

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

## Explanatory Notes

### Short title

The short title of the Bill is the Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 (Bill).

### Policy objectives and the reasons for them

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.

Against the backdrop of this 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 any meaningful deterrence under current laws.

In 2023, in response to these serious concerns, the Commonwealth 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 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.

The current regulatory environment in Queensland is governed by the *Tobacco and Other Smoking Products Act 1998* (TOSPA) and *Medicines and Poisons Act 2019*. This includes:

- enforcement under TOSPA for offences relating to the supply and possession of illicit tobacco (certain black-market tobacco products, including those that are non-compliant with plain packaging requirements and health warning requirements) and supply of smokeless tobacco products (for example, snus or chewing tobacco); and
- enforcement under the Medicines and Poisons Act for offences relating to the possession of non-tobacco nicotine products without a prescription (capturing disposable pre-filled recreational vapes and other products such as nicotine pouches).

Enforcement powers under the Medicines and Poisons Act differ to those under TOSPA. For example, under TOSPA, authorised persons can search an entire premises, whereas under the Medicines and Poisons Act, they cannot go behind the counter or into back storerooms without consent (which is frequently withheld) or a warrant. Similarly, penalty infringement notices can be issued for certain offences under TOSPA (negating the need to prosecute in many instances) but cannot be issued under the Medicines and Poisons Act. Prosecutions under the Medicines and Poisons Act require evidence that the vapes or other products seized contain nicotine, which can be time consuming to obtain.

The amendments in the Commonwealth Bill will ban the domestic manufacture, supply and possession of recreational vapes. Health and Police Ministers have agreed in principle that states and territories will have primary responsibility for enforcing these new provisions. To facilitate this, the Commonwealth Therapeutic Goods Act will authorise the Secretary of the Department of Health and Aged Care to delegate investigative and enforcement powers for the new offences to state and territory officers.

These delegated powers are intended to enable Queensland to take immediate action to enforce the national vaping ban. Once implemented, the Commonwealth Bill will allow the imposition of higher penalties and significant jail terms for supply and commercial possession of vaping goods. This will be critical for addressing the most serious vaping offences involving high value targets. However, pursuing the new Commonwealth offences will be complex and resource intensive, requiring authorised persons to be trained in the exercise of federal enforcement powers and to follow specialised procedures for investigating, charging and prosecuting offences. For these reasons, state-level offences will remain critical as a more efficient and appropriate avenue of enforcement in a wide range of cases.

The Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Bill 2024 (Bill) will ensure that Queensland can appropriately enforce the Commonwealth ban on the supply and possession of vaping goods, give effect to the Government Response to the Committee Report, and remedy deficiencies within Queensland's existing regulatory environment. This will ensure that Queensland can take strong and decisive action to regulate vaping and address the high levels of uptake of vaping among children and young adults.

To achieve these objectives, 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),

as well as products containing nicotine or another substance detrimental to health that have been 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 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;
- make other minor amendments to support enforcement:
  - 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.

### ***Waste Reduction and Recycling Act 2011 amendments***

One of the objects of the *Waste Reduction and Recycling Act 2011* is to minimise the overall impact of waste generation and disposal in Queensland. One approach to achieving this object is by prohibiting particular conduct in relation to waste.

Chapter 5 of the Waste Reduction and Recycling Act creates offences relating to littering and illegal dumping, with specific offence provisions for dangerous littering (section 103). *Dangerous littering* is defined at subsection (5) to mean depositing waste that causes or is likely to cause harm to a person, property or the environment and attracts a maximum penalty of 40 penalty units. Examples of dangerous littering include throwing a lit cigarette on to dry grass in extreme fire conditions and smashing a bottle and leaving broken glass on a footpath.

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. Additionally, litter audits conducted across more than 300 sites in Queensland indicate that between November 2022 (when vapes were added as a litter category) 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.

Littered vaping devices and vaping accessories are known environmental hazards as they contain toxic chemicals and heavy metals that can leach into the environment, entering waterways and soil. Many vaping devices are brightly coloured, making them potentially attractive to children, which creates a health and safety risk from possible leaking chemicals, heavy metals and battery electrolytes if picked up. Vaping devices also contain lithium-ion batteries and other electronic componentry that can cause fires.

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

## **Achievement of policy objectives**

### ***Regulating vaping goods and other nicotine products***

Queensland is continuing to see rapid growth in the illegal trade of tobacco, vaping goods and other novel nicotine and related products. 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 an average of 12 new stores opening every month in Queensland.

To ensure that TOSPA may be used to effectively enforce the Commonwealth ban on vaping products, both during implementation of the Commonwealth Bill and in the longer term as an

alternative enforcement option, and to remove the need for action to be taken under the Medicines and Poisons Act, the Bill inserts a new definition of ‘illicit nicotine product.’ This term is defined to mean vaping goods (that is, vaping devices, substances and accessories, as defined in the Commonwealth Bill), or another product containing nicotine or another substance detrimental to health that has been prescribed by regulation.

The Commonwealth definition of vaping goods is broad. For example, vaping device includes a device (whether or not filled with a vaping substance) that generates, releases or is designed or intended to generate or release, using a heating element and by electronic means, an aerosol, vapour or mist for direct inhalation by its user. Vaping substance means nicotine in solution in any concentration, or any liquid or other substance for use in, or with, a vaping device. This ensures that the enforcement framework applies to all vapes, irrespective of nicotine content or therapeutic claims, and includes, for example, a vape that is or is claimed to be nicotine-free.

The ability to prescribe products by regulation ensures that novel nicotine and related products can be captured within the prohibition as they arise, or their use becomes commonplace in Queensland. These products do not need to contain nicotine but can also contain a substance detrimental to health. This may capture, for example, nicotine pouches (a pouch usually containing synthetic nicotine and flavouring, which is placed under a person’s lip against their gum). The use of nicotine pouches is becoming widespread in Queensland, including by children and young adults.

### ***Remove definition of ‘personal vaporiser’***

Section 7 of TOSPA contains a definition of personal vaporiser which does not align with the Commonwealth definition of ‘vaping device’. The Bill removes the definition of ‘personal vaporiser’ and replicates the Commonwealth definition of vaping goods to avoid inconsistencies with the Commonwealth regime.

However, it is necessary to continue to retain the exceptions in section 7(2)(a)–(d) of TOSPA, to ensure:

- devices used for therapeutic reasons (other than smoking cessation or the management of nicotine dependence) are not captured within the definition of ‘vaping device’ - for example, devices used for the ‘vaping’ of medicinal cannabis to treat epilepsy;
- devices used for legitimate medical reasons to deliver oxygen into an individual’s body are not captured within the definition of ‘vaping device’;
- bongs, hookahs or ice pipes continue to be regulated under separate provisions, for example, section 158 of TOSPA; and
- flexibility in the ability to prescribe, by regulation, a device that is not a vaping device.

To achieve this, the Bill inserts the exceptions captured by section 7(2)(a)–(d) of TOSPA within the replicated Commonwealth definition of ‘vaping device’. These exceptions are intended to apply to products that are not vaping devices but share a design feature or component that makes them analogous to a vaping device.

Other examples of devices that are not ‘vaping devices’ include humidifiers, diffusers, nebulisers, and inhalers.

### ***Supply and possession of vaping products and other nicotine products***

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. For example, businesses supplying both smoking products and vaping goods (such as tobacco retailers and convenience stores), those supplying only vaping goods (vape specialist stores), and those supplying vaping goods and other products (for example, giftshops selling vaping goods but not smoking products) will be captured by this provision. The maximum penalty for non-compliance is two years imprisonment, or 2,000 penalty units.

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 connected – for example, a storage shed or vehicle. The broad use of ‘premises’ is intended to target suppliers and wholesalers who currently attempt to evade enforcement measures by keeping very small quantities of illicit products in the retail environment, while storing most of their stock at an off-site premises.

While authorised persons have a right to enter a store that is open to the public, or subject to a closure order or injunction, a warrant or consent will be required to enter a storage facility or vehicle. The maximum penalty for the possession offence is 12 months imprisonment, or 1,000 penalty units, or both.

New section 161A does not apply to a person who is an employee, or otherwise acting on behalf of another person – for example, an employee in a tobacco retail store, or a friend of the business owner working in the business without payment.

Profit margins for retailers of illicit tobacco and vaping goods are high, with seized point of sale data demonstrating around \$40,000 cash turn over per day in a single store. Current penalty levels are of little deterrence. Once implemented, the Commonwealth legislation will allow the imposition of higher penalties and jail terms. However, the process for prosecuting the Commonwealth offences will be complex and time-consuming and not appropriate for every offence.

The penalties provided in the Bill will allow for a tiered enforcement response, by introducing lesser (although still substantial) penalties for offending than the Commonwealth legislation. This will create an escalating enforcement framework which permits enforcement teams to select the most efficient and effective option and ensure a proportionate and timely enforcement response can be taken in relation to moderately serious supply or possession offences that may not meet the threshold for action under Commonwealth legislation.

Given the need to curb a large black-market in illicit nicotine products and to effectively deter non-compliance, particularly in light of the high profit margins associated with these products, these penalties are considered appropriate and proportionate to the proscribed conduct. The offences are intended to provide an effective deterrent to non-compliance, and to reflect the serious impact non-compliance has on public health.

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 has been lawfully supplied.

The first defence gives effect to the intention not to criminalise possession of illicit nicotine products for personal use and maintain legitimate patient access to nicotine products where clinically appropriate. This defence could easily be made out if the person could produce a valid prescription or written authority to possess the illicit nicotine product. 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. It is not intended for the Commonwealth Bill's definition of 'commercial quantity' to guide what is considered 'personal use' under TOSPA.

The second defence is aimed at protecting persons who may possess the product on behalf of someone who requires the product in connection with treatment for smoking cessation or the management of nicotine dependence, including carers or partners. Like the first defence, this defence could be made out if the person produces a prescription or written authority to possess the product.

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. Reversing the burden of proof is justified because of the public interest in the regulation of illicit nicotine products, noting the seriousness of the public health harms associated with vaping in Queensland. It would be significantly more difficult, costly, and burdensome for the prosecution in civil penalty proceedings, to prove these matters in their totality as an element of the offence or civil penalty provision rather than for the defendant to establish that the defence exists. The person seeking to rely on the exceptions will likely hold the evidence to substantiate the lawful status of the goods with respect to possession.

