

HEALTH LEGISLATION AMENDMENT BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Policy Objectives of the Bill

The Bill makes amendments to the following Health portfolio Acts:

- *Tobacco Products (Prevention of Supply to Children) Act 1998*
- *Medical Act 1939*
- *Health Services Act 1991*.

The main policy objectives of the amendments contained in the Bill are to:

- reduce the number of children who take up smoking by extending the application of the *Tobacco Products (Prevention of Supply to Children) Act 1998* to restrict children's access to non-tobacco smoking products such as herbal cigarettes and non-tobacco loose smoking blends;
- facilitate the implementation of a scheme aimed at recruiting overseas trained doctors to reduce the shortage of general practitioners in rural and remote areas of the State; and
- remove obstacles in the *Health Services Act 1991* that have prevented the application of the legislation which provides a statutory shield for approved quality assurance committee members and committee information.

Means of Achieving Objectives

Amendment of Tobacco Products (Prevention of Supply to Children) Act 1998

The Queensland release of a new brand of non-tobacco herbal cigarettes, “Ecstasy”, has raised concerns regarding the health risks associated with young people smoking non-tobacco smoking products as an alternative to conventional tobacco products (e.g. cigarettes, roll your owns, pipe tobacco, etc).

As a result of research that has been undertaken in Australia and overseas, it has been established that the deliberate inhalation of smoke from the combustion of any matter is injurious to health, whether or not the smoking compound contains addictive substances such as nicotine. Furthermore, the smoking of non-tobacco products, such as herbal cigarettes, leads to at least a similar degree of exposure to carbon monoxide and tar as conventional cigarettes. These substances have been linked to the development of adverse health risks such as cancer, heart disease, emphysema and other conditions affecting the respiratory system.

In recognition of the adverse health effects, and the apparent trend towards the smoking of herbal cigarettes and other non-tobacco smoking products by young people, the Bill amends the *Tobacco Products (Prevention of Supply to Children) Act 1998* by prohibiting:

- the supply of non-tobacco smoking products to a child by a person who, as part of a business activity, supplies non-tobacco smoking products to the public (eg. “over the counter” sales or the distribution of herbal cigarettes as part of a marketing campaign);
- the supply of non-tobacco smoking products through vending machines;
- the supply of non-tobacco smoking products to a child by an adult, other than by a responsible adult for the child (eg. in social situations); and
- the sale of non-tobacco smoking products below a specified minimum quantity.

Amendment of Medical Act 1939

A scheme known as *Doctors for the Bush* has been developed by Queensland Health, in collaboration with the Commonwealth and peak medical professional bodies, for the primary purpose of recruiting overseas trained doctors to reduce the shortage of general practitioners in rural and remote areas of the State. The scheme will operate on the basis that practitioners who work in rural and remote communities for five years will be entitled to various benefits including eligibility for permanent residency status and the receipt of an unrestricted Medicare provider number.

For the scheme to be implemented, practitioners recruited under the scheme will need to obtain conditional registration from the Medical Board under s.17C(d) of the *Medical Act 1939*. Registration under that provision may only be granted for the purpose of enabling the practitioner to practise in an “unmet area of need”.

The effect of s. 17C(d) is that the Medical Board must decide if an “unmet area of need” exists. However, in relation to the registration of practitioners recruited under the *Doctors for the Bush* scheme, the Medical Board will have no involvement in deciding if an unmet area of need exists. Under the scheme, the Minister will have the responsibility for identifying the rural/remote communities in the State which have a shortage of general practitioners. Therefore, to ensure that s.17C(d) can effectively operate and enable appropriately qualified practitioners recruited under the scheme to be registered under that provision, the Bill provides that the Minister may decide there is an “unmet area of need”.

The Bill also inserts an additional category of conditional registration under s.17C which will enable practitioners who have fulfilled their obligations under the *Doctors for the Bush* scheme to be granted registration conditional upon their continuation in general practice but without any geographical limitations.

Amendment of Health Services Act 1991

The quality assurance committee provisions in the *Health Services Act 1991* (ss.30-38) (the Act) are intended to provide the necessary regulatory framework for restricting disclosure of committee information, and providing immunity for committee members, in order to encourage frank and open discussion and critical analysis of health services under review.

Such committees serve the public interest by facilitating improvements to health services.

Weaknesses in the construction of the legislation have prevented its application - no committees have ever been approved under the legislative provisions. The proposed amendments are minor, but they will overcome difficulties in three key aspects: the establishment of committees, mandatory functions of committees, and authorising the disclosure of patient identifying information to committees.

