

Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2025 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 Tim Nicholls MP, Minister for Health and Ambulance Services, provide this human rights certificate with respect to the *Tobacco and Other Smoking Products and Other Legislation Amendment Regulation 2025* (Amendment Regulation) made under the *Tobacco and Other Smoking Products Act 1998* and the *State Penalties Enforcement Act 1999*.

In my opinion, the Amendment 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

On 19 September 2024, the *Tobacco and Other Smoking Products (Vaping) and Other Legislation Amendment Act 2024* (Amendment Act) received assent. The Amendment Act amended the Tobacco and Other Smoking Products Act to create several new offences relating to illicit nicotine products (which includes vaping goods and other products prescribed by regulation) and significantly increased the penalties for existing offences relating to illicit tobacco. The Amendment Act also introduced new enforcement options such as closure powers and injunctive relief.

Despite these reforms, the widespread availability of vaping goods and illicit tobacco remains a substantial public health issue in Queensland. The profitability of this illegal trade outweighs the risks for many suppliers, driving non-compliance. The supply of nicotine pouches is also increasing. These products are often sold by the same retailers who supply vaping goods and illicit tobacco, and are promoted as a healthy and discreet alternative to smoking and vaping.

Tobacco, vaping goods and products like nicotine pouches are associated with a variety of negative health outcomes, including respiratory illness, cardiovascular problems, and nicotine dependence. Further controls are required to effectively disrupt the economic incentives associated with the supply of these products.

Prescribing penalty infringement notice offences

Penalty infringement notices (PINs) are an essential component of the enforcement framework under the Tobacco and Other Smoking Products Act. Significant PIN penalties are required for the offences relating to the supply and commercial possession of illicit tobacco and illicit nicotine products, to ensure penalties are commensurate with the economic incentives of this illegal trade and provide an effective deterrent.

The State Penalties Enforcement Act enables the issuing of PINs as an alternative to prosecution. The recipient of a PIN can either pay the fine contained in the PIN or, if they wish to contest the offence, elect to have the matter decided by a court. PINs can be issued for an

offence if the offence is prescribed in schedule 1 of the *State Penalties Enforcement Regulation 2014* as an infringement notice offence.

The Amendment Regulation amends schedule 1 of the State Penalties Enforcement Regulation to prescribe the offences under sections 161(1) and 161A(1) of the Tobacco and Other Smoking Products Act as PIN offences. These offences relate to the supply of illicit tobacco and illicit nicotine products as part of a business activity. The PIN penalty for each offence is 200 penalty units for an individual and 1000 penalty units for a corporation. The Amendment Regulation also prescribes the offences in sections 161(2) and 161A(2) as PIN offences. These offences relate to the possession of illicit tobacco and illicit nicotine products as part of a business activity. The PIN penalty for each offence is 100 penalty units for an individual and 500 penalty units for a corporation. These penalties are commensurate with the economic incentives driving the ongoing illegal supply of illicit tobacco and illicit nicotine products.

The Amendment Regulation also prescribes sections 109A(1), 109A(2) and 109A(3) of the Tobacco and Other Smoking Products Act as PIN offences. These offences relate to the display, advertising and promotion of illicit nicotine products. The PIN penalty for all offences is 10 penalty units for an individual and 50 for a corporation. Sections 215(3) and 216(1) are also prescribed as PIN offences. These offences relate to non-compliance with a requirement to provide information about an offence under the Tobacco and Other Smoking Products Act to an authorised person, and to providing false or misleading information to an authorised person. The PIN penalty for each offence is 4 penalty units.

Schedule 1 of the State Penalties Enforcement Regulation is also amended to increase the penalties for sections 90(1), 90(2), 90(3), 158(1) and 159(1) of the Tobacco and Other Smoking Products Act, which are currently prescribed as PIN offences. These offences relate to the display and advertising of smoking products, and the sale, supply and display of ice pipes and bongs. These offence provisions will attract a PIN penalty of 10 penalty units for an individual and 50 penalty units for a corporation (an increase from the current PIN penalty of 4 penalty units).

The Amendment Regulation also amends schedule 1 of the State Penalties Enforcement Regulation to identify the authorised persons for service of infringement notices relating to the following offences:

- section 78(2) – authorised persons appointed under section 170(1) of the Tobacco and Other Smoking Products Act.
- section 127(2) or section 131(2) – authorised persons appointed under section 170(1), (2), (3) or (4) of the Tobacco and Other Smoking Products Act, or a police officer; and
- sections 161A(1), 161A(2) and 161B(2) – authorised persons appointed under section 170(1) or (7) of the Tobacco and Other Smoking Products Act.

The Amendment Regulation will support the enforcement of the relevant offences in the Tobacco and Other Smoking Products Act by providing authorised persons with additional enforcement options, increasing the deterrent effect of the offences, and reducing the regulatory burden on the justice system.

