered in the context of the proposed power of the chief executive to apply to a Magistrates Court for a long-term closure order, where the magistrate must be satisfied that a business at the premises is supplying illicit tobacco or illicit nicotine products or is satisfied a business is selling smoking products without a licence under TOSPA.¹⁰⁷ The decision of the magistrate will be subject to appeal rights.

Committee comment

Taking into consideration the interim and short-term nature of closure orders under proposed s 209A, the committee considers the provisions of the Bill relating to closure orders are appropriate, and have sufficient regard to the rights and liberties of individuals.

¹⁰² Bill, cl 27 (proposed new s 209A).

¹⁰³ Bill, cl 27 (proposed new s 209B).

¹⁰⁴ LSA, s 4(3)(a); OQPC, Notebook, pp 15, 18.

¹⁰⁵ Explanatory notes, p 30.

¹⁰⁶ OQPC, Notebook, p 23.

¹⁰⁷ Bill, cl 27.

2.8.5 Power to prescribe definitions of illicit goods, products and quantities

The Bill includes a number of proposed definitions which allow matters to be prescribed by regulation, including:

- that a device is not a vaping device¹⁰⁸
- that goods or classes of goods are or are not vaping goods¹⁰⁹
- the quantity of illicit tobacco that is a commercial quantity for the purposes of s 161 of TOSPA¹¹⁰
- another product containing nicotine or another substance detrimental to health for the definition of illicit nicotine product.¹¹¹

2.8.5.1 *Fundamental legislative principles – institution of Parliament – delegation of legislative power*

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons; and it is sufficiently subject to the scrutiny of the Legislative Assembly.¹¹²

The explanatory notes only address the issue of the delegation of legislative power in the context of the definition of illicit nicotine product,¹¹³ and justify the delegation on the basis that matters such as inclusion of new products to be captured by a definition are considered to be administrative in nature and subject to rapid change as new products are introduced to the market. The explanatory notes state that delegating this legislative power is appropriate and necessary to ensure that new and harmful products that come into the market can be rapidly captured within the prohibition.¹¹⁴

Similar arguments may be made in relation to the delegation of legislative power in the context of the definitions of vaping devices and vaping goods.

No justification was provided in relation to defining commercial quantities of illicit tobacco. However, the commercial quantity of illicit tobacco is already defined in s 15A of the Tobacco and Other Smoking Products Regulation 2021 as 50 individual cigarettes or 50g of tobacco products other than cigarettes.

Committee comment

The committee considers the delegation of legislative power to define matters to be prescribed by regulation is appropriate in light of the fact that new products can be brought to market quickly and the designation of new products may be regarded as of an administrative nature.

2.9 Other issues

2.9.1 Education, training and quitting support services

The need for targeted education and awareness activities, as well as training to support healthcare workers and quitting support services was emphasised by many submitters, who suggested:

- the changes to the regulation of vaping and other illicit nicotine products be accompanied by a comprehensive education and awareness program conducted by Queensland Health¹¹⁵

¹⁰⁸ Bill, cl 7 (proposed new s 7(1) definition of vaping device).

¹⁰⁹ Bill, cl 7 (proposed new s 7(3)).

¹¹⁰ Bill, cl 17 (proposed new s 161(6)).

¹¹¹ Bill, cl 35 (Act, amends sch 1 definition of illicit nicotine product).

¹¹² LSA, s 4(4)(a), (b).

¹¹³ Explanatory notes, p 30.

¹¹⁴ Explanatory notes, pp 30-31.

¹¹⁵ Submission 13, p 2.

- there needs to be broad community understanding of details about what are illicit nicotine products and clear explanation of the health risks associated with vaping and other illicit products¹¹⁶
- education and awareness should be particularly focused on assisting parents and carers to guide and direct children and young people¹¹⁷
- education and health campaigns need to be created and co-designed by consumers, especially young people¹¹⁸
- adequate resourcing is needed for public health, health promotion, and smoking cessation services along with the provision of a range of evidence-based stop smoking medicines¹¹⁹
- increased training and funding is needed to improve referral pathways to vaping and smoking cessation supports, and build capability and capacity to ensure the health workforce can provide evidence-based nicotine addiction and cessation supports.¹²⁰

Queensland Health advised that ‘the Queensland and Commonwealth Governments are investing in educational materials to ensure that all adults have clear information about harms of vaping and other nicotine products, especially for children and youth’ and that education and awareness campaigns will be undertaken during implementation of the Bill, including collaboration with stakeholders in the development and dissemination of materials.¹²¹

Further, Queensland Health advised that it is expanding prevention and quit support measures including:

- inclusion of support to quit vaping in the Quitline service
- messaging to the community about the benefits of quitting
- trialling a pilot program in schools to support vape cessation (which engages with the school-based youth health nurses)
- training for health professionals in brief intervention and supporting clients with quit vaping messaging and referral.¹²²

2.9.2 Vaping devices for medicinal cannabis

The need for continued availability of refillable cartridge vapes for legal medical marijuana use from online suppliers was highlighted by some submitters,¹²³ who noted that the devices provide the ‘least harmful and most controllable administration of legal medical marijuana’.¹²⁴

Queensland Health confirmed:

The definition of vaping device in section 7 of the Bill excludes a device included in the register under the TG Act, other than a device designed for use by a person for smoking cessation or management of nicotine dependence. This means that a device designed for using with medicinal cannabis to manage certain

¹¹⁶ Submission 13, p 2.

