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Queensland Health Legislation Consultation
Legislative Policy Unit
Strategy, Policy & Reform Division
Queensland Health

By email: [REDACTED]

Dear Legislative Policy Unit

Tobacco and Other Smoking Products and Other Legislation Amendment Bill 2025 – Consultation Paper

Thank you for the opportunity to provide feedback on the Consultation Paper regarding the Tobacco and Other Smoking Products and Other Legislation Amendment Bill 2025. The Queensland Law Society (QLS) appreciates being consulted on this important Consultation Paper.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Executive Summary/Key Points:

- QLS supports evidence-based measures to eliminate the supply of illicit tobacco and illicit nicotine products. However, there is insufficient evidence cited in the Consultation Paper to support a number of the proposed amendments.
- We have identified several concerns and unintended consequences of the proposed amendments that require further consideration.
- In particular, the proposals affecting lessors may have significant impacts on the retail sector.
- To address these issues, we have outlined our recommendations throughout this submission.
- QLS would welcome the opportunity to provide further feedback when the draft legislation has been prepared.

This response has been compiled by the QLS Criminal Law Committee and Property and Development Law Committee, whose members have substantial expertise in this area.

General comments

The proposed amendments to the *Tobacco and Other Smoking Products Act 1998* (Qld) (the **Act**) are lacking in detail at this stage. It is difficult to provide comprehensive feedback without considering the details of the proposed amendments. QLS would welcome the opportunity to provide further feedback when the draft legislation has been prepared.

QLS supports evidence-based measures to eliminate the supply of illicit tobacco and illicit nicotine products. However, while the Consultation Paper notes previous amendments to the Act have not been effective, the paper does not provide evidence that the proposed amendments will be more effective. Although the Consultation Paper refers to similar laws being recently introduced in South Australia, it is not clear whether this approach has effectively reduced the supply and possession of illicit tobacco and illicit nicotine products in South Australia. Additionally, it is not clear whether the Department has considered the possibility of the amendments further driving the illicit tobacco and illicit nicotine product trade underground.

As several of the proposed amendments will significantly impact the retail sector, QLS suggests the Department consults with commerce and property experts before proceeding further with the proposals. We also suggest you consider the unintended consequences outlined in this submission that could disproportionately impact regional and remote areas, 'mum and dad' investors and self-managed superannuation fund lessors, and lawfully operated businesses that are caught out by the acts of their employees.

Closure powers

QLS is concerned with the proposed extension of the interim closure order made by the chief executive from 72 hours to three months. As an 'interim' power, the closure order should only be required as a temporary step to halt trading until the chief executive can apply to a magistrate for a long-term closure order. The chief executive should usually be able to obtain a court order in less than three months. If this is not currently possible, we suggest additional resourcing be provided to Magistrates Courts to ensure they can hear these matters and issue orders on an urgent basis.

QLS agrees that extending the power to issue an interim closure order for more than 72 hours should require the chief executive to satisfy a higher threshold. QLS agrees the chief executive must be "satisfied", rather than "reasonably suspects", that illicit tobacco or illicit nicotine products are being supplied at the premises before issuing an order.

However, the proposed extension of an interim closure order to three months could be interpreted as imposing a financial punishment without first obtaining a court order. As stated in the Consultation Paper, a three-month closure period will "ensure that closure has a tangible and significant financial impact on illegal operators." In our view, it is inappropriate for the chief executive to impose a punishment on a business operator, including halting its legal trading activities, which could have the effect of putting the store permanently out of business. This step should only be taken after a magistrate has considered the evidence and is satisfied that a long-term closure order is required to stop the supply of illicit tobacco or illicit nicotine products from the premises.

Recommendations

1. Allow an interim closure order for a maximum of one or two weeks to give the chief executive sufficient time to obtain a longer closure order from a magistrate.
2. Require the magistrate to determine whether it is appropriate to close the business for a longer period to stop the supply of illicit tobacco or illicit nicotine products from the premises.

Termination of leases

QLS agrees that if a lessee's business is shut down for a long period of time due to a closure order, lessors should not be out-of-pocket or left with premises they cannot re-lease. However, QLS is concerned with potential unintended consequences of the proposed lessor's right to terminate a lease of premises subject to a closure order.

The Consultation Paper does not specify whether the proposed right to terminate will apply to existing leases, but presumably it will apply to existing leases to capture operators who are currently selling illicit tobacco and nicotine products as well as leases entered after the legislation comes into force. To effectively do this, the right to terminate will need to override legislation such as the *Retail Shop Leases Act 1994* (Qld) and *Property Law Act 1974* (Qld), the express lease provisions agreed by the parties, and general contractual principles. Any right that so extensively overrides other legal rights and obligations must be carefully considered and drafted.