The Bill also provides that the supply and possession offences do not apply if the person would be entitled to an exception under the law of the Commonwealth relating to the possession or supply of the illicit nicotine product, other than if the exception related to personal use of the illicit nicotine product. These exceptions are outlined in the Commonwealth Bill and include, for example, if the person is a pharmacist, medical practitioner, or nurse practitioner who is the holder of a relevant licence and authorised to possess or supply the products. In these circumstances, the type of evidence that a person is likely to produce includes evidence of current registration as a pharmacist, medical practitioner, or nurse practitioner and, if applicable, their authorisation or licence. These are all matters that can be easily produced by a person if required and are matters within the person's knowledge. The personal use exception is deliberately excluded, as this is already appropriately captured by the Bill's personal use defences.

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.

### ***Supply or possession of illicit tobacco***

Section 161 of TOSPA regulates the supply and possession of illicit tobacco by a supplier. The Bill updates this provision to improve enforcement efforts and ensure consistency with new section 161A, which regulates the supply and possession of illicit nicotine products by a person as part of a business activity.

New section 161 clarifies that the provision will apply to a person, who as part of a business activity, supplies or possesses illicit tobacco. 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 tobacco to the public in some capacity. The amendments clarify that this offence does not apply to an employee, or person who is otherwise acting on behalf of another person – for example, an employee in a tobacco retail store or a family member of the business owner working in the store without payment.

The Bill provides that a person must not, as part of a business activity, supply illicit tobacco. The person must also not, as part of a business activity, store or otherwise be in possession of illicit tobacco at the premises where the business activity is conducted, or at another premises connected with the premises where the business activity is conducted. This ensures that the prohibition on commercial possession of illicit tobacco extends to locations other than the premises, where a person supplies smoking products – for example, a storage shed or vehicle.

It is a defence to a possession charge for a person to prove that the illicit tobacco is for personal use by the person or an employee of that person. However, the defence will not apply if the quantity of illicit tobacco is a commercial quantity. ‘Commercial quantity’ for illicit tobacco means more than the quantity prescribed by regulation.

The Bill also amends the definition of ‘illicit tobacco’, as the *Tobacco Plain Packaging Act 2011* (Cth) has been repealed and replaced by the *Public Health (Tobacco and Other Products) Act 2023* (Cth). Tobacco product requirements and health warning requirements are now prescribed by the Public Health (Tobacco and Other Products) Act.

### ***Increased penalties for illicit tobacco***

Illicit tobacco remains a significant problem nationally, with estimates that the illicit tobacco trade could be as high as 25 percent of the tobacco market.<sup>1</sup> As noted above, profit margins for retailers of illicit tobacco and vaping goods are high and the rate of growth in stores selling these products has been sustained since recent amendments and enforcement of section 161 of TOSPA. This indicates that the current penalties have limited deterrent effect.

Queensland Health enforcement officers have advised that to avoid regulation, higher risk retail owners reportedly employ a myriad of strategies to obstruct enforcement efforts. As a result, there are concerns that enforcement action is less effective against higher-risk retailers who

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<sup>1</sup> Norman, J. *Fake cigarettes, firebombs and a flourishing black market*, ABC News, 30 May 2024.

were most at fault, while being more effective penalising lower-risk retailers. In most cases, current penalties and seizures result in minimal disruption to trading for high-risk retailers. However, there are also reports of increasing non-compliance among previously lower risk retailers such as service station franchisees, who cite being undercut by other retailers' illicit sales as the driver.

The penalty for the commercial supply and possession of illicit tobacco will be aligned with the proposed penalties for the commercial supply and possession of illicit nicotine products – that is, a maximum of two years imprisonment, 2,000 penalty units, or both, for supply, and a maximum of 12 months imprisonment, 1,000 penalty units, or both, for commercial possession. It will remain a defence under section 161 for a person to prove that the illicit tobacco in their possession is for their personal use, or the personal use of their employee. As noted above, the defence is not available if the quantity of illicit tobacco is more than a commercial quantity. 'Commercial quantity' is defined in the *Tobacco and Other Smoking Products Regulation 2021* as 50 cigarettes, or 50 grams of another tobacco product.

Given the deliberate obstruction of enforcement efforts, exploitation of gaps in the enforcement framework by serious organised crime groups and the immense profits obtained from the retail of illicit tobacco, the proposed penalties are proportionate and appropriate for the proscribed conduct.

### ***Employee supply offence***

It is not currently an offence for a person other than a supplier to supply illicit tobacco. 'Supplier' is defined in schedule 1 of TOSPA as a person who, as part of a business activity, supplies smoking products to the public, but does not include a person who supplies smoking products to the public as an employee of another person.

Vaping goods are currently widely stocked by retailers that sell tobacco including tobacconists, convenience stores, and petrol stations, but are also available at other stores such as specialist e-cigarette/vape stores, and discount and gift stores. During enforcement efforts, Queensland Health Public Health Units have found that staff working in retail stores selling illicit products were clearly aware of the illegality of the operation they were in and, in most cases, were deliberately evasive, refusing to provide information or claiming that they have no idea who they are working for. This prevents enforcement action against the business for the illegal activity, and there is no current deterrent to effectively deal with this behaviour.

The Bill amends TOSPA to provide that it is an offence for a person acting as an employee of another person or otherwise acting on behalf of another person, to supply illicit tobacco or illicit nicotine products at a retail or wholesale outlet selling smoking products, or premises at which illicit nicotine products are available for sale by retail or wholesale (for example, a gift store that sells vapes but not smoking products, such as cigarettes). This offence is intended to apply to employees, as well as persons performing work at the business who may not have a legal employment relationship with the business owner (for example, volunteers such as friends or family members of the business owner working in the business without payment).

The maximum penalty for this offence is 140 penalty units. The offence does not apply to an employee of, or other person who supplies on behalf of a person who is authorised to do so under the Commonwealth laws – for example, a pharmacy assistant who is involved in a pharmacist's supply of a therapeutic vaping product pursuant to a prescription.

This amendment is intended to strengthen enforcement options by making all persons involved in the supply of illicit tobacco and illicit nicotine products accountable for their actions, deter non-compliance with prohibitions on supplying illicit products, and deter people from working in illegitimate businesses. Queensland Health intends to take an educative approach in the first instance in relation to this offence, focusing on informing and educating before moving to penalties.

### ***New offence for supplying illicit nicotine products to a child***

The Bill amends TOSPA to create a new offence for an adult to supply illicit nicotine products to a child. This offence is intended to apply to the supply of illicit nicotine products outside of a commercial or therapeutic setting – for example, supply to a child by an adult family member or friend. It does not apply to a person acting as an employee of, or otherwise on behalf of, another person, or to a person who supplies the illicit nicotine product as part of a business activity. These persons would be captured under new section 161A, 161B, or be entitled to claim a Commonwealth exception or defence under the Bill.

It is a defence to a charge for a defendant to prove that at the time of the offence, the defendant honestly and reasonably believed that the relevant person was an adult. This offence replicates section 82 of TOSPA, which applies to the supply of smoking products to children by an adult.

This offence is consistent with the main purpose of the Bill, which is to arrest and reverse the increasing uptake and use of recreational illicit nicotine products, especially among children, to protect them from the exposure and easy access to addictive and unsafe products. The maximum penalty for this offence is 140 penalty units.

### ***Closure powers***

TOSPA does not currently provide any power to order the closure of a business premises that has been found to supply illicit tobacco and illicit nicotine products, or an unlicensed business selling smoking products. While illicit tobacco can be seized and forfeited, this often does not provide sufficient deterrence. In many cases, suppliers, particularly those associated with organised crime groups, simply restock the relevant products (often almost instantly) and continue trading.

The Bill inserts new section 209A to provide that the chief executive may make an interim closure order that a stated premises be closed if the chief executive reasonably suspects illicit tobacco and illicit nicotine products are being supplied at the premises as part of a business activity, or is satisfied a business is being carried on at the premises in a way that involves a contravention of section 9B of the *Tobacco and Other Smoking Products Amendment Act 2023*, which will be renumbered as section 65 in TOSPA (selling smoking products without a licence). The interim closure order can be in place for up to 72 hours after the order was served on the person apparently in charge of the premises or posted in a conspicuous place.

New section 209B provides a Magistrate the power to order closure of such a business for a longer, stated period of not more than six months. The chief executive must serve the application on the owner of the premises, unless it is not reasonably practicable to do so. The order must also be served on the owner, unless it is not reasonably practicable to do so, and posted in a conspicuous place at the premises. A closure order issued under new section 209A

or new section 209B will apply to the entire premises. During the term of the closure order, any business operating at the premises must be closed.

The Bill inserts new section 209C, which makes it 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 force. The maximum penalty for non-compliance will be 200 penalty units. For a court-ordered closure, failure to comply with the closure order (for example, by reopening the premises and operating any business from the premises) may constitute contempt of court under the *Magistrates Court Act 1921* and be punishable by a maximum penalty of 200 penalty units or 3 years imprisonment. Persons continuing to possess or supply illicit tobacco or illicit nicotine products from the premises that is subject to a closure order is in force will commit an offence under new sections 161, 161A or 161B.

### ***Injunctive relief***

To ensure appropriate action can be taken against recidivist suppliers of illicit tobacco and illicit nicotine products, the Bill amends TOSPA to introduce the ability for the chief executive to apply to the District Court to grant an injunction in circumstances where a person has or is engaged in the supply of illicit tobacco and 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. The court may grant an injunction in the terms it considers appropriate, including restraining a person from carrying on a business involving the supply of smoking products or illicit nicotine products.

This will capture both licensed and unlicensed operators, but in practical terms, will be most effective in dealing with recidivist unlicensed operators who continue to offend, including those likely to quickly set up new stores after another has been closed. Enforcement of licensed operators will primarily occur through the licensing framework; however, the injunctive relief may be useful where there is continued non-compliance.

