

Health Legislation Amendment Bill 2014

Explanatory Notes for amendments to be moved during consideration in detail by the Honourable Lawrence Springborg MP

Title of the Bill

Health Legislation Amendment Bill 2014

Objectives of the amendments

The main objectives of the amendments are to amend the Bill, in response to issues raised by stakeholders and the Health and Community Services Committee, to clarify that the definitions of ‘personal vaporiser’ and ‘personal vaporiser related product’ capture all of the vaporiser devices and products which are intended to be regulated.

The Bill is also amended to clarify the circumstances under which the State may recover a financial contribution from local government for a liability indemnified for an asbestos-related event in a non-workplace setting, to ensure there is no ambiguity. This amendment also responds to recommendations from the Health and Community Services Committee.

Amendments will also be made to the Bill to exclude individuals acting on their own behalf, seeking donation of human eggs or human sperm for fertility treatment from the advertising prohibition in section 41 of the *Transplantation and Anatomy Act 1979*.

Achievement of the objectives

The objective will be achieved by making the amendments specified in the Notes on Provisions section of these Explanatory Notes.

Alternative ways of achieving policy objectives

There are no viable alternatives that would achieve the policy objectives of these amendments.

Estimated cost for government implementation

The costs of the amendments will be met from within existing departmental resources.

Consistency with fundamental legislative principles

Making a regulation to prescribe devices that are not captured by the definition of personal vaporiser, or personal vaporiser related product, raises the fundamental legislative principle of whether the Bill has sufficient regard to the institution of Parliament, and whether it

authorises the amendment of an Act by another Act under section 4(4)(c) of the *Legislative Standards Act 1992*.

Personal vaporisers are an emerging technology, and vary widely in content, design and operation. In August 2014, a report produced for the World Health Organisation advised that regulatory approaches to personal vaporisers should be developed to allow for flexibility to take account of these emerging technologies.

The capacity to explicitly exclude products not intended to be captured as personal vaporisers, or personal vaporiser related products, will provide clarity to consumers and industry, and support enforcement of the *Tobacco and Other Smoking Products Act 1998*.

Consultation

Submissions were invited on the Bill following its introduction into the Legislative Assembly on 9 September 2014. Twenty-seven submissions were received, and the Health and Community Services Committee held a public hearing on 29 October 2014 to hear from invited witnesses.

NOTES ON PROVISIONS

Amendment of clause 1 (Short title)

Amendment 1 amends the short title of the Bill. The short title of the Bill will be amended to ‘Health and Other Legislation Amendment Bill 2014’.

Amendment of clause 2 (Commencement)

Amendment 2 amends the commencement provision of the Bill to take account of the proposed new part 2A.

The proposed new part 2A makes amendments to the *Building and Construction Industry Payments Amendment Act 2014*.

Amendment of clause 14 (Insertion of new pt 8, div 7)

Amendment 3 amends the heading title in the new part 8, division 7 of the *Ambulance Service Act 1991* to refer to the ‘Health and Other Legislation Amendment Act 2014’.

Amendment 4 amends the reference to the *Health Legislation Amendment Act 2014* in the new section 100 of the *Ambulance Service Act 1991* to refer instead to the *Health and Other Legislation Amendment Act 2014*.

Amendment of clause 38 (Insertion of new pt 13, div 5)

Amendment 5 amends the heading title in the new part 13, division 5 of the *Hospital and Health Boards Act 2011* to refer to the ‘Health and Other Legislation Amendment Act 2014’.

Amendment 6 amends the reference to the *Health Legislation Amendment Act 2014* in the new section 322 of the *Hospital and Health Boards Act 2011* to refer instead to the *Health and Other Legislation Amendment Act 2014*.

Amendment of clause 43 (Insertion of new ch 11, pt 1A)

Amendment 7 amends the new section 454A to insert a definition for the term ‘indemnified liability’. ‘Indemnified liability’ of a local government means a civil liability of the local government that is indemnified by the State under the new section 454C(1). This new definition results from the proposed new section 454CA that is inserted by amendment 9 below.

