

2016

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

SMOKE-FREE LEGISLATION AMENDMENT BILL 2016

REVISED EXPLANATORY STATEMENT

**Presented by
Meegan Fitzharris MLA
Assistant Minister for Health**

Outline

This Bill aims to protect the health of the public from the potential harms associated with personal vaporisers. Personal vaporisers are in some circles referred to as electronic cigarettes (e-cigarettes) and also include devices such as e-cigars, e-pipes, vape pens, hookah pens and e-hookahs. The measures outlined in this Bill are designed to prevent the widespread uptake of personal vaporisers in the community, including by non-smokers and children, whilst still allowing adults to purchase personal vaporisers from licensed tobacco sellers. The measures also protect against the renormalisation of smoking in the community and reduce the risk of personal vaporisers acting as a gateway to tobacco.

Personal vaporisers are devices designed to produce a vapour that the user inhales. Many devices use an electric element to heat liquid to produce vapour and are used in a manner that simulates smoking, however there are a wide variety of products that differ in their design, operation and appearance. Some devices look like tobacco products, such as cigarettes or pipes, whereas some resemble everyday items such as lipsticks and pens, and others are not designed to resemble a specific product.

This Bill uses the term ‘personal vaporiser’ in order to encompass the breadth of devices currently on the market, and allow flexibility to include devices that may emerge in the future as the technology and market evolve. The term does not focus on a specific device and is hence more inclusive than a term such as ‘e-cigarettes’.

This Bill will introduce restrictions on personal vaporiser sales and promotion in the ACT, commensurate with existing restrictions on tobacco and herbal products. It will also prohibit the use of personal vaporisers in legislated smoke-free areas, including all enclosed public places (for example, shopping centres, cinemas, office buildings, buses, taxis, restaurants, pubs and clubs), outdoor eating or drinking places, underage music functions and in cars when children are present.

This Bill amends the *Tobacco Act 1927* to regulate the sale and promotion of personal vaporisers in the same way as tobacco and herbal products and apply the same offences for non-compliance. It also amends the *Smoke-Free Public Places Act 2003* and *Smoking in Cars with Children (Prohibition) Act 2011* to prohibit the use of personal vaporisers in legislated smoke-free areas and apply the same offences for non-compliance. In addition, this Bill makes minor changes to the *Smoke-Free Public Places Act 2003* to clarify the application of existing smoke-free laws at outdoor eating and drinking places.

Measures in the Bill apply to all personal vaporisers, regardless of whether or not they contain nicotine. It should be noted that the sale and possession of personal vaporisers that contain nicotine is currently illegal without approval under the *Medicines, Poisons and Therapeutic Goods Act 2008*. To date, no approval has been granted for the supply of nicotine for use in personal vaporisers. In specific circumstances, it may be lawful for individuals to import personal vaporisers and/or liquid nicotine for personal therapeutic use via the Therapeutic Goods Administration’s Personal Importation Scheme.

This Bill utilises the existing regulatory framework for tobacco control to facilitate compliance and enforcement with the measures, avoiding the need to establish a separate licensing system. Costs for inspection and enforcement are expected to be minimal, and will be met within existing resources.

As new products and further scientific evidence relating to personal vaporisers become available, there may be a need to review the restrictions that apply to the devices or particular models. For example, should some personal vaporiser types or models be approved as therapeutic devices in the future, there may be a need to review provisions on who can sell these devices.

The impact of the Bill on Territory finances is likely to be negligible. Some future revenue may be generated through infringement notices and new tobacco licences for businesses that sell personal vaporisers, however this is expected to be minimal.

Human Rights Assessment

It is a requirement that compatibility with the *Human Rights Act 2004* (the HRA) be addressed in explanatory statements to Bills proposed to the Legislative Assembly.

Human rights arguments may be raised in relation to the right to liberty and security of the person, and privacy, as a result of applying an offence to the use of personal vaporisers in smoke-free areas. However, any limitations are considered reasonable and proportionate given the aim of preventing potential health harms from personal vaporiser use and exposure.

In 2015 the National Health and Medical Research Council (NHMRC), as the peak national body for developing health advice for consumers and health professionals, issued a statement on e-cigarettes (personal vaporisers). The statement reviewed the current body of evidence about the potential risks and benefits of e-cigarette use which is currently the subject of much debate among tobacco control and public health experts.