To obtain Ministerial approval under the Act currently, a committee must be established by either a *public sector health service or an establishment, college, association or other body prescribed by regulations*. There is doubt as to whether this allows private hospitals to establish committees under these provisions. To rectify this, the amendments provide for the express inclusion of private hospitals in the list of entities eligible to establish quality assurance committees under the Act.

The committee establishment provisions also exclude quality assurance activities conducted by sections within Queensland Health's corporate office that involve the collection and review of sensitive patient or practitioner data from health facilities across the State. The amendments will extend the scope of entities able to establish quality assurance committees to include the chief executive of Queensland Health. The quality and extent of data contributed by health practitioners to State-wide quality improvement activities will be enhanced by this provision.

The Bill also provides for quality assurance committees to be established by more than one entity. This provision is necessary to cater for the diversity of partnerships that exist within the health sector, for example, collocation of private and public sector hospitals.

The Act currently provides for the approval of quality assurance committees that meet certain eligibility criteria—one of which requires the review of clinical privileges to be included in a committee's functions. The mandatory incorporation of the review of clinical privileges in the function of a quality assurance committee creates two difficulties for the application of the legislation. It limits the scope of committees able to be approved under the Act. Secondly, the requirements for the review of clinical privileges in relation to information disclosure and use differ from those required for other quality assurance activities. The legislative provisions relating to restrictions on committees, disclosure of committee information

and shielding the use of committee information, while appropriate for the effective operation of quality assurance committees which have an advisory and educative role, are not appropriate for committees reviewing clinical privileges. The amendments resolve this difficulty by removing the mandatory inclusion of the review of clinical practices and privileges from the function of approved quality assurance committees.

Quality assurance committees that collect and use data that identify recipients or providers of health services bear responsibility for ensuring such information remains confidential. However, separate general confidentiality provisions in the Act (s.63) impose a duty on officers, employees or agents of the Department to not disclose information that could identify a person who has received a public sector health service. Quality assurance committees cannot operate without access to relevant patient data. The amendments overcome this technical difficulty by providing an exemption to the confidentiality duty in relation to the giving of information to an approved quality assurance committee or to a person authorised by the committee to enable the committee to perform its functions.

Estimated Cost for Government Implementation

The Bill will not have any significant financial impact.

Consistency with Fundamental Legislative Principles

Aspects of the Bill which raise possible fundamental legislative principles issues are outlined below.

Liability of person for conduct of representatives

The application of section 25 of the *Tobacco Products (Prevention of Supply to Children) Act 1998* is to be extended to deal with the sale of non-tobacco smoking products in contravention of the minimum quantities specified under the legislation. Under this section, a person will be liable for the actions of their employees or agents, where an employee or agent has contravened those provisions of the Bill which make it an offence to sell non-tobacco smoking products below a minimum specified quantity (see clauses 29 and 31).

While this provision effectively provides for the reversal of the onus of proof, it is appropriate that those persons who are ultimately responsible for the conduct of a business ensure that the requirements of the legislation are not breached. As with most provisions of this type, where an individual or corporation is presumed to be liable for the conduct of their representatives, the individual or corporation will have a defence if they can prove that they took reasonable steps to prevent the conduct.

Powers of Entry

Clause 33 of the Bill amends section 33 of the *Tobacco Products (Prevention of Supply to Children) Act 1998* to enable an authorised person to enter, without the occupiers' consent or a warrant, an outlet where non-tobacco smoking products are supplied to the public. While this provision may be seen to have a negative impact on the rights and liberties of certain individuals, this provision is warranted for the following reasons:

- The rights are the same as those a member of the public would normally have (eg. enter a retail shop while it is open for business).
- These powers of entry are essential to the effective monitoring and enforcement of the legislation. An authorised person will not be able to gain an accurate picture of a person's or a business's compliance with the legislation, if those individuals who supply non-tobacco smoking products to the public are aware that they are being observed by an authorised person.
- The provision does not provide for unfettered access to an outlet, as the powers of entry can only be exercised when the outlet is open for carrying on business.

Power to require evidence of age, name and address

Clause 34 of the Bill amends section 39 of the *Tobacco Products (Prevention of Supply to Children) Act 1998* to enable an authorised person to establish the age of a person being supplied with a non-tobacco smoking product, who the authorised persons suspects on reasonable grounds to be a child. Under these circumstances the authorised person can ask for acceptable evidence of age. Where the person cannot provide such evidence, or provides evidence which shows that the person is under 18, the authorised person may require the person to state their name and address.

It is essential that an authorised person be able to establish the age of a person he or she has observed being supplied with a non-tobacco smoking product in order to determine whether the person supplying the product has committed an offence. The amendment of section 39 is essential to the effective enforcement of those measures provided for in the Bill to restrict the supply of non-tobacco smoking products to children.