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. This will restrain those operators from continuing to trade in illicit tobacco or illicit nicotine products pending the outcome of proceedings under TOSPA, noting the harm that can result in intervening months.

### ***Displaying, advertising, or promoting illicit nicotine products***

The emergence of illicit nicotine products in recent years has increased efforts by retailers and manufacturers to find avenues to advertise and promote these products. Promotion and advertising of illicit nicotine products is primarily targeted at children and young adults and occurs across a range of media channels that have broad reach among children and young adults, including websites, social media, in print and in retail stores. They are promoted as less harmful, contained in attractive packaging, and supplied in an array of interesting flavours. Evidence suggests that exposure to these advertisements increases the likelihood that children and young adults will try illicit nicotine products. Direct exposure to promotional material relating to illicit nicotine products also contributes to decreased risk perceptions associated with these products.

Use of illicit nicotine products is significantly influenced by advertising (including online advertising), promotion and display. It is important that the public's exposure to the advertisement, promotion and display of illicit nicotine products, which poses a serious risk to public health, is limited to combat the sale and uptake of these products.

The Commonwealth Bill prohibits any advertising relating to vaping goods, unless an exception applies, or an authorisation is given by the Secretary of the Department of Health and Aged Care. The Commonwealth offences carry a maximum penalty of 5,000 penalty units, 7 years imprisonment, or both.

TOSPA currently imposes a number of requirements and offences that apply to the advertising, promotion and display of smoking products. However, illicit nicotine products are excluded from the definition of smoking products and not captured by these provisions. Further, as smoking products differ from illicit nicotine products, as they are legally sold, these provisions are not fit-for-purpose to regulate the display, advertisement, and promotion of illicit nicotine products.

The Bill therefore amends TOSPA to provide new offences for a person, who as part of a business activity, displays, advertises, or promotes illicit nicotine products. Each offence carries a maximum penalty of 140 penalty units. This new framework is designed to protect consumers from the advertisement of illicit nicotine products and is intended to apply to a broad range of media platforms, extending to social media and other forms of advertising, promotion and sponsorship.

The Bill provides that these offences do not apply if the act constituting the offence is authorised or permitted under the Commonwealth Therapeutic Goods Act. Authorised advertisements under that Act include if the Secretary of the Department of Health and Aged Care authorises advertising or specified representations on labels or packaging.

***Increased penalties for providing false or misleading information, failing to give information***

Under section 215 of TOSPA, if an authorised person reasonably believes an offence against TOSPA has been committed and a person may be able to give information about the offence, the authorised person may require the person to give information about the offence to the authorised person. It is an offence to fail to comply with this requirement. Under section 216, it is an offence to provide false or misleading information to an authorised person. The penalty under both provisions is a maximum of 50 penalty units.

Queensland Health Public Health Units advise that staff working in premises selling illicit tobacco and vaping products routinely claim to have only just commenced working, or that they are temporarily volunteering, and do not know their employer or who they are helping, how to contact them or the details about any persons, processes or suppliers connected with the business.

To provide further deterrence against this behaviour, and enable prosecutions against wilfully non-compliant suppliers, the Bill increases the penalties for these offences from a maximum of 50 penalty units to a maximum of 100 penalty units.

### ***Executive liability provisions***

There are currently no executive liability provisions within TOSPA. There are significant public health implications stemming from the commercial supply of illicit tobacco and illicit nicotine products. Attaching liability to a corporate supplier or wholesaler is not likely on its own to sufficiently promote compliance and have the desired deterrence effect. Anecdotally, non-compliant suppliers frequently act to obscure the responsible entities for offences in various ways, including through establishing complex business structures or changing corporate entities.

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. These officers should be made accountable for the actions of their company where they are in a position to influence the corporation and are aware of breaches by the company of TOSPA but fail to take reasonable action to prevent the breaches.

The Bill amends TOSPA to provide that an executive officer of a corporation can be taken to have committed certain deemed executive liability provision offences committed by the corporation. This will include the offences of supplying or possessing illicit tobacco (section 161), supplying or possessing illicit nicotine products (new section 161A), supplying smoking products to children (section 66), failing to ensure employees do not supply smoking products to children (section 67) and unlicensed supply of smoking products (section 9B of the *Tobacco and Other Smoking Products Amendment Act 2023*, which will be renumbered as section 65 in TOSPA).

It is appropriate to extend executive liability to these offences, as there is significant public harm caused by corporate offending as a result of the supply and possession of illicit nicotine products and illicit tobacco, the unlicensed supply of smoking products, and the supply of smoking products to children.

### ***Additional circumstances where authorised person may enter a place***

Section 181(1) of TOSPA empowers an authorised person to enter a place with consent or pursuant to a warrant. Section 181(2) further provides that 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.

Following entry, TOSPA empowers the authorised person to seize anything they reasonably believe is evidence of an offence against TOSPA or is otherwise covered by the terms of the consent or warrant.

The Bill amends section 181(2) to clarify that an authorised person may also enter a place without the occupier’s consent or a warrant if the place is:

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

- a premises for which an injunction is in effect under new division 4B.

This amendment is consequential to other amendments contained in the Bill, such as regulating illicit nicotine products, introduction of closure order powers, and authorising the District Court to grant an injunction restraining a person from supplying illicit tobacco or illicit nicotine products.

Allowing authorised persons to enter a place without the occupier's consent or warrant in the circumstances outlined is justified, as the primary purpose of the Bill is to improve enforcement efforts to limit the supply of illicit nicotine products to consumers. To ensure effective monitoring and enforcement activities and enable immediate removal of illicit tobacco and illicit nicotine products from the marketplace, extending the existing powers in the above circumstances is necessary.

### ***Minor and technical amendments***

#### Long title and object of TOSPA

The Bill amends the long title and sections 3 and 4 of TOSPA to incorporate illicit nicotine products into the long title and object of the Act. This will ensure that illicit nicotine products are included in the underlying purpose of TOSPA, and can be used to resolve uncertainty or ambiguity, including assisting the courts and others in the interpretation of the legislation.

#### References to 'smoking product'

Illicit nicotine products are not captured within the definition of smoking product. However, there are numerous provisions in TOSPA that regulate smoking products that should also capture illicit nicotine products. The Bill therefore amends sections 40, 46, 88, 119, 192, 193, and 233 of TOSPA to also refer to 'illicit nicotine products'.

By way of example, the Bill amends section 40(1)(e) of TOSPA to clarify that whether or not the person has contravened a 'corresponding law' (defined to be a law of the Commonwealth or a state that regulates or prohibits the supply of smoking products, substances used in smoking products or illicit nicotine products), is a factor that the chief executive may have regard to when deciding whether the person is a fit and proper person to be a licensee.

#### Forfeiture of ice pipes and bongs

The Bill amends TOSPA to provide that ice pipes and bongs, if seized, may be forfeited. This is correcting a current legislative deficiency which requires seized ice pipes and bongs to be returned to their owner, notwithstanding they are prohibited items under part 9 of TOSPA.

This amendment will empower the chief executive to decide, following a show cause process, to forfeit those products. The forfeiture of seized ice pipes and bongs prevents them from being used to commit further offences, as the ice pipe or bong would not be in the possession of the supplier, and also removes potentially harmful tools from the marketplace. A supplier can appeal a forfeiture decision to a Magistrates Court and the court may either confirm the original decision, substitute another decision for the original decision or set aside the original decision and return the matter to the chief executive with directions.

The public health risk associated with smoking dangerous drugs, such as methamphetamine, is well established. Increasing regulatory controls by introducing a forfeiture power aims to reduce this public health risk.

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

#### Returning seized goods within 12 months

The Bill amends the current requirement within 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, to provide a 12 month period instead of six month period.

Under section 52 of the *Justices Act 1886* (Justices Act), 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 commenced. Seized goods must be retained as evidence if a prosecution is intended.

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.

#### Clarifying police officer powers

The Bill amends section 170(7) of TOSPA to clarify that for enforcing an illicit nicotine product provision under sections 161, 161A and 161B, police officers may exercise all the powers of an authorised person under TOSPA. This includes powers of entry and search of premises, making enquires and seizure of evidence. Taking prosecutions under TOSPA will remain the responsibility of Queensland Health.

#### Meaning of ‘proceeding’ under TOSPA

Where a police officer exercises a power under TOSPA as an authorised person, only the chief executive of Queensland Health may commence a proceeding arising from that exercise of power. Bringing a prosecution is a very time and resource intensive activity. Making Queensland Health responsible for prosecuting offences under TOSPA was intended to ensure police officers were not diverted from their usual duties, including to protect the community from serious crime.

To remove any doubt about the intent of this provision, the Bill amends TOSPA to clarify that a ‘proceeding’ only means actual prosecution action for an offence. The Bill also clarifies that section 234 does not prevent a police officer performing a function under section 170(7). This will ensure police officers may still exercise all other powers of an authorised person under TOSPA, including powers of entry and search of premises, making enquiries and the seizure of evidence.

### New and updated definitions

The Bill amends TOSPA to insert new definitions for ‘corresponding law’, ‘health warning requirement’, ‘illicit nicotine product’ and ‘tobacco product requirement’. It also inserts updated definitions for ‘illicit tobacco’ and ‘smoke’. These definitions are consequential to the amendments contained in the Bill, as outlined above.

### ***Waste Reduction and Recycling Act amendments***

Section 103 of the Waste Reduction and Recycling Act provides general littering provisions. The Bill amends section 103 to provide that depositing waste that is a vaping device or vaping accessory is taken to be dangerous littering. ‘Vaping device’ and ‘vaping accessory’ are defined under new section 7 of TOSPA, inserted by the Bill. This removes any doubt as to the intent of the application of a dangerous littering offence as it applies to depositing a vaping device or vaping accessory.

## **Alternative ways of achieving policy objectives**

The supply of recreational vaping goods containing nicotine is currently illegal under the Medicines and Poisons Act. However, deficiencies within the existing regulatory framework mean that the existing policy cannot be properly enforced. Immediate action is required to strengthen the enforcement framework to implement the existing policy.

Additionally, the Queensland Government has committed to supporting the Commonwealth ban on vaping. The amendments must be progressed with urgency to ensure Queensland enforcement officers can effectively enforce the Commonwealth vaping ban as soon as possible after commencement.