¹¹⁷ Submission 13, p 2.

¹¹⁸ Submission 29, p 6.

¹¹⁹ Submission 25, p 8.

¹²⁰ See submissions 20, 25, 26.

¹²¹ Queensland Health, correspondence, 9 July 2024, p 7.

¹²² Queensland Health, correspondence, 9 July 2024, pp 8-9.

¹²³ Submission 5; public hearing transcript, Brisbane, 10 July 2024, pp 2, 5.

¹²⁴ Submission 5.

medical conditions, that is recorded on the register under the TG Act, will not be a vaping device and is not prohibited under the Bill.¹²⁵

2.9.3 Ban on political donations

Acknowledging that the suggestion is not within scope of the Bill, the Lung Foundation recommended ‘that the Queensland Government amend the *Electoral Act 1992* to include the banning of political donations from both the tobacco and vaping industry’. The Lung Foundation noted that this has occurred in New South Wales and is being explored by other jurisdictions ‘to protect public health and the political system from industry interference’.¹²⁶

2.9.4 Monitoring and evaluation of impacts

Several submitters recommended the Queensland and Commonwealth Governments continue to monitor the use of vapes to evaluate the impacts of the new regulatory framework.¹²⁷ In addition NCATSIW highlighted the need for governments to ensure quality data and adequate sampling is obtained to evaluate the impacts among the Aboriginal and Torres Strait Islander population, in specific geographic areas and among different population groups, and in remote areas.¹²⁸

Submitters also recommended a review of the regulatory framework within 12 to 18 months¹²⁹ or 3 to 5 years.¹³⁰

Queensland Health provided the following information in relation to monitoring, evaluation, and research and data collection:

- Queensland and other jurisdictions are investing in ongoing research and monitoring approaches that measure the population and sub-population rates of use and health impacts vaping goods
- evaluation of enforcement, policy and program delivery is being progressed to ensure that measures remain effective; the National Vaping Enforcement Framework which has been agreed includes a series of indicators to which jurisdictions will contribute
- the Queensland Government is engaging with providers under the Tackling Indigenous Smoking (TIS) program, which includes a coordinated evaluation that assesses program delivery and measures the impact of the program on reducing tobacco and vape use
- Queensland Health will monitor and evaluate the impact of the reforms in the Bill on an ongoing basis through a variety of mechanisms, including by reviewing information on complaints received and enforcement action pursued.
- it is not proposed to include a statutory review period within the Bill.¹³¹

¹²⁵ Queensland Health, correspondence, 9 July 2024, p 7.

¹²⁶ Submission 28, p 2.

¹²⁷ See for example submissions 20, 25, 26.

¹²⁸ Submission 25, p 9.

¹²⁹ Submission 26.

¹³⁰ Submission 20.

¹³¹ Queensland Health, correspondence, 9 July 2024, p 7.

Appendix A – Submitters

Sub #	Submitter
1	Paul Creighton
2	Doug Gavel
3	Confidential
4	Super Vape Store
5	Kathy Young
6	Alcohol and Drug Foundation
7	TSG Franchise Management
8	Confidential
9	Health and Wellbeing Queensland
10	Queensland Network of Alcohol and Other Drugs Agencies
11	Name withheld
12	Confidential
13	Queensland Catholic Education Commission
14	Australian Medical Association Queensland
15	Philip Morris Limited
16	Dr Matthew Rimmer, Australian Centre for Health Law Research, Queensland University of Technology
17	No More Butts
18	Heart Foundation
19	Pamela Wright
20	Queensland Nurses and Midwives' Union
21	Environmental Health Australia (Queensland)
22	Cancer Council Queensland
23	Local Government Association of Queensland
24	Shopping Centre Council of Australia
25	National Centre for Aboriginal and Torres Strait Islander Wellbeing, The Australian National University and Torres Health Indigenous Corporation Inc
26	Australian College of Nursing
27	Australian Lottery and Newsagents Association, Australian Association of Convenience Stores, and MGA Independent Businesses Australia
28	Lung Foundation Australia and the Australian Council on Smoking and Health
29	Queensland Family and Child Commission
30	The Royal Australian and New Zealand College of Psychiatrists, Queensland Branch

Appendix B – Officials at public departmental briefing

Public briefing – Brisbane – 24 June 2024

Queensland Health

- Mr Mark West, Executive Director, Prevention Strategy Branch
- Mr Karson Mahler, Director, Legislative Policy Unit
- Ms Kate Sanderson, Manager, Legislative Policy Unit
- Ms Elizabeth Good, Manager, Prevention Strategy Branch

Appendix C – Witnesses at public hearing

Public hearing – Brisbane – 10 July 2024

Queensland Network of Alcohol and Other Drugs Agencies

- Ms Rebecca Lang, Chief Executive Officer

Alcohol and Drug Foundation

- Mr Robert Taylor, Manager, Policy and Engagement

TSG Franchise Management

- Mr Leo Gerandonis, Queensland State Manager
- Mrs Pamela Wright, Tobacconist

Shopping Centre Council of Australia

- Mr James Newton, Head of Policy and Regulatory Affairs

National Centre for Aboriginal and Torres Strait Islander Wellbeing Research, The Australian National University

- Dr Raglan Maddox, Associate Professor, Tobacco Free Program

Heart Foundation

- Ms Sheree Hughes, General Manager

Lung Foundation Australia

- Ms Paige Preston, General Manager, Policy and Advocacy

Australian Medical Association Queensland

- Dr Nick Yim, President