Some experts argue that e-cigarettes have the potential to reduce the number of smoking related diseases and deaths by assisting smokers to quit. Others have concerns that e-cigarettes are promoted as a safer option for smokers when the long term health effects are currently unknown. There are also concerns that the potential benefits to smokers are outweighed by the risks posed by widespread e-cigarette use within the community, including the possibility that they may make smoking socially acceptable again.

The appeal of flavoured e-cigarettes to children and adolescents is also of concern to the NHMRC, with studies reporting rapid uptake of e-cigarettes among adolescents, in countries where they are readily available.

Other studies have shown that e-cigarettes expose both users and bystanders to particulate matter that may worsen existing illnesses, or increase the risk of developing diseases such as cardiovascular or respiratory disease. Some experts also suggest that e-cigarettes, with or without nicotine, may be harmful. Some e-cigarettes have been reported to contain chemicals such as propylene glycol, glycerol or ethylene glycol, which may form toxic or cancer-causing compounds when vaporised. E-cigarette liquids or vapour may also contain potentially harmful chemicals which are not present in smoke from tobacco cigarettes. Labelling of e-cigarettes and e-liquids has also been found to be inaccurate, with tests revealing that some products labelled as nicotine free actually contain nicotine.

The NHMRC advised that there is currently insufficient evidence to conclude whether e-cigarettes can benefit smokers in quitting, or about the extent of their potential harms. The NHMRC recommended that health authorities act to minimise harm associated with e-cigarette use until further evidence of safety, quality and efficacy can be produced. The ACT government has accepted this recommendation, and through this Bill addresses the risks associated with personal vaporisers by treating them in the same way as smoking products.

The clauses of this Bill do not contain new strict liability offences. However, the passage of the Bill will mean that the current strict liability offences relating to tobacco and herbal products will also apply to personal vaporisers. These include strict liability offences for: personal vaporiser use in smoke-free areas; non-compliance with restrictions on the sale and promotion of personal vaporisers; and for occupiers or managers that allow personal vaporisers to be used in smoke-free areas. All offences within the *Tobacco Act 1927* and the *Smoke-Free Public Places Act 2003* were either inserted or amended after the commencement of the HRA, and as such all relevant offences within those Acts and the *Smoking in Cars with Children (Prohibition) Act 2011* were previously assessed and considered reasonable and proportionate.

Strict liability

Strict liability offences engage the right to be presumed innocent in section 22(1) of the HRA because there are no fault elements to these offences. The absence of a fault element generally places a burden upon the defendant to challenge the prosecution case by raising a defence through the presenting of or pointing to some evidence.

Strict liability offences are predominately crafted to address unlawful behaviour in a context where the person knows, or ought to know, their legal obligations. It is for this reason that strict liability offences are most commonly used for ‘regulatory’ offences. However, it has also been appropriate to apply strict liability in situations where there is adequate signage or forewarning that particular conduct is an offence. Examples include offences for smoking at outdoor eating or drinking places and the consumption of liquor at certain public places.

In the existing offences cited as examples above, the ACT Government has accepted that while strict liability offences engage the presumption of innocence, strict liability offences are not inherently incompatible with human rights. In those instances the limitation on the human right in section 22(1) of the HRA was demonstrably justifiable given community expectations about the conduct to which the offence applies, and that there has been signage or other information indicating the application of the offence. These same considerations apply to the strict liability offences that will apply to personal vaporisers following the passage of this Bill.

While the inclusion of strict liability within an offence limits the range of defences that may be available to a person accused of such an offence, a number of defences do still remain available to the accused, depending on the particular circumstances of each case. Section 23(1)(b) of the ACT *Criminal Code 2002* (the Criminal Code) provides a specific defence to strict liability offences of mistake of fact. Section 23(3) of the Criminal Code provides that other defences may also be available for use for strict liability offences, such as the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.

Detailed explanation

Part 1 Preliminary

Clause 1 Name of Act

This clause declares the name of the Act to be the *Smoke-Free Legislation Amendment Act 2016*.