QLS is also concerned about giving a lessor the right to terminate a lease before the lessee is found to have committed an offence or a closure order has been issued by a magistrate. The Consultation Paper proposes allowing a lessor to terminate a lease after the chief executive issues an interim closure order. However, in our view, granting the right to override all other legal rights and obligations based on an administrative order that has not withstood the rigour of court scrutiny cannot be legally justified. We recommend the right to terminate a lease only be exercisable after a magistrate has issued a long-term closure order.

Although the Consultation Paper states the lessor will be immune from any claims for damages if it properly invokes the statutory right to terminate, this right to immunity must be carefully drafted to ensure lessors are adequately protected from all potential claims by a lessee. The Consultation Paper notes that if a lease is terminated due to an erroneous closure order, the lessee could seek compensation for direct losses from Queensland Health. However, the lessee may also suffer indirect losses, which should also be covered by Queensland Health. Further, it is not clear how the lessee's losses will be quantified and agreed upon. This could be a complex exercise, particularly if the lessee cannot find alternative, comparable premises and consequently goes out of business, or if its reputation and goodwill are damaged by the erroneous closure order.

Additionally, we query who will be liable for the lessor's losses and damages arising from the closure order (either issued lawfully or erroneously), such as loss of rent and outgoings and the costs of finding another lessee. If the lease terms do not deal with this issue, will the proposed legislation require the lessee to compensate the lessor? Moreover, if the lessee is no longer able to trade due to the closure order, and subsequently enters into liquidation, who will compensate the lessor? In our view, it is not reasonable to require the lessor to join other

unsecured creditors in this situation. Will Queensland Health compensate the lessor for all its losses in these circumstances?

Another significant consideration is the safety of the lessor who terminates a lease due to a closure order. If the lessee is part of an organised crime group or involved in criminal activities, the lessor may be reluctant to terminate a lease due to fear of repercussions from the lessee. What protections will be provided to lessors in these circumstances?

We also note the Consultation Paper does not address other practical issues that will arise from a lease termination. For example, will the lessee be entitled to remove their remaining stock and fit-out after termination? Will the lessee be responsible for restoring the premises back to their condition before the lease commenced? While these issues are usually dealt with in the lease terms, there could be leases that have not been drafted broadly enough to cover a situation where the lease has been terminated due to a statutory termination right that did not exist when the lease was entered into. Further, if the lessee is given the minimum notice period of 14 days, this may not be enough time for the lessee to properly vacate and reinstate the premises. This could result in lessors seeking much higher bond amounts from lessees to cover the costs of reinstating the premises.

Recommendations

3. The lessor's right to terminate a lease should only be exercisable after a magistrate has issued a long-term closure order.
4. The lessor's right to immunity should cover all potential claims by a lessee, not just the lessee's direct losses.
5. Further consider:
 - the interaction of proposed closure order powers with other legislation, the express lease provisions agreed by the parties, and general contractual principles;
 - how the lessee's losses will be quantified and agreed upon if the lease has been terminated due to an erroneous closure order;
 - who will be liable for the lessor's losses and damages arising from a closure order (whether issued lawfully or erroneously), particularly if the lessee goes into liquidation and is unable to compensate the lessor;
 - how to ensure the safety of a lessor who terminates a lease due to a closure order;
 - practical issues arising from a lease termination due to a closure order, such as removal of the lessee's stock and fit-out and the lessee's make-good obligations; and
 - the potential consequence of lessors requiring higher bond amounts from lessees to cover their costs and damages.

Lessor offence

QLS has several concerns with the proposal to enact a lessor offence of knowingly permitting a lessee to use premises for the supply or possession of illicit tobacco or illicit nicotine products.

Tobacco and Other Smoking Products and Other Legislation Amendment Bill 2025 – Consultation Paper

While there may be some justification for creating an offence where a lessor knowingly leases premises for illegal activities or knowingly turns a blind eye to illegal activities at their premises, the proposed circumstances when a lessor will be deemed to have knowledge are not reasonable. The introduction of a lessor offence represents a substantial shift in responsibility and risk allocation. In light of this, and should a lessor offence be introduced, we recommend it only applies if the lessor has actual knowledge of illegal activities taking place at the premises and did not take reasonable steps within its control to prevent those activities.

We are concerned the offence renders the lessor criminally liable for the lessee's illegal activities despite having no control over how the lessee conducts its business. This is an extraordinary step for the legislature to take because lessors are not usually held responsible for the illegal acts of their lessees.