Queensland Health has considered four regulatory options to address Queensland’s vaping problem:

1. status quo;
2. regulate illicit nicotine products under a consumer model;
3. expand state-level enforcement under TOSPA to complement Commonwealth reforms; and
4. replicate the proposed Commonwealth offences and penalties under state law.

The Bill implements the third regulatory option because it will ensure Queensland can appropriately enforce the Commonwealth ban on the supply and possession of vaping goods while also remedying deficiencies in Queensland’s existing regulatory environment and enabling effective enforcement of restrictions on illicit nicotine products and illicit tobacco under TOSPA. The Bill achieves this by creating stand-alone offences relating to illicit nicotine products, increasing penalties relating to illicit tobacco, and creating powers to order closure of a business selling illicit nicotine products or illicit tobacco and for the District Court to grant an injunction restraining a person from selling these products.

The Commonwealth legislation will allow the imposition of higher penalties and jail terms for the supply and commercial possession of vaping goods, which are expected to have a strong deterrent effect. However, the process for prosecuting the Commonwealth offences will be

complex, time-consuming and costly, and therefore will not provide a realistic avenue of enforcement for all but the most serious cases involving high-value targets. The Bill will allow for a tiered enforcement response, by introducing lesser (but still significant) penalties for offending than the Commonwealth legislation. This will create an escalating enforcement framework that permits enforcement teams to select the most efficient and effective option and ensure a proportionate and timely enforcement response can be taken in relation to moderately serious supply offences that may not meet the threshold for action under Commonwealth legislation.

Option one would rely on powers currently contained in TOSPA and the Medicines and Poisons Act. These powers are not adequate for dealing with retail outlets selling both tobacco and vaping products as:

- inspectors are unable to use TOSPA and Medicines and Poisons Act powers concurrently, requiring additional officers for each inspection;
- suspected nicotine products must be tested before action can be taken under the Medicines and Poisons Act;
- TOSPA does not currently fully capture vaping products (it only prevents their advertising, display and sale to minors); and
- there are a lack of enforcement options under TOSPA and the Medicines and Poisons Act to address wilful or ongoing non-compliance.

This option fails to address the present problem concerning vaping products and to deliver on the policy objectives of regulating vaping products. This option would limit the ability to enforce the Commonwealth ban on vaping and will be insufficient to deal with moderate-to-serious offending where Commonwealth enforcement powers may take too long or be too resource intensive. As such, it will not directly address the uptake of vaping products, succeed in preventing nicotine addiction, allow for effective regulation of novel nicotine products, or reduce the risk of future tobacco use. The avoidance of additional regulatory burden is not a reasonable basis for supporting the status quo where it is failing to address the objectives of government action and failing to protect public health.

Option two would target nicotine and smoking addiction through public health campaigns and quit services by making a range of illicit nicotine products readily available for smoking cessation. Even though illicit nicotine products would be widely available, education campaigns about the risks and appropriate use of illicit nicotine products, and quit services, could potentially reduce, to a limited extent, the non-therapeutic use of these products and consequent risks of nicotine addiction and smoking uptake. They would also provide adults with information about how to effectively use vaping products for smoking cessation. This option is not available due to the introduction of Commonwealth legislation banning the supply and possession of vaping products. This option would also fail to address fundamental gaps in Queensland's ability to enforce existing restrictions on the supply of vaping products, including the widespread unlawful supply of nicotine vaping products, particularly to children and adolescents.

Option four would enable robust criminal enforcement under TOSPA with civil and criminal penalties aligning with those introduced under the Commonwealth laws. This would allow serious offences to be dealt with under TOSPA instead of Commonwealth laws. However, the Commonwealth offences relating to the importation, domestic manufacture, supply, commercial possession and advertisement of illicit nicotine products are significant – for

example, a person who supplies vaping goods in Australia faces seven years' imprisonment, 5,000 penalty units (currently \$1,565,000) or both. Aligning the penalties under TOSPA with Commonwealth penalties would not allow for a tiered enforcement framework which permits enforcement teams to select the most efficient and effective option depending on the level of offending, which is facilitated by the preferred option. Also, merely replicating the proposed Commonwealth offences would not address the need for additional investigatory tools, enforcement powers and judicial remedies at the state level to overcome deficiencies in Queensland's current enforcement framework that are preventing effective action to shut down unlawful suppliers and curb the rapidly growing trade in illicit nicotine products.

### ***Waste Reduction and Recycling Act amendments***

An alternative to deeming the deposit of a vaping device or vaping accessory to be dangerous littering would be to provide clarifying information under the existing provisions that, similar to a lit cigarette butt or a syringe in a public place, depositing a vaping device or vaping accessory would be considered dangerous littering.

However, this would still link to the circumstances where depositing the waste was likely to cause harm to a person, property or the environment, in order to be considered to be dangerous littering, placing the onus on the prosecution to prove this.

Littered vaping devices and vaping accessories are known environmental hazards as they contain toxic chemicals and heavy metals that can leach into the environment, entering waterways and soil. Many vaping devices are brightly coloured, making them potentially attractive to children, which creates a health and safety risk from possible leaking chemicals, heavy metals and battery electrolytes if picked up. Vaping devices also contain lithium-ion batteries and other electronic componentry that can cause fires.

Raising awareness among vape users of the hazards of inappropriate management of vaping devices and vaping accessories is important; however strong, unambiguous offences are also necessary to support awareness and behaviour change messaging.

Considering the known risks associated with inappropriate management of vaping devices relying on raising awareness alone is not considered to be an appropriate option that will support delivery of the objects of the Waste Reduction and Recycling Act.

## **Estimated cost for government implementation**

Queensland Health will incur costs in implementing the amendments proposed in the Bill, including new signage and education campaigns for both industry and the community. Ongoing monitoring and enforcement activities will also be required to ensure compliance with the proposed new restrictions and prohibitions.

Queensland Health has committed funding of \$2.75 million in 2023-24, \$6.77 million in 2024-25, \$6.37 million in 2025-26, and \$6.21 million recurrently for additional smoking product legislative enforcement and nicotine dependence services. The Bill will make better use of that investment through streamlining enforcement efforts.

### ***Waste Reduction and Recycling Act amendments***

The Department of Environment, Science and Innovation will not incur additional costs as a result of the amendments proposed in the Bill as the littering – and potentially dangerous littering – offence currently exists.

The amendments will potentially help streamline enforcement action concerning vaping device and vaping accessory litter activities as they make it explicit that depositing a vape is dangerous littering, without needing to prove that depositing the waste causes or is likely to cause harm to a person, property or the environment.

Information concerning the environmental and safety risks associated with the inappropriate management of vaping devices and vaping accessories will be provided on the Department of Environment, Science and Innovation's website.

## **Consistency with fundamental legislative principles**

The Bill is generally consistent with fundamental legislative principles in the *Legislative Standards Act 1992*. However, several clauses may impact on particular principles. The potential departures from fundamental legislative principles are discussed below and are considered justified to support improving the health of Queenslanders by reducing exposure to illicit tobacco and illicit nicotine products. All potential departures have been carefully considered and wherever possible, the impact of the potential departures have been minimised.

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

#### **Offence Provisions**

The list of examples in the Legislative Standards Act is not exhaustive of the issues relevant to deciding whether legislation has sufficient regard to the rights and liberties of individuals. Although not specifically enumerated in the Legislative Standards Act, for legislation to have sufficient regard to the rights and liberties of individuals, the consequences imposed by legislation should be proportionate and relevant to the actions to which they are applied. Legislation should maximise the reasonableness, appropriateness and proportionality of the legislative provisions to give effect to policy.

#### **New offences**

The Bill will introduce the following new offences:

- new section 109A - offence for a person, as part of a business activity, to display, advertise or promote an illicit nicotine product, which will have a maximum penalty of 140 penalty units;
- new section 161A - offence for a person, as part of a business activity, to supply an illicit nicotine product, which will have a maximum penalty of 2,000 penalty units, 2 years imprisonment, or both;

- new section 161A - offence for a person, as part of a business activity, to possess an illicit nicotine product, which will have a maximum penalty of 1,000 penalty units, 1 year's imprisonment, or both;
- new section 161B - offence for an employee or person acting on behalf of another person to supply an illicit tobacco or an illicit nicotine product in a commercial environment, which will have a maximum penalty of 140 penalty units;
- new section 161C - offence for an adult outside of a commercial environment to supply an illicit nicotine product to a child, which will have a maximum penalty of 140 penalty units;
- new section 209C - offence to supply smoking products or work in a business involving the supply of smoking products at a premises while a closure order is in force, which will have a maximum penalty of 200 penalty units; and
- new section 230A - executive liability offences to ensure executive officers of corporations are deemed liable for certain offences committed by the corporation, which will have a maximum penalty of that for a contravention of the relevant executive liability provision by an individual.

The purpose of prohibiting the supply and possession of illicit nicotine products is to protect the public from the harmful effects of these products. This includes protecting the health of adults and young adults 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.

The purpose of new sections 161B and 161C is to ensure liability for all individuals involved in the supply of illicit nicotine products, such as employees or adults other than those supplying commercially. Under the current provisions in TOSPA, liability attaches only to the 'supplier' of illicit tobacco, which does not include an employee or another adult involved in supply. As such, there is currently no personal liability for individuals, other than a supplier, that engage in the supply of illicit tobacco. The new offences are intended to address this gap and provide a strong disincentive for people to work in these businesses. Similarly, the proposed executive liability offences are targeted at unscrupulous operators who often hide behind the 'corporation' upon coming to the attention of authorities, avoiding liability and continuing operations under a new corporation.

The introduction of closure order power in new sections 209A and 209B is intended to ensure that non-compliant retailers cannot continue trading at the premises while a closure order is in force. The new offence for carrying on the supply of smoking products or working at a premises while a closure order is in force in new section 209C is intended to discourage breaches of a closure order. 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.

The ongoing supply of vaping products, and their use, particularly by children and young adults, is a serious public health issue. The new offences proposed by the Bill are aimed at stopping the supply of illicit tobacco and illicit nicotine products in Queensland and are proportionate and relevant to achieve this purpose. The new offences address the seriousness of this increasing public health issue.