Clause 2 Commencement

Pursuant to this provision, this Act is to commence on a day the Minister specifies by written notice. This will allow a lead time to be given between the anticipated passage of the Bill and the commencement of its provisions, to ensure stakeholders have sufficient time to prepare for the new measures.

Due to the operation of section 75(1) of the *Legislation Act 2001* (the Legislation Act) the naming and commencement provisions of this Act, clauses 1 and 2, commence automatically on the day the Act is notified. A note to that effect is included in the provision (note 1).

Note 2 informs the reader that different provisions in the Bill may take effect on different days, or on the same day, as per section 77 (1) of the Legislation Act. The dates will be fixed by the Minister in the written notice.

Note 3 informs the reader that if a provision in the Bill has not commenced within 6 months of the notification day, it will automatically commence on the first day after that period, as per section 79 of the Legislation Act.

Clause 3 Legislation amended

This clause provides that this Bill will amend the *Smoke-Free Public Places Act 2003*, *Smoking in Cars with Children (Prohibition) Act 2011* and *Tobacco Act 1927*.

When notified, this Bill becomes the *Smoke-Free Legislation Amendment Act*, which upon commencement will alter the *Smoke-Free Public Places Act 2003*, *Smoking in Cars with Children (Prohibition) Act 2011* and *Tobacco Act 1927* in accordance with the provisions contained in this Bill. The *Smoke-Free Legislation Amendment Act 2016* will then be immediately repealed.

Consequentially, from the date that the *Smoke-Free Legislation Amendment Act 2016* commences a new republication of the *Smoke-Free Public Places Act 2003* and *Smoking in Cars with Children (Prohibition) Act 2011* will be available. The *Tobacco Act 1927* will be renamed the *Tobacco and Other Smoking Products Act 1927*.

The new note declares that this Bill also amends other legislation. These are listed in Schedule 1, being the *Children and Young People Act 2008*, *Fair Trading (Australian Consumer Law) Act 1992* and *Magistrates Court (Tobacco Infringement Notices) Regulation 2010*.

Part 2 Smoke-Free Public Places Act 2003

Part 2 has the effect of prohibiting the use of personal vaporisers in places where smoking is banned under the *Smoke-Free Public Places Act 2003*, including at all enclosed public places, outdoor eating or drinking places, and underage music functions. This prohibition will apply whether or not the personal vaporiser contains nicotine.

Strict liability offences will now apply for using a personal vaporiser in a smoke-free area and for occupiers if they allow personal vaporiser use in a smoke-free area.

Part 2 also makes minor changes to the *Smoke-Free Public Places Act 2003* to clarify the application of smoke-free laws at outdoor eating or drinking places.

Clause 4 Dictionary Section 3, note 1

A dictionary is included at the end of the *Smoke-Free Public Places Act* providing definitions of terms and phrases specifically for the Act. This includes references (signpost definitions) to terms defined elsewhere.

Section 3, note 1 of the Act provides an example of a signpost definition. It explains that ‘*smoking product*—see the *Tobacco Act 1927*, dictionary’ means that the expression ‘smoking product’ is defined in the *Tobacco Act 1927* dictionary, and that this definition applies to the *Smoke-Free Public Places Act 2003*.

This Bill changes the name of the *Tobacco Act 1927* to *Tobacco and Other Smoking Products Act 1927* (see clause 26). Hence, the example of a signpost definition should now refer to the *Tobacco and Other Smoking Products Act 1927*, and not the *Tobacco Act 1927*. Clause 4 provides for this change and makes no other alterations.

Clause 5 Meaning of *smoke* Section 5B (1)

Section 5 defines the meaning of *smoke* for the purposes of the *Smoke-Free Public Places Act 2003*.

Section 5B (1) currently defines *smoke* to mean smoke from an ignited smoking product. Clause 5 broadens the definition of *smoke* to also include vapour from a personal vaporiser.

The new note is intended to inform the reader that under section 3A of the *Tobacco and Other Smoking Products Act 1927*, a personal vaporiser is defined as a smoking product.

Section 3A is a new section in the *Tobacco and Other Smoking Products Act 1927* – refer to clause 27 of this Bill for a detailed explanation.