If service of a closure order on the lessor is to be tendered as evidence that the lessor has been made aware of the lessee's illegal activities, we suggest the closure order must be issued by a magistrate rather than the chief executive. All relevant parties can then be certain the claimed illegal activities have received appropriate judicial scrutiny.

QLS does not support the proposal that, if a lessor does not terminate a lease within 90 days of a closure order, the lessor will be deemed to have knowledge and, therefore, commit an offence if further enforcement action occurs for the supply of illicit tobacco or illicit nicotine products at the premises after the 90-day period. This effectively gives the lessor no choice but to terminate the lease or risk liability for the possibility of a lessee's future illicit actions. We are concerned this will amount to the government-forced termination of an otherwise valid lease.

A lessor should have the right to make the commercial decision whether to terminate a lease. The lessor may have valid reasons to continue a lease after the closure period has expired. For example:

- the lessee may have assured the lessor that no more illegal activities will take place at the premises, e.g., because the lessee has sacked a rogue manager who was supplying illegal tobacco from the premises without their knowledge;
- the lessor may consent to the lessee selling their ownership of the lessee company to a third party, so that the lessee on the lease remains the same but control of the lessee company has changed hands; or
- the lessor may wish to retain a head lease of franchised premises to a franchisor provided that the franchisor removes the franchisee that was supplying illicit tobacco or illicit nicotine products and replaces them with a new franchisee.

In these circumstances, it is unreasonable to deem the lessor to have knowledge if there is a further supply of illegal tobacco or illegal nicotine products from the premises after 90 days.

The lessor offence provision is likely to disproportionately affect lessors of retail premises in regional or remote areas because they may not be able to find another lessee willing to lease premises in an area with a low population. Similarly, 'mum and dad' investors or self-managed superannuation fund owners of single stand-alone shops may find it harder to secure another lessee than a large, commercial shopping centre lessor could. Therefore, these lessors may have to decide between risking an offence or having an empty store.

Conversely, the lessor offence may make some lessors reluctant to lease to businesses that legally sell tobacco and nicotine products, such as convenience stores, or other types of stores that have been implicated in the illicit tobacco and nicotine product trade, such as gift shops. The lessor offence may also impact a lessor's ability to obtain insurance if they do lease to one of these businesses. These issues could result in lessors passing on additional risk management costs to lessees through higher rents, and lawful business operators having difficulties finding suitable premises to lease at a reasonable rent.

In addition, the effectiveness and fairness of the proposed offence provision will be entirely contingent on the lessor receiving timely and clear notice of the closure order. Without such notice, a lessor cannot reasonably be expected to comply with the proposed obligation to terminate the lease. To ensure procedural fairness and legal certainty for lessors, we recommend that any legislative amendments include appropriate safeguards in relation to the provision of notice of a closure order including mandatory written notice, clear statement of grounds, a prescribed method of service and a right to seek clarification or review.

While we note that a reasonable excuse defence will apply, the Consultation Paper does not specify what will be considered a reasonable excuse. As tests of 'reasonableness' are usually vague, we suggest the elements of the defence be clearly set out in the legislation with clear examples of what is a reasonable excuse. This should also be accompanied by clear guidance given to lessors. A lessor should be able to understand what steps are required without having to obtain legal advice on what is 'reasonable'.

Recommendations

6. Reconsider deeming a lessor criminally liable for its lessee's illegal activities given that lessors do not control how their lessees conduct their businesses.
7. If a lessor offence is to apply:
 - the lessor should only be liable if they have actual knowledge of illegal activities taking place at the premises and did not take reasonable action that was within its control to prevent those activities;
 - there must be appropriate safeguards in relation to the provision of notice of a closure order including mandatory written notice, a clear statement of grounds, a prescribed method of service and a right to seek clarification or review; and
 - the offence should only arise after a closure order has been issued by a magistrate.
8. Reconsider requiring a lessor to terminate a lease to avoid liability for the lessee's illegal activities.
9. Clarify what will constitute a "reasonable excuse".
10. Further consider:
 - the possible disproportionate effect of the offence on lessors of retail premises in regional or remote areas, 'mum and dad' investors and self-managed superannuation funds;

Tobacco and Other Smoking Products and Other Legislation Amendment Bill 2025 – Consultation Paper

- the impact the offence may have on a lessor’s willingness to lease to lawful tobacco and nicotine product suppliers, and its ability to obtain insurance;
- the impact the offence may have on the ability of retailers of lawful tobacco and nicotine products to find suitable premises at a reasonable rent.

Executive officer liability

QLS is concerned with the proposal to strengthen the executive officer liability that currently applies under section 230A of the Act.