Consultation

The following key stakeholders were consulted in relation to the amendment of the *Tobacco Products (Prevention of Supply to Children) Act 1998*:

- Heart Foundation of Australia
- Queensland Cancer Fund
- Australian Medical Association (Queensland Branch)
- Queensland Retail Tobacco Traders' Association
- Queensland Retail Traders' and Shopkeepers' Association
- Retailer's Association of Queensland
- Queensland Newsagents' Association
- Motor Trades Association of Queensland
- Major retailers

The following stakeholders were consulted in relation to the amendments to the *Medical Act 1939*:

- Medical Board of Queensland
- Australian Medical Association
- Queensland Rural Doctors' Association
- Royal Australian College of General Practitioners
- Australian College of Rural and Remote Medicine
- Queensland Rural Medical Support Agency
- Queensland Divisions of General Practice Association.

The following stakeholders were consulted in relation to the amendments to the *Health Services Act 1991*:

- Australian Medical Association
- Royal Australian and New Zealand College of Radiologists
- Royal Australian College of General Practitioners
- Royal Australian and New Zealand College of Psychiatrists
- Royal Australasian College of Surgeons
- Private Hospitals' Association of Queensland

NOTES ON PROVISION

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Act.

Clause 2 provides for the commencement of the provisions of the Act.

PART 2—AMENDMENT OF HEALTH SERVICES ACT 1991

Clause 3 identifies this part of the Bill as amending the *Health Services Act 1991*.

Clause 4 makes various amendments to section 31. Clause 4(1) provides a minor change to terminology to increase specificity. Clause 4(2) allows additional entities to establish quality assurance committees. They are the chief executive and holders of a licence to use a private hospital under the *Health Act 1937*. It also provides for a combination of entities to establish a quality assurance committee. Clause 4(3) amends section 31(3)(a) by limiting its application to committees that are not established by

an individual. This amendment is consequential to the amendment to section 31(2) which provided for individuals (the chief executive and possibly, a private hospital licensee) to establish quality assurance committees. The provision requiring a committee to be established under a resolution or in accordance with the rules or official procedures of the founding entity is not relevant in the case of a committee established by an individual. Clause 4(4) amends section 31(3)(b) by removing the mandatory inclusion of the ‘review of clinical practices and privileges’ from the functions of a committee eligible for approval by the Minister.

Clause 5 amends section 33(b)(i) by replacing the term ‘body’ with the term ‘entity’ for the purposes of consistency with section 31. The term ‘entity’ encompasses reference to an individual as well as an incorporated or unincorporated body.

Clause 6 amends section 36(3) by inserting provisions that clarify the responsibility for indemnifying members of committees established by different types of entities. The provision specifies that members of a committee established by a public sector health service or the chief executive are indemnified by the State and in all other cases indemnification is the responsibility of the particular entity that established the committee. The clause also provides for circumstances where a committee may be established jointly by more than one entity. The provision separates the responsibility for indemnifying particular members. It clarifies that the relevant entity is to indemnify members that it appoints to the committee.

Clause 7 amends section 63(2) by inserting a provision that provides an exemption to the duty of confidentiality imposed on officers, employees or agents of Queensland Health in relation to information that may identify a person who has received a public sector health service. The purpose of this exemption is to provide identifying information to an approved quality assurance committee or a person authorised by the committee to prepare information for the committee. The exemption is qualified by the requirement that the giving of the information is to enable the committee to perform its functions.

Clause 8 provides for an amendment consequential to the commencement of the *Private Health Facilities Act 1999*. *Clause 8* will amend section 31(2)(c) by removing the reference to a person who holds a licence to use a private hospital under the *Health Act 1937* and inserting a reference to the equivalent term used under the *Private Health Facilities Act 1999*. This provision overcomes the need to make a separate amendment to the Act in the future once the *Private Health Facilities Bill 1999* commences.

Clause 9 replaces the heading for Division 2 of Part 9.

Clause 10 inserts a transitional provision as a consequence to the amendment provided for in *Clause 8*. *Clause 10* specifies that an approved quality assurance committee, established by the holder of a licence to use a private hospital under the *Health Act 1937*, will continue to be an approved committee on commencement of the *Private Health Facilities Act 1999*. This provision removes any doubt about the continuation of the Minister's approval of these quality assurance committees.

PART 3—AMENDMENT OF *MEDICAL ACT 1939*

Clause 11 specifies that this part of the Bill amends the *Medical Act 1939*.