Clause 6 Section 5B (2) (a)

Section 5B (2) (a) currently defines ‘a person *smokes* if the person – a) directly puffs smoke, whether or not the person uses a device designed for the inhalation of smoke by a smoker’. Clause 6 omits ‘puffs smoke’ from this definition and substitutes it with ‘puffs, draws or

inhales smoke'. This change is intended to encompass the ways in which personal vaporisers are used.

Clause 7 Section 5B (2) (b)

Section 5B (2) (b) currently defines 'a person *smokes* if the person – b) holds or has control over a smoking product while it is ignited'. Clause 7 extends this definition to cover personal vaporisers that are in active use. The new definition reads 'a person *smokes* if the person – b) holds or has control over a smoking product while it is ignited or a personal vaporiser while it is activated'.

Clause 8 Section 5B (3)

Section 5B (3) states that a person is not considered to *smoke* if they hold a smoking product for the purpose only of extinguishing it or removing it from the smoke-free area. Clause 8 includes personal vaporisers in this statement, and reflects the fact that personal vaporisers are commonly deactivated to turn them off.

The new section will read: 'However, a person does not *smoke* only because the person holds or has control over a smoking product or personal vaporiser if the person holds or has control over it for the purpose of extinguishing it, deactivating it, or removing it from – a) an enclosed public place; or b) an outdoor eating or drinking function; or c) an underage function.'

This section means that a person does not commit an offence for smoking in a legislated smoke-free area if they are merely holding a personal vaporiser so that they can deactivate it or remove it from the venue. For example, a security guard or authorised officer to whom a personal vaporiser has been surrendered is not considered to be smoking if they hold the personal vaporiser for the purposes of turning it off and/or removing it from a smoke-free area.

Clause 9 Section 5B (4)

Section 5B (4) currently defines a *smoking product*. Clause 9 omits this section to reduce duplication, given that the definition will now appear in the *Tobacco and Other Smoking Products Act 1927*. See clause 27 for the definition of a *smoking product*.

Clause 10 Meaning of *outdoor eating or drinking place* Section 9A (1) (c) (ii), except examples

Section 9A (1) defines the meaning of an *outdoor eating or drinking place*. A place is currently an *outdoor eating or drinking place* if – '(a) it is a public place (other than an enclosed public place); and (b) people at the place may consume food or drink provided from the on-site service; and (c) (i) either the place is licensed premises; or (ii) tables and chairs are provided by the on-site service for use by people consuming food or drink at the place'.

Clause 10 is intended to correct ambiguities in the current definition concerning the provision of tables and chairs. It replaces the current wording for tables and chairs under (c) (ii) with ‘tables or chairs are provided for use by people consuming food or drink provided at the place’.

The new wording makes it clear that it is sufficient to have either tables or chairs in a place to satisfy (c) (ii), rather than requiring both tables and chairs. This ensures that outdoor eating or drinking places that only have tables or chairs – for example, a pub or club with an outdoor drinking area with cocktail tables but no chairs, or a stadium where food is served and there are only chairs but no tables – are still considered smoke-free areas. Outdoor eating or drinking places that have both tables and chairs, such as restaurants or cafes, are still captured under the new wording.

The new wording also removes the reference to an on-site service providing the tables or chairs. This is intended to remove the ambiguity concerning outdoor eating or drinking places where the tables or chairs are provided by a third-party service, for example in places like outdoor food courts. Such places are smoke-free areas, provided they meet the other parts of the *outdoor eating or drinking place* definition.

In some cases, it will not be appropriate to conclude that the tables or chairs at an outdoor site are provided for the explicit purpose of people consuming food or drink. For example, a fixed government park bench that just happens to be in proximity to a food service provider is not intended to be captured under the *outdoor eating or drinking place* definition.

Clause 11 Section 9A (1) (c) (ii), new examples 4, 5 and 6

Section 9A (1) (c) (ii) provides examples of outdoor eating or drinking places to illustrate the definition for the reader. Clause 11 adds three new examples to demonstrate instances where a place has only tables or chairs. The examples are: an outdoor area at premises containing stand-up tables at which food or drink purchased at the premises may be consumed; an outdoor area containing milk crates to sit on at a cafe; and a sports stadium containing chairs at which food or drink purchased at outlets at the sports stadium may be consumed.