### **Penalties of appropriate nature**

As a subset of the consequences imposed by legislation having to be proportionate and relevant, penalties provided under a provision of an Act that state that a person committing an offence must do or refrain from doing an act must have a reasonable connection to the type and severity of the breach; that is, penalties must be of an appropriate nature.

### **Increased penalties**

The Bill will increase penalties for current offences under TOSPA:

- Section 161 – supply and possession of illicit tobacco  
Supply: Increase from a maximum of 300 penalty units to a maximum of 2,000 penalty units, 24 months' imprisonment, or both.  
Possession: Increase from a maximum of 140 penalty units to a maximum of 1,000 penalty units, 12 months' imprisonment, or both.
- Sections 215 and 216 – providing false or misleading information and failing to provide information.  
Increase from a maximum of 50 penalty units to a maximum of 100 penalty units.

### ***Supply and possession of illicit tobacco***

Queensland has continued to see growth in the illegal trade of tobacco and vapes. The penalties currently set out in section 161 of TOSPA are not proportionate to the risk and public health consequences of illicit tobacco. 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. 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.

The increased penalties are aimed at deterring illegal activity which is often conducted by organised criminal businesses that turn over substantial profits per day. The new offence provisions are greater in seriousness, and as such, it is necessary to increase penalties to ensure that they act as a strong disincentive to contravene these laws, and to ensure consistency.

Reduced access is directly linked with reduced usage. As such, penalties and terms of imprisonment achieve the purpose of the Bill not only through deterring non-compliance, but also by potentially removing key operators from the marketplace. This will reduce the number of suppliers supplying illicit tobacco and address the current ease of access to illicit tobacco.

### ***Providing false or misleading information***

It has been reported that staff working in smoking and vape businesses often feign ignorance, claiming that they are either new or temporary employees and accordingly, do not know their employer or how to contact them. However, Queensland Health Public Health Units have found that these staff were clearly aware of the illegality of the operation they were employed at and were deliberately evasive and misleading in providing information.

The increase in penalties for non-compliance with a notice to provide information or providing false or misleading information to an authorised person is to incentivise the provision of accurate information and to strengthen the ability of enforcers to successfully prosecute the supply offences. The increase in penalties is appropriate and proportionate to the proscribed conduct.

### *Injunctions*

The Bill will give the District Court the power to grant an injunction (in terms the Court sees fit) restraining a person from supplying illicit tobacco or illicit nicotine products if:

- the person has engaged, or is engaging, or is proposing to engage in the supply of illicit tobacco or illicit nicotine products;
- whether or not it appears to the court that the person intends to engage again, or to continue to engage, in the conduct; and
- whether or not the person has previously engaged in the conduct.

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.

The power to order an injunction will be a last resort tool to deal with continued non-compliance. It will restrain relevant operators from continuing to trade in illicit tobacco and illicit nicotine products pending the outcome of proceedings under TOSPA, noting the actions that may still be undertaken by operators in the months before proceedings are determined.

This injunction penalty is of an appropriate nature as a last resort tool because operators who will be restricted from doing an act will have shown a history of non-compliance. Further, for an injunction to be granted by the District Court, the severity of an operator's breach would be significant. This measure is therefore proportionate and relevant when considering the risks that the supply of illicit tobacco and illicit nicotine products pose, particularly by recidivist offenders who often have links to serious and organised crime.

### *Closure orders*

As above, the introduction of closure order power in new sections 209A and 209B is intended to ensure that non-compliant retailers cannot continue trading at premises while a closure order is in force. Closure orders may be interim or long-term, and aim to reduce the sale of illicit tobacco and illicit nicotine products at premises.

Closure order powers are appropriate and justified as a chief executive (for interim closure premises) or Magistrate (for long term closure orders) may order that a premises be closed only if:

- satisfied that there has been, or is likely to be, the supply of illicit tobacco or illicit nicotine products at the premises; or
- a business is being carried on at the premises in a way that involves a contravention of section 65 (supply of smoking products without a licence).

These provisions are directly connected to regulating businesses who are contravening provisions of TOSPA, and are therefore appropriate.

**Restrictions on ordinary activities must be justified**

Although not specifically enumerated in the Legislative Standards Act, legislation should not, without sufficient justification, unduly restrict ordinary activities.<sup>2</sup> An activity should be lawful unless, for a sufficient reason, it is declared unlawful by an appropriate authority. This includes unduly interfering in a person's conduct of business.

The Bill:

- inserts a definition for 'illicit nicotine products', which includes vaping goods and other nicotine-related products, or substances detrimental to health, and prohibits the supply and possession of these products;
- prohibits the advertising, display and promotion of illicit nicotine products;
- authorises the chief executive to order the interim closure of a premises if the chief executive reasonably suspects a business at the premises is supplying illicit tobacco or illicit nicotine products, or if satisfied that the business is operating unlicensed, with the ability for the Magistrates Court (on application by the chief executive) to extend the period of closure to a maximum period of six months; and
- authorises the District Court to grant an injunction restraining a person from supplying illicit tobacco or illicit nicotine products in specific circumstances.

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.

**Supply and possession of illicit nicotine products**

Currently, it is an offence under section 161 of TOSPA to possess or supply illicit tobacco. The Bill will expand this, by inserting new section 161A, making it an offence to possess or supply illicit nicotine products, which includes vaping products and products containing nicotine or another substance detrimental to health prescribed by regulation. 'Other products' may include novel and unanticipated smoking, tobacco and nicotine products requiring a public health response under TOSPA (for example, nicotine pouches, which are becoming more widespread in Queensland).

Restricting a person's ability to supply and possess illicit nicotine products is justified, as the amendments will ensure TOSPA provisions may be used to effectively enforce the new ban on vaping products, both during implementation of the Commonwealth Bill and in the longer term as an alternative enforcement option. These restrictions are appropriate 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.

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<sup>2</sup> See, e.g., *Fundamental Legislative Principles, The OQPC Notebook*, p. 118-120 (updated Jan 2008).

### Advertising, display and promotion of illicit nicotine products

Vaping goods are widely marketed, available and accessible to children and young adults in Australia, and many products have a low purchase price and are very easy to obtain, compared to other tobacco products. Marketing of vaping goods intentionally targets children and young adults through promotional activities and product features. Vaping goods are aggressively promoted by the vaping industry in online advertising and other youth-focused media channels. Advertising spending is often focused on social media promotion, allowing for lower costs and wider reach, particularly to children and young adults. Colours and flavours further contribute to the appeal of vaping goods and their uptake among children and young adults – for example, flavours of vaping liquid easily accessible online include “cola bottle candy”, “strawberry shortcake” and “grape bubble-gum”.

The restrictions on the advertising, display and promotion of illicit nicotine products are appropriate and justified as they will promote 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.

An international study<sup>3</sup> of more than 4,000 people aged 15-30 showed that the most common physical settings where the Australian respondents saw advertising relating to vaping goods were vape shops, tobacco retailers and general retailers like supermarkets, corner shops and petrol stations. Social media is also playing an increasing role for advertising, with many respondents having 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.<sup>4</sup>

The purpose of the new offences is to protect public health by preventing persons from advertising and promoting illicit products with the aim of increasing their use in the community, particularly for children and young adults. The restriction is limited to a person who as part of a business activity advertises, displays or promotes illicit nicotine products. Given the importance of the purpose of the restriction, the new offences are justifiable.

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<sup>3</sup> 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*.

<sup>4</sup> VicHealth, *How vaping advertisers target young people*, 2023. [www.vichealth.vic.gov.au/news-publications/research-publications/how-vaping-advertisers-target-young-people](http://www.vichealth.vic.gov.au/news-publications/research-publications/how-vaping-advertisers-target-young-people)

### Closure powers

The Bill will authorise the chief executive to order the closure of a premises if the chief executive reasonably suspects supply illicit tobacco or illicit nicotine products are being supplied at the premises as part of a business activity, of the chief executive is satisfied that a business is being carried on at the premises that involves a contravention of section 65 of TOSPA. The purpose of these provisions is to protect public health by ensuring that illicit tobacco and illicit nicotine products are not being supplied to the public in contravention of TOSPA and the Commonwealth Bill. The restriction is justified and necessary to achieve the desired objective of stopping the supply of illicit tobacco and illicit nicotine products in Queensland.

If the Magistrates Court issues a closure order, the closure order will apply to the premises and prohibit persons from carrying out a business activity at the premises. If this premises is owned by a landlord, this may restrict a landlord's ability to lease the property to another tenant or generate income from the premises while the closure order is in force. This may occur, for example, if the illicit nicotine product retailer ceases to pay rent and the landlord terminates the lease. However, the Bill provides safeguards for landlords by requiring the chief executive to give a copy of the application for the long-term closure order to the premise owner, if reasonably practicable.

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 a person will have been taken, including the issuing of warnings. The restrictions are therefore justified and necessary to prevent recalcitrant non-compliant traders from supplying illicit products.

### Injunction powers

The powers of the District Court to order an injunction are 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 new provisions) 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 includes 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 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 the intervening months.

The amendment is proportionate to public health risks that the supply of illicit tobacco and illicit nicotine products pose, particularly by recidivist offenders who often have links to serious and organised crime.

### **Reversing evidential onus**

#### **Defences**

For legislation to have sufficient regards to the rights and liberties of individuals it must not reverse the onus of proof in criminal proceedings without adequate justification (section 4(3)(d) of the Legislative Standards Act). For civil penalties, the reversal of the onus is often considered reasonable and appropriate in circumstances where the conduct poses danger to the health and safety of the public, and where the matters required for proof are within the person's knowledge and easily adduced, if required.

The Bill provides that 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; or
- possessed behalf of another person for whom the product has been lawfully supplied.

These defences give effect to the intention not to 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 factors which will determine whether a defence is available, such as whether the possession is in a retail setting and the quantity of products held.