Amendment 8 inserts a proposed new subsection 454C(5) to clarify that the State is entitled to manage and control any proceedings started against a local government in relation to the civil liability for asbestos-related harm.

Amendment 9 amends clause 43 to insert a proposed new section 454CA.

In its current form, there is no provision in the new chapter 11, part 1A of the *Public Health Act 2005* that requires a local government to notify the State of a claim, where a person who has suffered ‘asbestos-related harm’ issues proceedings against the relevant local government. Although local governments are likely to notify the State of each claim as it is

received, this may not always occur. Where no notification is received, or notification is not timely, the State may not be able to ensure that the defence of the claim is managed appropriately. Even where the State does receive timely notification of the claim, there is currently no provision in the Bill that gives the State the right to manage the defence of a claim made against a local government.

The proposed new section 454CA provides that if a proceeding is started against a local government, and that proceeding may result in civil liability being indemnified by the State under the section 454C, the local government must give the State notice of the proceeding as soon as practicable after the proceeding started.

These amendments provide clarity that the State has a right to manage the defect of a claim brought against a local government for asbestos-related harm in a non-workplace setting, and to require a local government to notify the State that such a claim has been received.

Amendment 10 amends clause 43 in response to recommendation 8 of the Health and Community Services Committee Report No. 59.

Clause 43 inserts a new section 454D into the *Public Health Act 2005*. This new section enables the State to recover a financial contribution from a local government for liability indemnified under section 454C(1), but only if the circumstances in stated in subsection (2), (3) or (4) exists.

The Health and Community Services Committee recognised that this is a reference to the circumstances at subsection (2), (3) or (4) of the new section 454D of the *Public Health Act 2005*.

However, the Committee considered that the positioning of the references to the circumstances stated in subsection (2), (3) or (4) immediately after a reference to section 454C may raise doubt as to whether the reference refers to subsections (2), (3) or (4) of the new section 454C, or section 454D as is intended. The Committee further noted that while the provision, as currently drafted, complies with current drafting practices, it may raise the issue of whether the legislation is unambiguous and sufficiently clear.

Amendment 10 clarifies the new section 454D to remove any ambiguity around the circumstances under which the State may recover a financial contribution from local government for a liability indemnified under the section 454C.

Amendment of clause 50 (Insertion of new pt 14, div 5)

Amendment 11 amends the heading title in the new part 14, division 5 of the *Radiation Safety Act 1999* to refer to the ‘Health and Other Legislation Amendment Act 2014’.

Amendment of clause 53 (Insertion of new s 5A)

Amendments 12 to 18 amend clause 53, to clarify the meaning of ‘personal vaporiser’ and ‘personal vaporiser related product’ in the new section 5A. These amendments give effect to the recommendation of the Health and Community Services Committee to amend the Bill to ensure that these definitions capture all of the devices and products intended to be regulated.

The amendments to the *Tobacco and Other Smoking Products Act 1998* in the Bill intend to capture all personal vaporisers, and personal vaporiser related products (such as liquid flavouring, cartridges and mouthpieces) as smoking products under the Act. Treating personal vaporisers as smoking products will enable existing restrictions regarding sale and supply, promotion, use and enforcement to apply to personal vaporisers as they would other smoking products.

The current definition of ‘personal vaporiser’ in the Bill limits the application of the proposed new provisions to devices that are capable of delivering only nicotine into an individual’s body. The definition does not extend to capture those personal vaporisers that do not contain nicotine. This is contrary to the intent of the provisions.

The long-term health effects of personal vaporisers, including those that do not contain nicotine, are not yet known. Furthermore, there is a risk that simulating smoking with a personal vaporiser, even if it does not contain nicotine, may normalise smoking behaviour, and undermine years of campaigning by governments and communities to reduce smoking rates.