The milk crate example is intended to illustrate that the term ‘chair’ in Section 9A is meant to refer to any type of seating or object intended to be used as seating at the eating or drinking place. Other forms of seating such as a stool or bench seat would also be considered a ‘chair’ in Section 9A.

Clause 12 Section 9A (4), new definitions of *licensed premises*

Section 9A (4) provides definitions for terms used in section 9A, being *food or drink service*, *on-site service* and *provide*, food or drink. Clause 12 adds the term *licensed premises* to this section and refers the reader to the dictionary of the *Liquor Act 2010* for the definition. The current definition in the *Liquor Act 2010* is a ‘*licensed premises* means premises that are the subject of a licence’.

Clause 13 Inspectors
Section 10 (1) (a)

Section 10 relates to the appointment of inspectors for the enforcement of the *Smoke-Free Public Places Act 2003*. Clause 13 amends the reference to the *Tobacco Act 1927*, to reflect the new name of the Act – the *Tobacco and Other Smoking Products Act 1927*.

Clause 14 Dictionary, definition of *herbal product*

A dictionary is included at the end of the *Smoke-Free Public Places Act 2003* providing definitions of terms and phrases specifically for the Act. This clause removes the definition of *herbal product* from the dictionary as the term no longer appears in the Act.

Clause 15 Dictionary, new definition of *personal vaporiser*

Clause 15 adds a definition for *personal vaporiser* to the *Smoke-Free Public Places Act 2003*. As this definition is contained in Section 3B of the *Tobacco and Other Smoking Products Act 1927*, the reader is simply referred to this section.

Clause 16 Dictionary, definition of *smoking product*

This clause amends the definition of *smoking product*, to reflect the change in the name of the *Tobacco Act 1927* and refers the reader to the relevant part of the *Tobacco and Other Smoking Products Act 1927*, that is section 3A. See clause 27 of this Bill for the new definition of a *smoking product*.

Clause 17 Dictionary, definition of *tobacco product*

This clause removes the definition of *tobacco product* from the dictionary as the term no longer appears in the *Smoke-Free Public Places Act 2003*.

Part 3 Smoking in Cars with Children (Prohibition) Act 2011

Part 3 has the effect of prohibiting personal vaporiser use in cars where children under the age of 16 are present. This prohibition will apply whether or not the personal vaporiser contains nicotine.

The offences in section 7 and 8 of the *Smoking in Cars with Children (Prohibition) Act 2011* will now apply for using a personal vaporiser in a car with a child under the age of 16, or for failing to comply with a requirement by a police officer. The offences in section 7 and 8 are strict liability offences.

Clause 18 Section 6, heading

This clause amends the heading of this section from **Meaning of *smoke* and *smoking product*** to **Meaning of *smoke***.

Clause 19 Section 6 (1)

Section 6 defines the meaning of *smoke* for the purposes of the *Smoking in Cars with Children (Prohibition) Act 2011*.

Section 6 (1) currently defines *smoke* to mean smoke from an ignited product. Clause 19 broadens the definition of *smoke* to also include vapour from a personal vaporiser.

The new note is intended to inform the reader that under section 3A of the *Tobacco and Other Smoking Products Act 1927*, a personal vaporiser is defined as a smoking product.

Section 3A is a new section in the *Tobacco and Other Smoking Products Act 1927* – refer to clause 27 of this Bill for a detailed explanation.

Clause 20 Section 6 (2) (b)

Section 6 (2) (b) currently defines ‘a person *smokes* if the person – b) holds or has control over a smoking product while it is ignited’. To extend this definition to cover personal vaporisers clause 20 alters the definition to read ‘a person smokes if the person holds or has control over a smoking product while it is ignited or a personal vaporiser while it is activated. This adjusted meaning is necessary as some personal vaporisers are simply activated by inhaling and do not require heat or combustion for use. Therefore, for personal vaporisers ‘ignited’ would be insufficient to capture all types of personal vaporisers.

Clause 21 Section 6 (3)

Section 6 (3) currently defines a *smoking product*. Clause 21 omits this section to reduce duplication, given that the definition will now appear in the *Tobacco and Other Smoking Products Act 1927*. See clause 27 of this Bill for the new definition of a *smoking product*.