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. It would be significantly more difficult, costly, and burdensome for the prosecution in civil penalty proceedings, to prove these matters in their totality as an element of the offence or civil penalty provision rather than for the defendant to establish that the defence exists. The person seeking to rely on the defence provisions will likely hold the necessary evidence to substantiate the lawful status of the goods with respect to possession (for example, a prescription authorising a person to possess a vaping product for therapeutic purposes).

Reversing the onus of proof is justified because of the public interest in the regulation of illicit nicotine products, noting the seriousness of the public health harms associated with vaping in Queensland.

### **Entry, search and seizure powers**

Section 4(3)(e) of the Legislative Standards Act provides that legislation will have sufficient regard to rights and liberties of individuals if the powers to enter a premises, and search and seize documents or property are conferred by a warrant issued by a judge or other judicial officer.

The entry, search and seizure powers under TOSPA currently provide for an authorised person to enter a place if the entry is authorised by a warrant, the place is open for business, or consent has been given. The Bill extends these powers to illicit nicotine products. To ensure effective monitoring and enforcement activities and enable immediate removal of illicit tobacco and illicit nicotine products from the marketplace, extending the existing powers of authorised

persons is considered necessary and justified and consistent with fundamental legislative principles.

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. The prohibition does not currently extend to other premises, such as storage sheds and vehicles associated with the relevant supply outlet. The Bill expands this by providing that a person must not store or possess illicit tobacco (amended section 161) or illicit nicotine products (new section 161A) at the premises where the business activity is conducted, or at another premises, such as a storage shed or vehicle, connected with the premises where the business activity is conducted.

The Bill will also amend section 181 to clarify that authorised persons have the powers to enter a premises while a closure order issued by the chief executive or a Magistrate is in force. This will ensure authorised persons may enter a place without the occupier's consent or a warrant if a closure order is in place, for example, to seize illicit tobacco or illicit nicotine products.

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 possession offence, and frequently restocking the retail premises. This results in suppliers not being able to be prosecuted for the supply or possession offences, notwithstanding that commercial quantities are held nearby and made available for supply.

Regulating illicit nicotine products and expanding what is captured as 'the business premises' achieves the purpose of protecting public health by addressing persons circumventing prosecution, and ensuring that the possession offence applies 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, subsequently reducing access and use, and promoting public health.

The limitation on the rights and liberties of individuals 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 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.

### **Natural justice**

Section 4(3)(b) of the Legislative Standards Act states that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation is consistent with the three principles of natural justice, which require:

- that something should not be done to a person that will deprive the person of some right, interest or legitimate expectation;
- the decision-maker must be unbiased;
- procedural fairness.

#### Forfeiture of ice pipes and bongs and illicit nicotine products

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.

Forfeiture is justified, as if the ice pipe or bong was returned, it may be used to facilitate the commission of another offence as the ice pipe and bong would be in the possession of the supplier. Therefore, forfeiture is considered necessary to prevent repeat offences. Further, the seized items may be potentially harmful as the sale, supply and display of ice pipes or bongs may feed a perception that smoking dangerous drugs is an acceptable and regular activity in Queensland.

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.

Authorised persons need clear, strong and decisive powers to ensure ice pipes and bong are forfeited, so they may be 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 is inefficient and requires 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 judicial review.

Under the proposed provision, the owner of the seized product will be issued a show cause notice, giving them 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 owner a clear decision and reasoning, which may be used in any subsequent judicial review process. An owner 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.

The proposed provision is identical to the forfeiture power in section 205 of TOSPA, which relates to the forfeiture of illicit tobacco. The Bill will extend the forfeiture of illicit tobacco under section 205 to 'illicit nicotine products'. Similar to the justification above, these powers are necessary to ensure that things which are unlawful to supply are not made available for further offences and may be dealt with appropriately.

### Retaining a seized item that is not subject to forfeiture

The Bill amends 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, 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 means 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 commenced. Seized goods must be retained as evidence if a prosecution is intended. The six month requirement is proposed to be replaced with a requirement to return seized goods (that are not subject to forfeiture) within 12 months.

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 improving enforcement of the offences under TOSPA 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. Improved enforcement is intended to deter non-compliance, which will reduce access and ultimately reduce use of illicit products.

TOSPA also includes safeguards in relation to these 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 need to be returned to the owner.

### Executive liability provisions

Section 4(3)(b) of the Legislative Standards Act also deals with procedural fairness. Procedural fairness involves a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case. The usual requirements of natural justice may be reduced by circumstances of urgency.

The Bill may limit an individual's right to procedural fairness 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.

The purpose of creating executive liability offences is to protect 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 regularly change corporate structures and business arrangements to avoid prosecution and continue trading.

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 on procedural fairness is justified to protect 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 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. Further, 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.

### **Exercise of administrative power**

#### **Closure powers**

Section 4(3)(a) of the Legislative Standards Act refers to legislation which makes liberties or obligations dependent on administrative power. It provides that such legislation may have regard to rights and liberties of individuals if the administrative power is sufficiently defined and subject to appropriate review.

The purpose of granting the chief executive the above-mentioned power is to ensure rapid closure of premises that are conducting illicit business operations. The power and circumstances of exercising the power are clearly set out (being that 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). Further, the power is interim in nature, lasting a maximum of 72 hours.

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

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

#### **Delegation of Legislative powers**

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

The Bill provides that the definition of ‘illicit nicotine products’ will include a reference to another product containing nicotine or another substance detrimental to health prescribed by regulation for this definition.

It is considered preferable to delegate matters that are administrative in nature or subject to frequent change to subordinate legislation. Matters such as inclusion of new products to be captured by a definition is considered administrative in nature and subject to rapid change depending on new products on the market. It is considered appropriate and necessary to

delegate this legislative power to regulations to ensure that new and harmful products that come into the market can be rapidly captured within the prohibition.

### ***Waste Reduction and Recycling Act amendments***

The amendment to introduce a specific offence that deems the deposit of a vaping device or vaping accessory as dangerous littering may impact section 4(3)(b) of the Legislative Standards Act. This section states that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation is consistent with the three principles of natural justice, which require:

- that something should not be done to a person that will deprive the person of some right, interest or legitimate expectation;
- the decision-maker must be unbiased;
- procedural fairness.

It could be argued that expressly deeming the deposit of a vaping device or vaping accessory to be dangerous littering without consideration of the relative impact on property, people or the environment is not providing sufficient natural justice in relation to the offence.

However, the known environmental and safety risks associated with the inappropriate management of a singular vape make it appropriate to decouple the depositing of a vaping device or vaping accessory from the likelihood of causing harm to a person, property or the environment.

The associated maximum penalty of 40 penalty units for the offence of dangerous littering is commensurate with the level of risk associated with the action of depositing a vaping device or vaping accessory.

## **Consultation**

Queensland Health conducted consultation with external stakeholders in April and May 2024 on proposed amendments to be included in the Bill. Targeted external consultation was undertaken with key stakeholder groups, including Aboriginal and Torres Strait Islander organisations, retail associations, liquor licensed venue associations, health professional associations and peak bodies, public health organisations, the education sector, unions, and community sector organisations.

Overall, stakeholders were supportive, and welcomed action from the Queensland government to address the supply of illicit tobacco and illicit nicotine products in Queensland. The proposed amendments were seen as important for addressing existing enforcement limitations in TOSPA and bringing penalties to a more appropriate level, and are expected to provide greater deterrence.

Representatives of retail suppliers supported the proposals in the consultation materials, noting that they are critical to combatting the illicit nicotine product market in Queensland. The measures are welcomed as timely and positive initiatives that strengthen recent efforts of the Queensland Government to combat the scourge of illicit nicotine products.

Public health groups broadly supported and commended the strengthening action on the issue of illicit tobacco and illicit nicotine product supply in Queensland. The proposals were noted as necessary to increase the effectiveness of Queensland's laws for controlling the illicit tobacco and illicit nicotine product market. Respondents noted that the proposed amendments address several limitations of the current laws and increase penalties to a more appropriate level for offences related to supply or possession of illicit tobacco. This is considered helpful as a greater deterrent to the supply of these products. There is also support for Queensland Health to take urgent action to stop ongoing trading where a person is found to be supplying illicit tobacco and illicit nicotine products from their business premises.

Some health stakeholders expressed strong concerns that the Bill would allow vaping products to be prescribed to children for therapeutic purposes (for example, for smoking cessation or nicotine dependency). The Bill does not expressly authorise supply of therapeutic vaping products to children. However, it provides that the supply offence in new section 161A does not apply if the conduct would be authorised under the Commonwealth Bill. The Commonwealth Bill allows pharmacists and other health professionals to supply therapeutic vaping products for smoking cessation and nicotine dependence. Evidence is currently unclear as to whether it is ever clinically appropriate for therapeutic vaping products to be prescribed to children. Further time is required to consider whether medical practitioners should be categorically prohibited from supplying 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 TOSPA.

## **Consistency with legislation of other jurisdictions**

The Bill will support and complement the Commonwealth vaping ban and ensure Queensland can appropriately enforce the Commonwealth ban on the supply and possession of recreational vaping goods. As of 4 June 2024, other states and territories have not introduced corresponding state level offences specifically prohibiting the supply and commercial possession of vaping goods or other nicotine products such as nicotine pouches. However, most jurisdictions prohibit the supply and possession of nicotine products without a prescription through medicines and poisons legislation, similar to Queensland's current framework. Upon commencement of the reforms in the Commonwealth Bill, the Commonwealth offences will be applied in all jurisdictions through the national application of the Commonwealth Therapeutic Goods Act.

General littering offences apply in other jurisdictions; however, the amendment to section 103 of the Waste Reduction and Recycling Act will be the first specific offence for depositing a vaping device or vaping accessory in Australia. Legislation covering littering offences in Victoria and South Australia provides definitions for dangerous or hazardous litter.

## Notes on provisions

### Part 1 Preliminary

#### Short title

*Clause 1* states that the short title of the Act will be the *Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Act 2024*.

#### Commencement

*Clause 2* states that this Act commences on a day to be fixed by proclamation.

### Part 2 Amendment of Tobacco and Other Smoking Products Act 1998

#### Act amended

*Clause 3* states that this part amends the *Tobacco and Other Smoking Products Act 1998* (the Act).

#### Amendment of long title

*Clause 4* amends the long title of the Act to include illicit nicotine products.