It is proposed to reverse the onus of proof by deeming the executive officer to have committed an offence unless they can prove they took all reasonable steps to ensure the corporation complied with the relevant provision or they were not in a position to influence the corporation’s conduct.

It is a fundamental legislative principle that legislation should not reverse the onus of proof without adequate justification. Reversal of the legal burden of proof arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification to depart from this principle. The Consultation Paper notes the change is required to “ensure executive officers cannot hide behind a corporate entity to avoid liability.” However, we suggest the executive officer liability provision in section 230A adequately does this without taking the significant step of reversing the onus of proof. The Consultation Paper does not cite any persuasive data or evidence to demonstrate the current provision is inadequate.

Additionally, shifting the onus of proof onto executive officers is particularly concerning when the definition of “executive officer” is broadly defined in the Act to include “a person who is concerned with, or takes part in, the corporation’s management”. An executive officer could include a large number of potential employees, including employees who have no decision-making power, but are responsible for implementing the management decisions of the corporation.

Although an innocent employee may raise a defence of not being in a position to influence the company’s conduct, they will be deemed to have committed an offence unless they can prove this defence. It may be difficult for an employee or former employee to establish the defence if they do not have access to all records of the corporation’s decision-making.

Recommendation

11. Reconsider whether there is adequate justification to reverse the onus of proof, particularly given the broad definition of “executive officer”.

Compromised goods

It appears the proposed right to seize, forfeit and destroy legal smoking product stock is excessive. As noted in the Consultation Paper, this right is intended to “provide a further financial disincentive” to businesses that sell illicit tobacco and illicit nicotine products. This could be seen as the government imposing a financial punishment on the business operator without a court order.

The exercise of this power would be particularly excessive in situations where a rogue manager or employee is supplying illicit tobacco or illicit nicotine products from the premises without the

business owner’s knowledge. Although the Consultation Paper suggests the owner could be compensated if the legal goods are wrongfully seized and forfeited, the compensation process is likely to occur at a later stage, possibly after the store has gone out of business due to its loss of stock and revenue.

Further, seizing, forfeiting and destroying legal stock will not only have a financial impact on the business owner, but it may also result in the business not having legal stock to sell to pay its creditors, employee wages and superannuation, or compensation to their lessor. These parties should not be out-of-pocket because of the illegal activities of the business owner.

As this power goes beyond stopping the sale of illegal products, we recommend stricter oversight before the power can be exercised. To ensure this power is only used when necessary and is subject to any necessary limitations, we recommend that a court order must be obtained before legal stock can be seized, forfeited and destroyed.

Recommendations

12. A court order must be obtained before legal smoking product stock can be seized, forfeited and destroyed.
13. Consider the impact of seizing and destroying lawful stock on the business’ ability to pay third parties, such as its creditors, employees and lessor.

Controlled purchase operations

QLS does not support the authorisation of Queensland Health staff to conduct undercover purchase operations. In our view, such operations are inappropriate for Queensland Health staff to conduct. It is not a law enforcement agency and therefore does not operate within relevant statutory oversight frameworks that govern covert operations by police or other integrity bodies. Covert operations, if deemed necessary, should be conducted by police.

Recommendation

14. Undercover purchase operations should be limited to police led operations under existing statutory frameworks.
15. The grounds for conducting controlled purchase operations must be proportionate to the nature and seriousness of the suspected illegal activity.

Entry to wholesale store

QLS has concerns with the proposal to allow entry to wholesale stores without a warrant or the occupier’s consent. QLS advocates that powers to enter premises without a warrant should be granted only where necessary. However, the Consultation Paper contains very little detail about when entry without a warrant will be permitted or whether there will be any limitations on entry. The Consultation Paper also does not explain why this power is necessary when the Act contains a mechanism for obtaining a special warrant of entry in urgent circumstances.

If a power to enter wholesale stores without a warrant is to be authorised, we recommend that entry only be permitted if an enforcement officer “reasonably suspects” that illicit tobacco or illicit nicotine products are being stored at the premises and that there is a risk the products will be removed from the premises before a special warrant can be issued.

Tobacco and Other Smoking Products and Other Legislation Amendment Bill 2025 – Consultation Paper

Recommendations

16. Reconsider whether there is adequate justification to allow enforcement officers to enter premises without a warrant, particularly when the Act contains a mechanism to obtain a special warrant in urgent circumstances.
17. If the power of entry without a warrant is to be granted, the power should only be exercised if the enforcement officer to “reasonably suspects” that illicit tobacco or illicit nicotine products are being stored at the premises.

We would welcome the opportunity to provide further input as part of the legislative drafting stage.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [REDACTED] [REDACTED]

Yours faithfully



Genevieve Dee
President