

Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2023

Human Rights Certificate

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

In accordance with section 41 of the *Human Rights Act 2019*, I, the Honourable Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women, provide this human rights certificate with respect to the Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2023 (the Regulation), made under the *Corrective Services Act 2006*, *Land Act 1994*, *Marine Parks Act 2004*, *Nature Conservation Act 1992*, *Parliamentary Service Act 1988*, *State Penalties Enforcement Act 1999* and the *Tobacco and Other Smoking Products Act 1998* (the Act).

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The object of the Act is to improve the health of Queenslanders by reducing their exposure to tobacco and other smoking products. Initiatives implemented under the Act have included restricting the supply of smoking products to children, limiting their advertising and promotion and reducing public exposure to second-hand smoke.

The *Tobacco and Other Smoking Products Amendment Act 2023* (the Amendment Act) updated the existing legislative framework to improve monitoring of the smoking product industry and enable more effective enforcement of the Act. This included the introduction of a licensing scheme for retail and wholesale suppliers of smoking products. The amendments were designed to assist smokers to quit, discourage youth uptake of smoking and further protect the community from exposure to smoking and smoking products.

The Regulation prescribes additional matters which support the licensing scheme and the new offence of possession of illicit tobacco.

The licensing scheme will allow Queensland Health to better identify and monitor the number, type and location of businesses selling smoking products. The Amendment Act allows the licensing scheme to be operationalised by prescribing licensing fees, licence display details and invoicing requirements in the Regulation.

Since passage of the Amendment Act, it is now an offence under Queensland law to supply or possess ‘illicit tobacco’, being smoking products which do not comply with Commonwealth requirements for plain packaging and health warnings. A supplier in possession of illicit tobacco may have a defence if they can prove it was for personal use. However, this defence is not available if the quantity of illicit tobacco is a commercial quantity. The Regulation prescribes the amount which constitutes a ‘commercial quantity’.

Also, a range of new offences introduced by the Amendment Act are intended to be enforced as penalty infringement notices (PINs) under the *State Penalties Enforcement Regulation 2014*.

Human Rights Issues

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

I have considered each of the rights protected by Part 2 of the Human Rights Act. In my opinion, the human rights which are potentially relevant to the Regulation are:

- right to freedom of expression (section 21);
- property rights (section 24);
- right to privacy and reputation (section 25);
- right to a fair hearing (section 31); and
- rights in criminal proceedings (section 32).

Consideration of reasonable limitations on human rights (section 13 Human Rights Act 2019)

Right to freedom of expression (section 21 of the Human Rights Act 2019) and right to privacy and reputation (section 25 of the Human Rights Act 2019)

(a) the nature of the right

The right to freedom of expression provides that every person has the right to hold and express an opinion, through speech, art and writing (or other forms of expression). This includes the freedom to seek, receive and impart information in any medium chosen by the person.

The Act requires a licence to be displayed in a retail outlet or an online shop. The Regulation prescribes the style of the displayed licence and the information it must contain. As such, the Regulation limits human rights by restricting a person's right to freedom of expression and right to privacy. The right to reputation is not considered to be engaged by the Regulation.

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

The object of the Act is to improve the health of the public by reducing their exposure to tobacco and other smoking products. The purpose of the Regulation is to support this object by prescribing the practical operational matters needed to implement the Act.

For example, specifying the display requirements for a licence ensures the public is provided sufficient information about a licensee and the licensees have clear direction about how to satisfy the display requirement. Also, prescribing the information required to be displayed, including limiting its appearance, colour and size, ensures the display of a licence is not used as a promotion, advertisement or endorsement for smoking.

As such, the display requirements are consistent with a free and democratic society based on dignity, equality and freedom.

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

Requiring certain information to be included in a displayed licence will help achieve the purpose of informing the public that the outlet or online shop is authorised to supply smoking products. It will also assist the licensee in taking the action needed to comply with the Act.

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

One alternative would be to require the display of the licence without prescribing its content or style. However, this may not ensure the public is provided with sufficient or accurate information. It may also allow unscrupulous businesses to display the licence as a form of advertising, which is inconsistent with the object of the Act. Further, it may result in licensees inadvertently not complying with the Act.

Accordingly, there are no other less restrictive and reasonably available ways to achieve the purpose identified above.

- (e) the balance between the importance of the purpose of the Regulation which imposes a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Prescribing information to be displayed on a licence is necessary to effectively implement the increased regulatory controls introduced through the new licensing scheme.

It is important for people to express themselves in an unrestricted manner and to not have their privacy unduly interfered with. However, commercial expression is less important than social or political expression. As the limitation proposed in the Regulation applies to businesses only, it is considered a less serious limitation of the right.

The amendments strike an appropriate balance between the importance of ensuring effective smoking product legislation and an individual's rights to freedom of expression.

Property rights (section 24 of the Human Rights Act 2019)

- (a) the nature of the right

This right protects the right of all people to own property. It provides that a person must not be arbitrarily deprived of their property. The concept of arbitrariness in this context carries the meaning of capriciousness, unpredictability, injustice and unreasonableness — in the sense of not being proportionate to the legitimate aim sought.

The Regulation limits this right by prescribing fees in relation to the licensing scheme.

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

The Act provides that a regulation may prescribe the licence fees for the grant, renewal or restoration of a retail or wholesale licence. Under the Regulation, these annual fees are 448 fee units (\$474.88) for a retail licence and 636.00 fee units (\$674.16) for a wholesale licence. The fees may also be reduced on a pro-rata basis if the licence term is less than one year.