#### Amendment of s 3 (Object of Act)

*Clause 5* amends section 3 to include illicit nicotine products in the object of the Act.

#### Amendment of s 4 (How object is to be achieved)

*Clause 6* amends section 4 to include references to illicit nicotine products in how the object of the Act is to be achieved.

#### Replacement of s 7 (Meaning of *personal vaporiser* and *personal vaporiser related product*)

*Clause 7* replaces section 7, which defines ‘personal vaporiser’ and ‘personal vaporiser related product’, with the definition of *vaping goods* and related terms. Related terms include *vaping accessory*, *vaping device* and *vaping substance*.

A *vaping accessory* means a cartridge, capsule, pod or other vessel that is for use in, or with, a vaping device, whether or not the cartridge, capsule, pod or other vessel contains a vaping substance or is designed or intended to be refilled.

A *vaping device* is a device (regardless of whether it is filled with a vaping substance) that generates or releases, or is designed to generate or release, using a heating element and by electronic means, an aerosol, vapour or mist for direct inhalation by its user, and includes a

vaping device that is temporarily or permanently inoperable, incomplete, damaged or unfinished.

A *vaping device* does not include a device included in the register under the *Therapeutic Goods Act 1989* (Cth) (other than a device designed for use by a person for smoking cessation or management of nicotine dependence), a device designed to be used to deliver oxygen into an individual's body, a bong, hookah or ice pipe or a device prescribed by regulation not to be a vaping device.

*Vaping goods* mean a vaping substance, a vaping accessory and a vaping device. A vaping good is also a good that presents and expressly or impliedly represents that it is one of those goods. Vaping goods are also goods that are, or are included in a class of goods that are, prescribed by regulation to be vaping goods but do not include goods that are, or are included in a class of goods that are prescribed by regulation not to be vaping goods.

A *vaping substance* is nicotine in solution in any concentration (including in a salt or base form) or any liquid or other substance for use in, or with, a vaping device. It also includes a container (other than a vaping accessory or vaping device), or part of such a container, in which a liquid or other substance referred to above is present.

In relation to the definition of vaping goods, the presentation of goods includes matters in relation to the name of the goods and the labelling and packaging of the goods and any advertising or informational material associated with the use or supply of the goods. In addition, these goods are taken to be presented as being a particular type of goods even if the presentation is capable of being misleading or confusing as to the content or proper use or identification of the goods, or suggests the goods have ingredients, components or characteristics that they do not have.

New section 7(3) provides that a regulation may prescribe that stated goods or stated classes of goods are or are not vaping goods or when used, advertised, or presented for use or supply in a particular way, are or are not vaping goods.

### **Amendment of s 40 (Deciding whether person is fit and proper)**

*Clause 8* provides that a relevant consideration when deciding whether a person, or corporation, is fit and proper to hold a licence is whether or not the person or a director of the corporation has contravened a corresponding law.

*Corresponding law* is defined in the dictionary to mean a law of the Commonwealth or a State that regulates or prohibits the supply of smoking products, substances used in smoking products, or illicit nicotine products.

### **Amendment of s 46 (Notification of convictions)**

*Clause 9* requires a licensee to notify the chief executive if the licensee is convicted of an offence under a corresponding law.

### **Amendment of s 65 (Supplier must not sell smoking products without licence)**

*Clause 10* inserts a note in section 65(1) to clarify that if a corporation commits an offence against this provision, an executive officer of the corporation may be taken to have committed an offence against section 230A(1).

### **Amendment of s 66 (Supplier must not supply smoking products to children)**

*Clause 11* inserts a note in section 66(1) to clarify that if a corporation commits an offence against this provision, an executive officer of the corporation may be taken to have committed an offence against section 230A(1).

### **Amendment of s 67 (Supplier must ensure employees do not supply smoking products to children)**

*Clause 12* inserts a note in section 67(1) to clarify that if a corporation commits an offence against this provision, an executive officer of the corporation may be taken to have committed an offence against section 230A(1).

### **Amendment of s 80 (Prohibition on use of vending machine to supply personal vaporisers and related products, herbal cigarettes and loose smoking blends)**

*Clause 13* amends section 80, which prohibits the sale of certain products by vending machine, to remove the references to personal vaporisers.

### **Amendment of s 88 (Definitions for pt 4)**

*Clause 14* amends the definition of ‘smoking product’ to remove references to personal vaporisers and personal vaporiser related products.

### **Insertion of new pt 4A**

*Clause 15* inserts a new Part 4A which prohibits the advertising, display and promotion of illicit nicotine products.

New section 109A(1) provides that a person must not, as a part of a business activity, display an illicit nicotine product and applies a maximum penalty of 140 penalty units.

New section 109A(2) provides a person must not, as part of a business activity, advertise an illicit nicotine product and applies a maximum penalty of 140 penalty units.

New section 109(A)(3) provides a person must not, as part of a business activity, promote an illicit nicotine product and applies a maximum penalty of 140 penalty units.

This provision does not apply if the act constituting the offence is authorised or permitted under the Commonwealth Therapeutic Goods Act.

### **Amendment of s 119 (Evidentiary provisions)**

*Clause 16* inserts a new section 119(2)(ba) to provide that if a defendant wishes to challenge an assertion that a thing is an illicit nicotine product, they must follow the procedures outlined in section 119.

## **Replacement of s 161 (Supply or possession of illicit tobacco)**

*Clause 17* removes current section 161 and inserts a new section 161, titled ‘Supply or possession of illicit tobacco as part of business activities’.

New section 161(1) provides that a person must not, as part of a business activity, supply illicit tobacco and applies a maximum penalty of 2,000 penalty units or 2 years imprisonment, or both.

New section 161(1) includes a note to clarify that if a corporation commits an offence against this provision, an executive officer of the corporation may be taken to have committed an offence against section 230A(1).

New section 161(2) provides that it is an offence for a person, as part of a business activity, to store or otherwise be in possession of illicit tobacco at the business premises or another premises, including, for example, a storage shed or vehicle, connected with the premises where the business activity is conducted. The maximum penalty is 1,000 penalty units or 1 year’s imprisonment, or both.

New section 161(2) includes a note to clarify that if a corporation commits an offence against this provision, an executive officer of the corporation may be taken to have committed an offence against section 230A(1).

New section 161(3) clarifies that subsections (1) and (2) do not apply to an act of the person that is done as an employee of another person or otherwise acting on behalf of another person.

New section 161(4) provides that it is a defence to a charge under subsection (2) for the person to prove that the illicit tobacco is for personal use by the person or an employee of the person. However, as provided for in new section 161(5), this defence cannot be used if the quantity of illicit tobacco is a commercial quantity.

In new section 161, a ‘commercial quantity’ of illicit tobacco means more than the quantity prescribed by regulation for this definition.

*Clause 17* also inserts new section 161A, titled ‘Supply or possession of illicit nicotine products as part of business activities’.

New section 161A(1) provides that a person must not, as part of a business activity, supply an illicit nicotine product, and applies a maximum penalty of 2,000 penalty units or 2 years imprisonment, or both.

New section 161A(1) also inserts a note to clarify that if a corporation commits an offence against this provision, an executive officer of the corporation may be taken to have committed an offence against section 230A(1).

New section 161A(2) provides that it is an offence for a person, as part of a business activity, to store or otherwise be in possession of illicit nicotine products at the business premises where business is conducted or another premises, including, for example, a storage shed or vehicle, connected with the premises where the business activity is conducted. The maximum penalty is 1,000 penalty units or 1 year’s imprisonment, or both.

New section 161A(2) inserts a note to clarify that if a corporation commits an offence against this provision, an executive officer of the corporation may be taken to have committed an offence against section 230A(1).

New section 161A(3) clarifies that subsections (1) and (2) do not apply to an act of the person that is done as an employee of another person or otherwise acting on behalf of another person.

Under new section 161A(4), the supply and possession offences relating to illicit nicotine products do not apply if, were the person to be charged with an offence under a law of the Commonwealth relating to the possession or supply of the illicit nicotine product, the person would be entitled to claim an exception in relation to the offence. This does not include a Commonwealth exception relating to personal use.

New section 161A(5) provides that it is a defence if the illicit nicotine product is possessed or stored for the personal use of the person, or their employee (including, for example, under a prescription) or on behalf of another person to whom it has been lawfully supplied.

Clause 17 also inserts new section 161B, titled ‘Supply of illicit tobacco or illicit nicotine products by employees at retail outlets, etc.’ This section applies in relation to the supply of illicit tobacco or an illicit nicotine product by a person acting as an employee or otherwise acting on behalf of another person – for example, a friend or family member of the business owner working in the business without payment or an employment relationship. The person must not, in a retail or wholesale environment, supply illicit tobacco or an illicit nicotine product. This does not apply to a person who is employed by or acting on behalf of a person who would be entitled to claim an exception under the new section 161A(4) – for example, a pharmacy assistant who assisted a pharmacist in the supply of a therapeutic vaping product. The maximum penalty is 140 penalty units.

Clause 17 also inserts new section 161C, titled ‘Supply of illicit nicotine products by other adults to children’. This new section prohibits the supply of illicit nicotine products by an adult to a child. This section does not apply in relation to the supply of an illicit nicotine product by a person acting as the employee of, or otherwise on behalf of, another person, or by a person as part of a business activity. The maximum penalty is 140 penalty units. This aligns with section 82 which prohibits adults from supplying smoking products to children outside of the retail environment.

### **Amendment of s 163 (Supply of objects resembling tobacco products)**

*Clause 18* amends section 163, which prohibits the supply of objects that resemble tobacco products, by omitting the exception in subsection (3), which applied to an object that is a personal vaporiser. References to personal vaporisers have been removed from the Act.

### **Amendment of s 170 (Appointment)**

*Clause 19* replaces section 170(7) to provide that a police officer is an authorised person, and the functions of the officer are to investigate, monitor and enforce compliance with sections 65 and 161 to 161B.

### **Amendment of s 181 (Entry of places by authorised persons)**

*Clause 20* amends section 181(2) to provide that an authorised person may enter a premises at which illicit nicotine products are available for sale by retail when the premises are open for carrying on a business, or a premises for which an order is in effect under division 4A, or a place in relation to which an injunction is in effect under division 4B.