Amendment 12 therefore amends the definition of ‘personal vaporiser’ in the new section 5A, to clarify that a personal vaporiser is a device that is capable of being used to deliver a substance (not just nicotine) into an individual’s body when the individual inhales through the device.

To ensure the definition of ‘personal vaporiser’ does not unintentionally capture a range of other devices, including medical devices that are used to treat a range of illnesses and diseases, application of the definition is restricted.

Amendment 13 further amends the new section 5A to clarify that a personal vaporiser will not include a device included in the Australian Register of Therapeutic Goods under the *Therapeutic Goods Act 1989* (Cwlth). However, a device that is designed for the purpose of helping a person to stop smoking, and satisfies the other elements of the definition of personal vaporiser, will continue to be captured. This means that devices such as asthma inhalers or other nasal decongestant inhalers will not be considered personal vaporisers for the purposes of these provisions.

Similarly, a device that is designed to be used to deliver oxygen into an individual’s body will also not be considered to be a personal vaporiser. This means that oxygen tanks, devices used to treat patients suffering from conditions like emphysema or cystic fibrosis, or other oxygen devices used in a workplace health and safety capacity are not personal vaporisers for the purposes of these provisions.

Amendment 13 goes on to clarify that a personal vaporiser does not include a bong, hookah or ice pipe, as these items are dealt with separately in the *Tobacco and Other Smoking Products Act 1998*.

The amendment also creates a head of power so that other devices, not intended to be captured as a personal vaporiser, can be prescribed under a regulation.

The effect of amending the definition of ‘personal vaporiser’ in this way will ensure the offence provisions relating to smoking products and personal vaporisers do not apply to devices not intended to be regulated by this Bill.

Amendment 14 renumbers clause 5A(2) to 5A(3), following the amendments made by amendment 13.

Amendment 15 amends the definition of ‘personal vaporiser related product’ to clarify that a personal vaporiser related product means a device or other product that is apparently intended to be part of a personal vaporiser, but is not capable of being used to deliver a substance into an individual’s body without adjustment, modification or addition.

This amendment ensures consistency with the changes to the definition of ‘personal vaporiser’ in capturing devices that are capable of delivering any substance into an individual’s body, rather than only applying to devices that deliver nicotine.

Amendment 16 goes on to remove the references to an atomiser as an example of a personal vaporiser related product. The amendment replaces ‘atomiser’ with a reference to an electronic heating element. This amendment was considered necessary, as ‘atomiser’ has multiple meanings, and was not defined in the new section 5A. This amendment also ensures consistency with the definition of ‘personal vaporiser’.

Amendment 17 amends paragraph (b) of the definition of ‘personal vaporiser related product’ in the current subsection 5A(2) to replace the semi-colon at the end of this paragraph with a full stop. This amendment takes account of the new subsection being inserted by amendment 18 below.

Amendment 18 inserts a proposed new subsection (4) into the section 5A. This new subsection creates a head of power so that other devices or products, not intended to be captured as personal vaporiser related products, can be prescribed under a regulation. This head of power will enable new products that enter the market, that are not intended to be classed as personal vaporiser related products, to be excluded from the scope of the definition.

Amendment of clause 67 (Amendment of schedule (Dictionary))

Amendment 19 amends the reference to the section 5A(1) in the definition of ‘personal vaporiser’ in clause 67 of the Bill, and replaces it with a reference to section 5A(1) and (2). This amendment takes account of the changes made to the definition of ‘personal vaporiser’.

Amendment 20 amends the reference to the section 5A(2) in the definition of ‘personal vaporiser related product’ in clause 67 of the Bill, and replaces it with a reference to 5A(3) and (4). This amendment takes account of the changes made to the definition of ‘personal vaporiser related product’.

Amendment 21 updates the amendment to the definition of ‘smoke’ made by clause 67 of the Bill. The amendment clarifies that for a personal vaporiser, ‘smoke’ means to inhale through the vaporiser.