By permitting the State to impose a licence fee on a retail or wholesale supplier of smoking products, the Regulation limits human rights by limiting a person's property rights.

The licensing scheme will ensure only legitimate businesses are authorised to sell smoking products. This will improve public confidence in the retail smoking product industry. It will also provide Queensland Health with greater visibility of the industry and support the monitoring and compliance activities needed to protect the community from unscrupulous suppliers, especially those trading in illicit tobacco.

It is a reasonable business expectation that this privilege will involve satisfying certain criteria, including payment of a licence fee.

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

The limitations in relation to prescribing fees for the licensing scheme under the Act achieve their purpose and do so only to the extent necessary. The amounts of the licence fees have been set to ensure full cost recovery for the licensing scheme and to fund additional compliance activities. The amounts are not intended to operate as ‘penalties’ or as barriers to entry to the industry. However, the rigour of the licensing scheme, including the payment of fees, may dissuade unscrupulous suppliers from entering the industry. Business stakeholders have not objected to either paying fees or the amount involved.

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

There are no other less restrictive and reasonably available ways to achieve the purposes identified above. As noted above, the license fees are necessary to fund the licensing scheme and associated compliance activities. Without a fee, taxpayers would effectively fund the cost of operating the licensing scheme and unscrupulous suppliers may be more inclined to enter the industry.

(e) the balance between the importance of the purpose of the Regulation which imposes a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The amendments in the Regulation which prescribe the fees for the licensing scheme strike a fair balance between the importance of funding the new licensing scheme under the Act and of preserving property rights.

The licensing scheme will provide improved oversight of the smoking product industry. The health risks associated with the use of smoking products, including the added potential dangers of illicit tobacco, are well established. As such, the benefits of increased regulatory control made possible by the introduction of a licensing scheme justify reasonable imposts on affected businesses, including payment of licence fees.

The imposition of fees is necessary to ensure cost recovery of the scheme and fund additional enforcement action. These amendments strike a balance between the importance of improved effectiveness of smoking product legislation and an individual’s rights to property.

Right to a fair hearing (section 31 of the Human Rights Act) and rights in criminal proceedings (Human Rights Act, section 32)

(a) the nature of the right

The right of a person to a fair hearing includes the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The Regulation amends the State Penalties Enforcement Regulation to allow PINs to be issued for new offences introduced by the Amendment Act. A person issued with a PIN is subject to punishment through payment of a fine without the benefit of a finding of guilt by a court after a fair and public hearing. This engages and could potentially be characterised as a limitation on the right to a fair hearing and rights in criminal proceedings, although it should be noted that a person to whom a PIN is issued may always elect to have the alleged offence dealt with by a court.

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

The purpose of the limitation is to assist authorised persons to enforce the Act and thereby protect the community from the dangers of smoking and second-hand smoke.

PINs are an effective and immediate enforcement response that is proportionate to the risk to public health created by the offending behaviour. Under the State Penalties Enforcement Regulation guidelines administered by the Department of Justice and Attorney-General, PINs are not prescribed for complex offences or where discretionary elements are involved.

PINs are a cost-effective method of enforcement, as they reduce the demands on courts and the need for authorised persons to initiate full prosecution action. PINs also give the alleged offender an alternative to prosecution, whereby they do not need to attend court or prepare a defence and have certainty about their legal liability. However, as an accused person always retains the option to challenge a PIN, issuing a PIN does not impede the accused's right to access the judicial system.

These amendments are consistent with a free and democratic society based on human dignity, equality and freedom.

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

The ability to issue a PIN provides an efficient and cost-effective way of enforcing the Act by providing for the immediate imposition of proportionate penalties outside the court process. As this limitation acts as a deterrent to contravening the Act, it assists in ensuring compliance with the requirements of the Act designed to protect public health.

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

If PINs could not be issued for contravening the new offences in the Act, the deterrent effect of these offences would be reduced. This is because it is unlikely that full prosecution action would be taken for every contravention, especially those which are less serious. The ability to issue a PIN does not alter existing obligations under the Act or create new offences and is

available only where an authorised person reasonably believes that a person has committed a prescribed offence under the Act.

For these reasons, there is no less restrictive and reasonably available way to achieve the purpose of enforcing the new offences in the Act in a timely and cost-effective way.

(e) the balance between the importance of the purpose of the Regulation which imposes a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The amendments in the Regulation which establish PINs strike a balance between competing rights and interests that is reasonable and demonstrably justifiable in a free and democratic society.

To ensure compliance with the Act, authorised persons undertake monitoring and compliance activities, which include the issuing of PINs where contraventions are identified. Without the ability to issue PINs, the only punitive action which could be taken is commencement of prosecution action, which has significant cost and resource implications and is usually reserved for the most serious breaches of the Act.

At the same time, the State Penalties Enforcement Regulation guidelines mean that PINs may only be prescribed for offences where any contravention would be clear and unambiguous. Also, a person to whom a PIN is issued may always elect to have the alleged offence dealt with by a court. As such, the person is afforded all the rights in criminal proceedings guaranteed under the Human Rights Act.

Conclusion

I consider that the *Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2023* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

SHANNON FENTIMAN MP
MINISTER FOR HEATH, MENTAL HEALTH AND
AMBULANCE SERVICES AND
MINISTER FOR WOMEN

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