Clause 22 Dictionary, definition of *herbal product*

This clause removes the definition of *herbal product* from the dictionary as the term no longer appears in the *Smoking in Cars with Children (Prohibition) Act 2011*.

Clause 23 Dictionary, new definition of *personal vaporiser*

This clause adds a definition for *personal vaporiser* to the dictionary. As this definition is contained in Section 3B of the *Tobacco and Other Smoking Products Act 1927*, the reader is simply referred to this section.

Clause 24 Dictionary, definition of *smoking product*

This clause changes the definition of *smoking product*. As this definition is contained in Section 3A of the *Tobacco and Other Smoking Products Act 1927*, the reader is simply referred to this section.

Clause 25 Dictionary, definition of *tobacco product*

This clause removes the definition of *tobacco product* from the dictionary as the term no longer appears in the *Smoking in Cars with Children (Prohibition) Act 2011*.

Part 4 Tobacco Act 1927

Part 4 has the effect of regulating the sale and promotion of personal vaporisers in the same way as tobacco and herbal products, whether or not they contain nicotine. Accordingly, the amendments made by this Part will mean that the strict liability offences in the *Tobacco Act 1927* (to be retitled the *Tobacco and other Smoking Products Act 1927*) may be applied to failures to comply.

This Bill will:

- prohibit the supply of personal vaporisers to under 18 year olds;
- prohibit the purchase of personal vaporisers for use by under 18 year olds;
- prohibit the sale of personal vaporisers by vending machine;
- prohibit the sale and import of food and toys that resemble personal vaporisers;
- allow the Minister to declare a personal vaporiser to be a prohibited smoking product if the smoke from the device has a distinctive fruity, sweet or confectionary-like character and the product or its packaging may be attractive to children;
- prohibit the display of personal vaporisers to customers at, or adjacent to, a retail or wholesale outlet;
- prohibit personal vaporisers advertising, promotions, inclusion in customer reward schemes or competitions, sponsorships and product giveaways;
- apply point of sale restrictions on personal vaporisers; and
- require that sellers of personal vaporisers hold a licence under the *Tobacco and Other Smoking Products Act 1927*.

It should be noted that the sale of personal vaporisers that contain nicotine is illegal in the ACT without a licence under the *Medicines, Poisons and Therapeutic Goods Act 2008*. The sale of nicotine-free personal vaporisers is permitted, provided no therapeutic claim is made.

Clause 26 Section 1

This clause changes the name of the *Tobacco Act 1927* to *Tobacco and Other Smoking Products Act 1927* to better reflect its content, with the addition of material relating to personal vaporisers.

Clause 27 New sections 3A and 3B

3A Meaning of *smoking product*

This is a new section that defines the meaning of *smoking product* in the *Tobacco and Other Smoking Products Act 1927* to mean any of the following: a tobacco product, herbal product or a personal vaporiser or a personal vaporiser related product. This definition incorporates personal vaporisers and personal vaporiser related products as smoking products for the first time. This has the effect of applying the same regulatory regime that currently applies to

smoking products to personal vaporisers and personal vaporiser related products. This includes the application of offences and penalties, as well as giving the Minister the same powers that apply in relation to smoking products. The restrictions on personal vaporisers would be easily circumvented if the same restrictions did not apply to the components of a personal vaporiser. For this reason the definition of a smoking product must also include personal vaporiser related products as well as personal vaporiser themselves. Otherwise a retailer could lawfully sell all the components of a personal vaporiser to an underage person, even though it would be unlawful to sell an already assembled personal vaporiser.

The definition of **smoking product** also applies to the *Smoke-Free Public Places Act 2003* and *Smoking in Cars with Children (Prohibition) Act 2011*.

3B Meaning of *personal vaporiser* and *personal vaporiser related product*

This is a new section that defines the meaning of **personal vaporiser** and **personal vaporiser related product** in the *Tobacco and Other Smoking Products Act 1927*.

3B (1) defines a **personal vaporiser** as a device that is made for the purpose or apparent purpose of delivering a substance into a person's body when the person inhales through the device; and has one or more of the following: a battery, an electric heating element, a cartridge or container to store a substance. Alternatively, a personal vaporiser is a device that the Minister prescribes by regulation.