Prescribing nicotine pouches as ‘illicit nicotine products’

New section 161A of the Tobacco and Other Smoking Products Act provides that it is an offence to supply or possess illicit nicotine products as part of a business activity. Section 161B provides that it is an offence for an employee or other person acting on behalf of another to supply illicit nicotine products or illicit tobacco. Section 161C provides that it is an offence for an adult to supply a child with an illicit nicotine product outside of a commercial environment (for example, supply by an adult to a friend or family member who is a child). Section 109A provides that it is an offence to display, promote or advertise illicit nicotine products as part of a business activity.

Schedule 1 of the Tobacco and Other Smoking Products Act defines ‘illicit nicotine product’ as vaping goods or another product containing nicotine or another substance detrimental to health prescribed by regulation. 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 instead contain another substance detrimental to health. To date, no products have been prescribed by regulation as illicit nicotine products.

Nicotine pouches are small pouches designed to be placed between the lip and gum which may contain nicotine, a synthetic nicotine, a nicotine analogue such as 6-methylnicotine, or another nicotine alternative or substitute. Nicotine pouches also often contain sweeteners and come in a variety of mint, fruit, beverage and confectionary flavours – for example, peppermint, watermelon, coffee and bubble gum. Nicotine pouches are sometimes held out to be ‘nicotine-free’, ‘zero nicotine’ or as giving ‘a nicotine-like experience without the nicotine’. Nicotine pouches are colloquially known as ‘lip pillows’, ‘upper decky’ or ‘zyn’.

The Amendment Regulation amends the *Tobacco and Other Smoking Products Regulation 2021* to prescribe nicotine pouches as illicit nicotine products. This will ensure that the prohibition on their supply and commercial possession can be effectively enforced under the Tobacco and Other Smoking Products Act.

Prescribed smoke-free places

Section 140(1) of the Tobacco and Other Smoking Products Act provides that a person must not smoke within a government precinct. Subsection (3) provides that ‘government precinct’ means land adjoining a building occupied by the State, the Legislative Assembly, a court, a tribunal, an entity that represents the State or another entity established by an Act, that is prescribed by regulation.

41 George Street, Brisbane, is no longer occupied by an entity that represents the State and therefore no longer meets the criteria to be prescribed as a smoke-free government precinct.

To ensure that the prescribed smoke-free places identified in the Tobacco and Other Smoking Products Regulation are accurate, the Amendment Regulation removes 41 George Street, Brisbane, from the list of smoke-free government precincts.

Human Rights Issues

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

In my opinion, the human rights that are relevant to the Amendment Regulation are:

- Right to property (section 24)
- Right to liberty and security (section 29); and
- Right to a fair hearing (section 31).

Where rights are potentially limited by the Amendment Regulation, I have provided an analysis of the justification for the limitation.

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

1. Human rights potentially limited by prescribing nicotine pouches as illicit nicotine products

By prescribing nicotine pouches as ‘illicit nicotine products’, the Amendment Regulation enables the prohibition on their supply and commercial possession to be enforced under the *Tobacco and Other Smoking Products Act*, instead of under the *Medicines and Poisons Act 2019*.

Under section 161A of the *Tobacco and Other Smoking Products Act*, a person must not, as part of a business activity, supply illicit nicotine products. The maximum penalty for non-compliance is 2 years imprisonment, and/or 2000 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 maximum penalty for this offence is 12 months imprisonment, and/or 1000 penalty units.

As with vaping goods, seized nicotine pouches would be able to be forfeited without prosecution if likely to be used to commit further offences if returned to the owner.

(a) the nature of the right

Right to property

Every person has the right to own property alone or in association with others and must not be arbitrarily deprived of their property (section 24, *Human Rights Act 2019*). Case authority suggests that ‘arbitrary’ in this context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are not proportionate to a legitimate aim that is sought.

‘Property’ includes all real and personal property interests recognised under general law (for example, interests in land, contractual rights, money and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).

The Amendment Regulation limits the right to property. It prescribes nicotine pouches as illicit nicotine products, thereby prohibiting their supply and commercial possession pursuant to the Tobacco and Other Smoking Products Act, as well as authorising their seizure and forfeiture under that Act if likely to be used to commit further offences if returned to the owner.

Right to liberty and security

The right to liberty and security (section 29, Human Rights Act) protects personal liberty and requires that due process be followed when state authorities exercise their powers of arrest and detention. The right protects against deprivation of liberty that is arbitrary or unlawful. The right is relevant whenever a person is placed at risk of imprisonment.

The Amendment Regulation limits the right to liberty and security, by prescribing nicotine pouches as illicit nicotine products, meaning that their supply or commercial possession may attract a term of imprisonment.

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

The purpose of the limitations engaged by prescribing nicotine pouches as illicit nicotine products is to protect public health. This is a purpose that is clearly consistent with a free and democratic society based on human dignity, equality and freedom.

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

The limitation achieves its purpose by effectively prohibiting the supply of nicotine pouches to the public. This will limit access by deterring suppliers from possessing and supplying them and by physically removing them from the market through seizure and forfeiture powers. This is expected to reduce usage, which will result in improved public health outcomes.

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

An alternative option to prescribing nicotine pouches as illicit nicotine products would be to rely on the use of current enforcement powers under the Medicines and Poisons Act for offences relating to the possession of nicotine without a prescription.