Amendment of clause 72 (Insertion of new ss 42AA and 42AB)

Amendment 22 amends the section heading for clause 72 to change the reference to the section 42AB to refer instead to 42AC. This amendment takes account of the proposed new section 42AC being inserted by amendment 23 below.

Amendment 23 amends clause 72 to insert a proposed new section 42AC into the *Transplantation and Anatomy Act 1979*.

Currently, the *Transplantation and Anatomy Act 1979* provides that a person must not advertise to buy tissue from someone unless the Minister for Health has approved the advertisement. Under the amendments in the Bill at clause 51A, the Minister will be able to delegate this approval power to an appropriately qualified public service employee or health service employee.

This prohibition on advertising applies to advertisements published or disseminated by newspaper or other periodical, books, broadcasting, television, cinematic or other means. It also applies to advertisements exhibited in public view in a house, shop or other place, and to pamphlets or other material deposited into a yard, garden, or enclosure of a house, shop or other place.

This prohibition was consistent with the model legislation drafted and proposed in 1977 by the Australian Law Reform Commission, and reflects the intent of the Act to prohibit trading in human tissue. The requirement for Ministerial approval of advertisements enables the Minister to monitor the legitimacy of any advertisements to buy tissue.

The definition of 'tissue' in the *Transplantation and Anatomy Act 1979* captures human ova (eggs) and human sperm, as well as any other human tissue. The prohibition on advertising to buy tissue therefore also applies to advertisements regarding human eggs and human sperm.

It has recently been identified that some advertisements to buy tissue are generated by individuals seeking human gamete donors. Submissions to the Health and Community Services Committee indicated that because of extensive waiting lists for human egg donors through Assisted Reproductive Technology (ART) providers, many patients recruit their own gamete donors, including via the internet, enabling them to undertake ART much sooner than if they waited for a donor sourced by the ART provider. For the purposes of the *Transplantation and Anatomy Act 1979*, this amounts to advertising and, if the person did not obtain Ministerial approval for their 'advertisement', contravenes the Act.

Submissions to the Health and Community Services Committee about the Bill raised further concerns in relation to whether the Act should continue to regulate advertisements for the buying of human tissue in this manner. In its Report, the Committee noted that it considers it is still appropriate for advertisements for certain human tissue to be approved by the Minister or his or her delegate. The Committee also noted that advertising has changed substantially over the years, and that the regulation of advertising over the internet is complex. It is possible that there would be difficulties in enforcement of the existing advertising requirements in relation to advertisements placed on the internet or other forums by individuals who seek human eggs or human sperm for fertility treatment.

In its Report No. 59, the Health and Community Services Committee recommended that options be examined to remove the requirement for approval of advertisements for altruistic non-commercial donations of human eggs or human sperm for fertility treatment.

The proposed new section 42AC provides that the prohibition on advertising to buy tissue without Ministerial approval does not apply to a donation of human eggs or human sperm if an individual (the recipient) publishes, disseminates, exhibits or deposits an advertisement

stating that they are seeking another individual (the donor) to donate human eggs or human sperm. The eggs or sperm must be for use by the recipient for the purpose of assisted reproductive technology, and the recipient must not give the donor valuable consideration for the donation.

‘Human eggs’ and ‘human sperm’ are defined by reference to the *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*. ‘Human sperm’ includes human spermatids.

‘Valuable consideration’, for the donation of human eggs or human sperm by an individual, means any form of payment, reward or other material benefit or advantage, but does not include the payment of the individual’s reasonable expenses in connection with the donation. Ensuring the recipient does not give any form of payment, reward or other benefit to the donor is consistent with the intent of the Act to prohibit trading in human tissue, while recognising some individuals may require altruistic donation of eggs or sperm in order to have children.

Amendment of long title

Amendment 24 amends the long title of the Bill to include a reference to the *Building and Construction Industry Payments Amendment Act 2014*. This takes account of the amendments included in the proposed new part 2A of the Bill.