3B (1) defines a **personal vaporiser related product** to mean, under (a), a device or other product that is not capable of being used to deliver a substance into an individual's body without an adjustment, modification or addition; but is apparently intended to be part of a personal vaporiser. Alternatively, under (b) a **personal vaporiser related product** is a device or other product that is apparently intended to be used in connection with a personal vaporiser. Or, under (c), it is a device prescribed by regulation.

Examples of personal vaporiser related products that meet (a) include an electric heating element, battery, cartridge, container or mouthpiece; or a product that combines an electric heating element and cartridge in a single unit. The note informs the reader that this list is not exhaustive and that there may be other relevant examples.

The definitions under 3B (1) are intended to capture existing personal vaporiser devices, and their components, as well as provide flexibility to capture devices that may be developed in the future. Acknowledging the evolving nature of the technology and the market, the Bill enables regulations to be made to specifically include devices in the definition, or put beyond doubt that particular devices are intended to be captured by the definition of personal vaporiser or personal vaporiser related product. Such a regulation would sit under the *Tobacco and Other Smoking Products Act 1927* and would need to be approved by the Executive, in this case the Minister responsible and one other Minister. As with all regulations, this would be tabled in the Legislative Assembly as per the requirements of the *Legislation Act 2001* and would be subject to disallowance.

3B (2) is intended to exclude devices that may otherwise be inadvertently captured under the definitions for *personal vaporiser* and a *personal vaporiser related product*. This has the effect of ensuring that the offence provisions that relate to smoking products and personal vaporisers do not apply to devices that are not intended to be regulated by this Bill.

3B (2) (a) provides that a *personal vaporiser* or a *personal vaporiser related product* does not include a device designed to be used to deliver oxygen into an individual's body. This is intended to describe devices such as an oxygen tank that is used to treat patients who suffer from respiratory conditions, as well as a self-contained breathing apparatus, such as that used by SCUBA divers or by fire fighters or workers in some hazardous environments.

3B (2) (b) provides that the definition of *personal vaporiser* or *personal vaporiser related product* does not intend to capture drug pipes, as these devices are dealt with under the Criminal Code.

3B (2) (c) aims to clarify that the definition of *personal vaporiser* or *personal vaporiser related product* does not intend to capture products that have been approved by the Therapeutic Goods Administration for use in the treatment of medical conditions, for example asthma inhalers or nasal decongestant inhalers. Accordingly, a therapeutic good, medical device or therapeutic device that is included on the Australian Register of Therapeutic Goods is not considered to be a personal vaporiser or personal vaporiser related product, unless a regulation has been made under the *Tobacco and Other Smoking Products Act 1927* that states that they are included in the definition.

However, it is possible that at some point in the future a personal vaporiser of a type that this Bill seeks to regulate could be added to the Australian Register of Therapeutic Goods. If that were to occur, and it is considered that such a device should still be subject to the *Tobacco and Other Smoking Products Act 1927*, a regulation may be made to specifically include that product as a personal vaporiser, or as a personal vaporiser related product. This would enable the case by case assessment of the particular characteristics of any such product, including its effects on bystanders and scientific evidence relating to the safety and efficacy of the device. It should be noted that no personal vaporisers have been approved for therapeutic use by the Therapeutic Goods Administration to date.

3B (2) (d) allows regulations that explicitly exclude products that are not intended to be regulated as personal vaporisers. This would provide clarity to consumers, industry and those involved in supporting compliance and enforcement activities with respect to the *Tobacco and Other Smoking Products Act 1927*.

3B (3) contains definitions of terms used in this section, that is for the *Australian Register of Therapeutic Goods* and *drug pipe*. The *Australian Register of Therapeutic Goods* is a register of therapeutic goods established under the *Therapeutic Goods Act 1989*. Goods entered in the Australian Register of Therapeutic Goods can be lawfully supplied in Australia.

The reader is referred to section 621A of the Criminal Code for the definition of *drug pipe*. The current definition is: '*drug pipe* (a) means— (i) a device, or components that together make a device, for the purpose or apparent purpose of smoking, or drawing or inhaling smoke or fumes from, a controlled drug; or (ii) a device that is intended to be used for the purpose or

apparent purpose of smoking, or drawing or inhaling smoke or fumes from, a controlled drug, but that requires an adjustment or modification to be used for that purpose; and (b) includes a device commonly known as— (i) a hash pipe; or (ii) an ice pipe; or (iii) a bong.’