### **Amendment of s 187 (General powers after entering places)**

*Clause 21* amends section 187(3)(g)(ii) to provide that if an authorised person enters a place under section 181, the authorised person may require the owner or occupier of the place, or another person at the place, to give the authorised person the name and contact details of the business that sells the smoking products or the illicit nicotine products at the place.

### **Amendment of s 192 (Power to require evidence of age, name and address of person observed being supplied a smoking product)**

*Clause 22* amends section 192 to clarify that the provision relating to the power to require evidence of the age, name and address of a person observed being supplied a smoking product also applies to a person being supplied an illicit nicotine product.

### **Amendment of s 193 (Power to seize smoking product)**

*Clause 23* amends section 193 to clarify that power to seize smoking products also applies to illicit nicotine products.

### **Amendment of s 205 (Forfeiture of illicit tobacco)**

*Clause 24* amends the heading of section 205 and section 205(1)(a) and (2)(a) to clarify that the provision relating to the forfeiture of illicit tobacco also applies to illicit nicotine products.

### **Insertion of new s 205A**

*Clause 25* inserts a new section 205A(1) which provides that the chief executive may decide a seized thing is forfeited to the state if the chief executive is satisfied the thing is a bong or ice pipe, and reasonably believes it is necessary to keep the thing to prevent it being used to commit the offence for which it was seized.

New section 205A(2) and (3) provides that before making the decision, the chief executive must give the owner of the seized thing a notice stating that the limbs of section 205A(1) are satisfied, the chief executive proposes the seized thing be forfeited to the state, and the owner may within 28 days after being given the notice, give the chief executive a written response to the belief and proposal. The chief executive must consider all responses complying with this section.

New section 205A(4) and (5) provides that if the chief executive decides the seized thing is forfeited to the state, the chief executive must give the owner of the seized thing written notice of the decision and the reasons for the decision. However, if a proceeding involving the seized thing was started, the chief executive must not act under subsection (1) until the end of the proceeding or any appeal from the proceeding.

*Seized thing* means a thing seized under section 197 or 198.

### **Amendment of s 208 (Return of seized things)**

*Clause 26* amends section 208(1) by providing that if a seized thing is not forfeited, the authorised person must return it to its owner at the end of 12 months, or if a proceeding for an offence involving the thing is started within 12 months, at the end of the proceeding and any appeal from the proceeding. This replaces the current six month period.

### **Insertion of new pt 11, divs 4A and 4B**

*Clause 27* introduces new part 11, division 4A ‘Closure orders’ and division 4B ‘Injunctions’.

New section 209A provides that the chief executive may make an order that stated premises be closed (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 the chief executive is satisfied a business is being carried on at the premises in a way that involves a contravention of section 65 of the Act.

New section 209A(2) provides that the interim closure order must be served on the person apparently in charge of the premises (if any), or posted in a conspicuous place, or for a mobile premises, at the mobile premises or at the entrance of a fixed premises connected to the business carried on at the mobile premises. *Mobile premises* is defined as a vehicle, building or other structure ordinarily moved from place to place.

New section 209A(3) provides that the interim closure order takes effect from the time it is served or posted and continues until either the chief executive revokes the order, or the end of 72 hours after the order was served or posted.

New section 209A(4) clarifies that no more than one interim closure order may be made for the same premises in a period of seven days.

New section 209B provides that a magistrate may, on application of the chief executive, order that a stated premises be closed for a stated period of not more than six months, if the magistrate is satisfied that illicit tobacco or illicit nicotine products have been, or are likely to be, supplied at the premises as part of a business activity, or a business is being carried on at the premises in a way that involves a contravention of section 65 of the Act.

An application may be made regardless of whether an interim closure order is, or has been, in effect in relation to the premises under new section 209A. An application under subsection (1) must be served on the owner of the premises, unless it is not reasonably practicable to do so. The order must also be served on the owner, unless not reasonably practicable to do so, and posted in a conspicuous place on the premises.

New section 209C provides that while a closure order is in effect, a person must not supply smoking products at the premises or work in a business involving the supply of smoking products at the premises. The maximum penalty for this offence is 200 penalty units. It is a defence in proceedings for an offence against this section if the person satisfies the court the person did not know, and could not reasonably have been expected to know, a closure order

was in effect in relation to the premises. *Closure order* is defined to mean an interim closure order under section 209A or an order under section 209B.

New section 209D provides that Division 4B applies 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 and the chief executive has reasonable grounds to believe an injunction is necessary in the public interest.

New section 209E provides that the chief executive may apply to the District Court for an injunction in relation to the conduct.

New section 209F provides that on considering the application, a District Court may grant an injunction restraining the person from engaging in the conduct concerned, and if in the court's opinion it is desirable to do so, require the person to do anything.

New section 209F(1) provides that on considering the application for an injunction, the District Court may grant an injunction restraining the person from engaging in the conduct concerned, and if in the court's opinion it is desirable to do so, requiring the person to do anything.

New section 209F(2) clarifies that the power of the court to grant an injunction restraining a person from engaging in the conduct may be exercised whether or not it appears to the court that the person intends to engage again, or to continue to engage, in the conduct, and whether or not the person has previously engaged in the conduct.

New section 209F(3) provides that the power of the court to grant an injunction requiring a person to do an act or thing may be exercised whether or not it appears to the court that the person intends to fail again, or to continue to fail, to do the act or thing, and whether or not the person has previously failed to do the act or thing.

New section 209(4) and (5) provides that an interim injunction may be granted under division 4B until the application is decided and that the District Court may rescind or vary an injunction at any time. The powers conferred on the District Court are additional to, and do not limit, any other powers of the court.

New section 209G provides that the District Court may grant an injunction in the terms the court considers appropriate. This may include restraining a person from carrying on a business involving the supply of smoking products or an illicit nicotine product, whether or not the business is carried on as part of, or incidental to, the carrying on of another business, for a stated period or except on stated terms and conditions. The injunction may require a person to take a stated action, including to action disclose information or publish advertisements, to remedy any adverse consequences of the person's conduct.

New section 209H provides that if the chief executive applies for an injunction, the court may not require the chief executive to give an undertaking as to damages or costs.

### **Amendment of s 215 (Power to require information)**

*Clause 28* amends section 215(3) by increasing the maximum penalty for a person failing to give information to an authorised person under section 215(2) from 50 penalty units to 100 penalty units.

### **Amendment of s 216 (False or misleading information)**

*Clause 29* amends section 216(1) by increasing the maximum penalty for a person stating to an authorised person something the person knows is false or misleading to a material particular, from 50 penalty units to 100 penalty units.

### **Amendment of s 224 (Definition for division)**

*Clause 30* amends section 224 by replacing the definition of *forfeiture decision*. The new definition means a decision of the chief executive to forfeit illicit tobacco or an illicit nicotine product under section 205, or a decision of the chief executive to forfeit a bong or ice pipe under section 205A.

### **Insertion of new s 230A**

*Clause 31* inserts a new section 230A, which provides that if a corporation commits an offence against an *executive liability provision* (being an offence against any of the following sections: 65, 66, 67, 161 and 161A), an executive officer of the corporation is taken to have also committed the offence if they did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.

Proceedings may be conducted against the executive officer, and they may be convicted of the offence, whether or not the corporation has also been proceeded against or convicted in relation to that offence. However, this does not affect the liability of the corporation for the offence, or the liability of any person for the offence under chapter 2 of the Criminal Code, whether or not the person is an executive officer of the corporation.

### **Amendment of s 233 (Disclosure of information to entities performing relevant functions)**

*Clause 32* amends section 233(2)(a) to clarify that the chief executive may disclose information a person obtained from performing a function or exercising a power under the Act to an entity of the Commonwealth or a state, for performing the entity's functions relating to the regulation or prohibition of the supply of smoking products or illicit nicotine products.

### **Amendment of s 234 (Only chief executive may commence particular proceedings)**

*Clause 33* amends section 234(2) by clarifying that only the chief executive may commence a proceeding for an offence.

*Clause 33* also inserts new subsection (4), which provides that to remove any doubt, it is declared that section 234 does not prevent a police officer from performing a function mentioned in section 170(7) of the Act.

### **Insertion of new pt 13, div 3**

*Clause 34* introduces new part 13, division 3, titled 'Transitional provisions for Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Act 2024'.

New section 241 provides that section 205A (Forfeiture of bongs and ice pipes) applies in relation to a bong or ice pipe whether it was seized before or after the commencement.

New section 242 provides that section 208 as amended by the Bill, applies in relation to a seized thing whether the thing was seized before or after the commencement.

### **Amendment of sch 1 (Dictionary)**

Clause 35 amends the dictionary in schedule 1 to omit definitions for *illicit tobacco*, *personal vaporiser*, *personal vaporiser related product* and *smoke*, as they are no longer used in the Act or are amended by clause 35(2).

Clause 35 inserts definitions for *corresponding law*, *health warning requirement*, *illicit nicotine product*, *illicit tobacco*, *smoke*, *tobacco product requirement*, *vaping accessory*, *vaping device*, *vaping goods* and *vaping substance*.

This clause also amends the definition of *smoking product* in schedule 1 to omit the references to a personal vaporiser or a personal vaporiser related product and amends the definition of *tobacco product* in schedule 1 to include vaping goods.

## **Part 3                      Amendment of Waste Reduction and Recycling Act 2011**

### **Act amended**

Clause 36 states that part 3 of the Bill amends the *Waste Reduction and Recycling Act 2011*.

### **Amendment of s 103 (General littering provision)**

Clause 37 amends section 103 of the Waste Reduction and Recycling Act to insert a new subsection that deems the depositing of waste that is a vaping device or vaping accessory under the *Tobacco and Other Smoking Products Act 1998* to be ‘dangerous littering’. Under section 103(1), the maximum penalty for dangerous littering is 40 penalty units.

The introduction of a deeming provision means that an authorised person or the prosecution does not have to prove that depositing the waste (vaping device or accessory) would cause or would be likely to cause harm to a person, property or the environment under the definition of dangerous littering.