Clause 12 amends section 17C by inserting a provision to enable the Medical Board to conditionally register a person as a medical practitioner if the person has qualifications in general practice conferred by the Royal Australian College of General Practitioners or another prescribed body and registration is for the purpose of enabling the person to practise in general practice. The clause also inserts new subsections (2) and (3) in section 17C which:

- provide that the Minister may decide there is an unmet area of need for the purpose of section 17C(1)(d) and specify in what circumstances the Minister may make a decision in this regard; and
- require the Minister to give the Medical Board written notice of such a decision.

PART 4—AMENDMENT OF *TOBACCO PRODUCTS (PREVENTION OF SUPPLY TO CHILDREN) ACT 1998*

Clause 13 specifies that this part of the Bill amends the *Tobacco Products (Prevention of Supply to Children) Act 1998*.

Clause 14 amends the long title of the *Tobacco Products (Prevention of Supply to Children) Act 1998*.

Clause 15 amends the short title of the Act.

Clause 16 amends the main object of the Act by extending the object from “tobacco products” to “smoking products”.¹

Clause 17 replaces the heading for Part 2.

Clause 18 replaces the heading for Division 1 of Part 2.

Clause 19 provides that Division 1 of Part 2 does not apply to the supply of smoking products from coin-operated vending machines.

Clauses 20 to 23 extend the application of sections 9 to 12 of the Act to the supply of herbal cigarettes and loose smoking blends to children.

Clause 24 extends the application of section 13 of the Act to suppliers of herbal cigarettes and loose smoking blends.

Clause 25 inserts a new Division 3 into Part 2 of the Act. This division bans the use of coin-operated vending machines to supply herbal cigarettes or loose smoking blends to *any person*. The penalty for breaching this requirement is 13 penalty units for a first offence and 26 penalty units for a second or later offence.

¹ In order to extend the application of the Act to restrict the supply of non-tobacco smoking products to children, a number of the key terms used throughout the legislation have been amended. For example, where appropriate:

- the term “tobacco product” is replaced with the broader term “smoking product”, which is defined as meaning a tobacco product, herbal cigarette, or loose smoking blend (ie. a herb or other plant, or a blend thereof, that is prepared for smoking as a roll your own cigarette or in a pipe); and
- the term “tobacco product supplier” is replaced with the broader term “supplier”, which is defined as meaning 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 (see clause 36).

As a consequence of the new Division 3 being inserted into Part 2, the clause also provides for:

- the renumbering of the existing Division 3 as “Division 3A - Supply of smoking products by adults to children”; and
- the insertion of a new application provision for this division (section 18A). This provision specifies that Division 3A does not apply to the supply of smoking products by suppliers or their employees, in the ordinary course of employment; or the supply of smoking products from coin-operated vending machines.

Clause 26 extends the application of section 19 of the Act to make it an offence for an adult, other than the responsible adult for a child, to supply a child with herbal cigarettes or a loose smoking blend. A “responsible adult” is defined as meaning an adult who is the child’s parent, step-parent, guardian, or who has parental rights and responsibilities for the child.

Clause 27 amends section 20 of the Act in accordance with the omission of the term “tobacco product supplier” in favour of the broader term “supplier”.

Clause 28 replaces the heading for Division 5 of Part 2.

Clause 29 makes it an offence to sell herbal cigarettes other than in a package or in a package containing less than 20 cigarettes.

Clause 30 amends section 23 of the Act in accordance with the omission of the term “tobacco product supplier” in favour of the broader term “supplier”.

Clause 31 inserts a new section into Division 5 of Part 2 to make it an offence for a supplier to sell a prepackaged loose smoking blend in a quantity of less than 15 g. A prepackaged loose smoking blend is defined under clause 37 as meaning a loose smoking blend that is packaged for retail sale.

Clause 32 extends the application of section 25 of the Act to deal with those circumstances where a person may be liable for a breach of the legislation in relation to the sale of a prepackaged loose smoking blend in a quantity below the prescribed minimum quantity for this type of smoking product.

Clause 33 amends section 33(2)(b) of the Act in accordance with the omission of the term “tobacco product supplier” in favour of the broader term “supplier”.

Clauses 34 and *35* amend section 39(1) and 40 respectively, to replace the term “tobacco product” with the broader term “smoking product”.

Clause 36 replaces the existing section 51 and sets out the circumstances under which evidence of a thing labelled as a tobacco product, herbal cigarette or loose smoking blend is evidence that the thing is or contains such a product.

Clause 37 amends the Schedule to the Act by omitting the definitions for the terms “package” and “tobacco product supplier”; and inserting definitions for the terms herbal cigarette, loose smoking blend, package (for cigarettes and herbal cigarettes), prepackaged loose smoking blend, smoking product and supplier.