Clause 28 Dictionary, new definitions

A dictionary is included at the end of the Act providing definitions of terms and phrases specifically for the Act. This clause provides for new definitions to be inserted into the dictionary; being definitions of *personal vaporiser* and *personal vaporiser related product*.

As the meanings of *personal vaporiser* and *personal vaporiser related product* are dealt with in section 3B, the definition simply refers the reader to that section.

Clause 29 Dictionary, definition of *smoking product*

This clause replaces the current definition of *smoking product* with a new definition. As the meaning of *smoking product* is dealt with in section 3A, the definition simply refers the reader to that section.

Schedule 1 Consequential amendments

Part 1.1 Children and Young People Act 2008

[1.1] Section 781 (3)

This item amends section 781 (3) of the *Children and Young People Act 2008* so that a reference to the *Tobacco Act 1927* is updated to reflect the new name of the Act - *Tobacco and Other Smoking Products Act 1927*.

The *Children and Young People Act 2008* provides for the protection, care and wellbeing of children and young people in the ACT. This includes regulation for employment of children and young people under 18 years of age. Section 781 of the Act defines the meaning of employment and excludes children and young people who participate in tobacco compliance testing under part 6A of the *Tobacco Act 1927*.

Part 1.2 Fair Trading (Australian Consumer Law) Act 1992

[1.2] Section 34 (2), definition of *consumer and trader legislation*, paragraph (g)

This item amends section 34 (2) of the *Fair Trading (Australian Consumer Law) Act 1992* so that a reference to the *Tobacco Act 1927* is updated to reflect the new name of the Act - *Tobacco and Other Smoking Products Act 1927*.

The *Fair Trading (Australian Consumer Law) Act 1992* promotes fair trading between consumers and traders. Section 34 provides that the Commissioner for fair trading may delegate their functions under the consumer and trader legislation or another territory law to a public servant, and that consumer and trader legislation includes the *Tobacco Act 1927*.

Part 1.3 Magistrates Court (Tobacco Infringement Notices) Regulation 2010
[1.3] Section 1

This item changes the name of the *Magistrates Court (Tobacco Infringement Notices) Regulation 2010* to *Magistrates Court (Tobacco and Other Smoking Products Infringement Notices) Regulation 2010* to better reflect content with the addition of personal vaporisers to legislation.

The *Magistrates Court (Tobacco Infringement Notices) Regulation 2010* is made under the *Magistrates Court Act 1930*. The regulation enables infringement notices to be issued for prescribed offences under the *Tobacco Act 1927* (to be retitled the *Tobacco and other Smoking Products Act 1927*)

[1.4] Sections 5 to 12

This item amends sections 5 to 12 of the *Magistrates Court (Tobacco Infringement Notices) Regulation 2010* so that all references to the *Tobacco Act 1927* are updated to reflect the new name - *Tobacco and Other Smoking Products Act*.

[1.5] Schedule 1, heading

Schedule 1 lists the infringement notice offences and penalties under the *Tobacco Act 1927*.

This item simply changes the name of the Schedule 1 heading to ‘Tobacco and Other Smoking Products Act infringement notice offences and penalties’ as per the new nomenclature. There is no change to the listed offences and penalties.

[1.6] Dictionary, definition of *authorised officer*

A dictionary is included at the end of the *Smoke-Legislation Amendment Act 2016 F* providing definitions of terms and phrases specifically for the Act.

This amends the definition of *authorised officer* so that the reference to the *Tobacco Act 1927* is updated to reflect the new name of the Act. The new definition will be: ‘*authorised officer* means an authorised officer under the Tobacco and Other Smoking Products Act, section 32 (Authorised officers).’

[1.7] Dictionary, definition of *Tobacco Act*

This item removes the definition of the Regulation as the name of the Act will have been altered by clause 2b of this Bill.

[1.8] Dictionary, new definition of *Tobacco and Other Smoking Products Act*

This item clause adds a definition for *Tobacco and Other Smoking Products Act* to the dictionary. *Tobacco and Other Smoking Products Act* means the *Tobacco and Other Smoking Products Act 1927*.