However, the enforcement powers under the Medicines and Poisons Act are less suited to efficient monitoring and enforcement of prohibitions on nicotine pouches than those available under the Tobacco and Other Smoking Products Act. For example, prosecutions under the Medicines and Poisons Act require evidence that the seized product contains nicotine. The analysis required to be undertaken to provide this evidence is slow and resource intensive.

Additionally, Queensland Health officers cannot simultaneously exercise powers under the Tobacco and Other Smoking Products Act and the Medicines and Poisons Act. This has resulted in a dual enforcement approach which requires at least four Queensland Health officers to be involved in inspections of retailers selling both nicotine pouches and tobacco products. It is preferable that officers be able to act under a single legislative framework in relation to these retailers.

For the above reasons, relying on the Medicines and Poisons Act to enforce the prohibition on the supply of nicotine pouches would not effectively achieve the purpose of the Amendment Regulation.

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The World Health Organisation recommends the regulation of novel nicotine products likely to be attractive to young persons who have never used the products before. The World Health Organisation noted that nicotine pouches have many attractive features. These include their availability in a variety of fruit, mint and other flavours which contain sweeteners, their cost (potentially less than a packet of conventional cigarettes), and the perception that pouches are effective for quitting smoking, less harmful than other tobacco products, and easy and discreet to use, including in places where smoking is banned.¹

Recent media articles indicate that nicotine pouches are being marketed to young Queenslanders as an ‘upgrade’ to smoking and vaping.² A 2024 University of Melbourne survey of almost 1600 Australians aged 16-39 years found that over one quarter (26 percent) of those surveyed had used a nicotine pouch in their lifetime, with almost one in five (19 percent) having used a nicotine pouch in the 30 days prior to the survey.³

Data from independent testing of nicotine pouches suggests they contain hazardous substances, including substances classified as ‘possibly carcinogenic’ by the International Agency for Research on Cancer. Nicotine pouches also pose a significant health risk in terms of creating and maintaining nicotine dependence, accidental misuse, and cardiovascular problems. Nicotine use by children and young adults can exacerbate mental health concerns such as anxiety and depression.

The amendments will deliver benefits to the community now and into the future, in terms of improved health outcomes and reduced health costs. Primarily, the limitations will impact individuals currently choosing to deliberately flout and obstruct existing laws designed to protect the community.

In my opinion, the amendments strike an appropriate balance between competing rights that is reasonable and demonstrably justifiable in a free and democratic society.

2. Human rights potentially limited by prescribing offences as PIN offences

- (a) the nature of the right

Right to a fair hearing

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.

¹ WHO study group on tobacco product regulation. (2023). Report on the scientific basis of tobacco product regulation: ninth report of a WHO study group. In WHO Technical Report Series (Vol. 1047). World Health Organization. <https://iris.who.int/bitstream/handle/10665/372463/9789240079410-eng.pdf?sequence=1>, ch.4.

² Couacaud, T. (2024, October 6). Alert on kid lure vaping facelift. *Sunday Mail*.

³ Jongenelis, M. I., Brierley, M. E., & Li, R. (2024). Patterns of nicotine pouch use among young Australians. *Drug and Alcohol Dependence*, 264, 112428. <https://doi.org/10.1016/j.drugalcdep.2024.112428>.

The Amendment Regulation amends the State Penalties Enforcement Regulation to allow PINs to be issued for certain offences, and to increase penalties applying to some existing PIN offences. 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 could be characterised as a limitation on the right to a fair hearing, 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, 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 *Tobacco and Other Smoking Products Act 1998* and protect the community from the public health risk posed by illicit tobacco and illicit nicotine products such as vaping goods and nicotine pouches.

PINs are a cost-effective method of enforcement, as they reduce the demands on courts and the need for authorised persons to initiate prosecution action. PINs also give the alleged offender an alternative to prosecution, removing the need to attend court or prepare a defence. They provide alleged offenders with 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.

The purpose of the limitation is therefore consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation 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 Tobacco and Other Smoking Products Act by providing for the immediate imposition of proportionate penalties outside the court process. As this limitation acts as a deterrent to contravening the Tobacco and Other Smoking Products Act, it assists in ensuring compliance with the requirements of that Act, that are designed to protect public health.

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

If PINs could not be issued for contravening the relevant offences in the Tobacco and Other Smoking Products Act, the main enforcement response would be prosecution, which is resource and cost intensive.

There is therefore no less restrictive and reasonably available way to achieve the purpose of enforcing relevant offences in the Tobacco and Other Smoking Products Act in a timely and cost-effective way.

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The amendments in the Amendment 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 Tobacco and Other Smoking Products Act, authorised persons undertake monitoring and compliance activities, which include the issuing of PINs where contraventions are identified. Without the ability to issue PINs, authorised persons would primarily need to rely on prosecution action, which as noted above has significant cost and resource implications.

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 Amendment Regulation is compatible with the Human Rights Act 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.

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MINISTER FOR HEALTH AND
AMBULANCE SERVICES

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