

40TH PARLIAMENT



Report 108

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

Tobacco Products Control Amendment Bill 2017

Presented by
Hon Michael Mischin MLC (Chairman)

October 2017

Standing Committee on Uniform Legislation and Statutes Review

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TOBACCO PRODUCTS CONTROL AMENDMENT BILL 2017

GLOSSARY

Act	<i>Tobacco Products Control Act 2006</i>
AHMC	Australian Health Ministers' Conference (see footnote 2 and report paragraphs 3.2 and 4.1)
Agreement	Multilateral agreement to prohibit the sale of fruit and confectionary flavoured cigarettes made by the Ministerial Council on Drug Strategy following the Australian Health Ministers' Conference on 18 April 2008 (see Executive Summary paragraph 2 and report paragraph 5.1)
Bill	Tobacco Products Control Amendment Bill 2017
CEO	The Chief Executive Officer of the Department defined in section 3 of the <i>Health Legislation Administration Act 1984</i>
Committee	Standing Committee on Uniform Legislation and Statutes Review
MCDS	Ministerial Council on Drug Strategy (see Executive Summary paragraph 2 and report paragraphs 3.2 and 4.1)

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**EXECUTIVE SUMMARY, FINDING AND RECOMMENDATION FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

TOBACCO PRODUCTS CONTROL AMENDMENT BILL 2017

EXECUTIVE SUMMARY

- 1 On 6 September 2017, the Tobacco Products Control Amendment Bill 2017 (Bill) was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) for consideration and report. The reporting date is 31 October 2017, being the next sitting day after the 45 day period mandated by Standing Order 126.
- 2 In 2008, Western Australia became a party to a multilateral agreement to prohibit the sale of fruit and confectionary flavoured cigarettes made by the Ministerial Council on Drug Strategy (MCDS), following the Australian Health Ministers' Conference on 18 April 2008 (Agreement).
- 3 The Bill amends the *Tobacco Products Control Act 2006* (Act) which controls the sale and supply of tobacco products. The Bill will affect the retail sale of tobacco products, simplify and streamline administrative arrangements for tobacco licences and aim to protect children and young people from exposure to tobacco products through various measures.
- 4 Only clause 5 of the Bill relates to the Agreement.
- 5 Clause 5 contains provisions that will prohibit the sale of fruit and confectionary flavoured cigarettes. This clause also prohibits the splitting of packages of cigarettes, capable of being split, into two or more portions containing fewer than 20 cigarettes. These provisions will commence six months after assent day.
- 6 The Committee concludes that the Bill is materially consistent with the MCDS Communique. The Communique outlines the agreement by all jurisdictions to prohibit the sale of fruit and confectionary flavoured cigarettes.
- 7 Under its terms of reference, the Committee is confined to investigating whether the Bill has an impact on the parliamentary sovereignty and law-making powers of the Parliament of Western Australia.
- 8 Clause 12 of the Bill inserts a new section 77 into the Act that provides for the appointment of restricted investigators. Section 77(4) gives the Chief Executive Officer of the Department defined in section 3 of the *Health Legislation Administration Act 1984* (CEO) the power to issue guidelines governing the appointment of restricted investigators. Restricted investigators investigate matters related to regulations about smoking in public places.

- 9 The Committee takes the view that proposed section 77(4) is, on balance, of an administrative nature and there are sound reasons for the CEO to issue guidelines from time to time without them being subject to Parliamentary scrutiny.
- 10 The Committee has found that the Bill does not impact upon parliamentary sovereignty.

FINDING AND RECOMMENDATION

- 11 The finding and recommendation appear in the text at the page numbers indicated:

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Finding 1: The Committee finds for the reasons outlined that proposed section 77(4) does not erode the sovereignty and law-making power of the Parliament in that the Chief Executive Officer's guidelines are, on balance, administrative in nature.

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Recommendation 1: The Committee recommends that the Legislative Council note the Committee's finding and comments during consideration of the Tobacco Products Control Amendment Bill 2017.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

TOBACCO PRODUCTS CONTROL AMENDMENT BILL 2017

1 INTRODUCTION

- 1.1 On 6 September 2017 the Tobacco Products Control Amendment Bill 2017 (Bill) was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) for consideration and report. The reporting date is 31 October 2017, being the next sitting day after the 45 day period mandated by Standing Order 126.

2 INQUIRY PROCEDURE

- 2.1 The Committee posted the inquiry on its website at [Uniform Legislation Committee homepage](#). The general public was notified of the referral via social media.¹ Given the Committee's terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted in relation to the Bill.
- 2.2 The Committee received two unsolicited submissions.
- 2.3 The first was a joint submission by letter dated 28 September 2017 from the Cancer Council WA, the Heart Foundation (WA) and the Australian Council on Smoking and Health (ACOSH), in support of the passage of the Bill. The correspondents were informed that the Committee is limited by its terms of reference not to consider the policy of the Bill, however the submission has been made public and so is available for the information of Members when the Bill comes before the House for debate. A copy is available for viewing on the Committee's website.
- 2.4 The second submission was by letter dated 9 October 2017 from Woolworths Group representing Woolworths Supermarkets, Woolworths Metro, BIG W, BWS and Dan Murphy's Stores in Western Australia. The submission was marked confidential and not to be published and made observations regarding elements of the Bill. Once again, the correspondent was informed that the Committee is limited by its terms of reference not to consider the policy of the Bill, and that the Committee did not consider the issues raised as material to its inquiry. The Committee advised that the request for confidentiality would be respected. Woolworths was also informed that if it wanted its views to be considered when the Bill is debated, it might wish to communicate them to Members of Parliament who will be involved in the debate.

¹ Legislative Council, 14 September 2017, retrieved from <https://twitter.com/WALegCouncil/status/905346601123684352>

3 SUPPORTING DOCUMENTS

3.1 The Committee received copies of the Bill, the Second Reading Speech and the Explanatory Memorandum when the Bill was introduced into the Legislative Council.

3.2 Hon Roger Cook MLA, Minister for Health, provided the Committee with the following documentation and information pursuant to Ministerial Office Memorandum MM2007/01:

- Excerpts from “item 2.11 – Australian Health Ministers’ Conference Final Decisions and Actions Arising” dated 18 April 2008.
- Excerpts from the “Ministerial Council on Drug Strategy Final Resolutions” dated 23 May 2008.
- A copy of the Australian Health Ministers’ Conference (AHMC) Communique dated 18 April 2008.
- A copy of the Ministerial Council on Drug Strategy (MCDS) Communique dated 23 May 2008.
- A copy of the Explanatory Memorandum for the Bill.
- A media statement released by the Government on 6 September 2017 indicating that the Bill proposed to ban the sale of fruit and confectionary flavoured cigarettes.
- A copy of the *Tobacco Products Control Act 2006* Review Discussion Paper April 2011.
- A summary of Australian Government legislation and activities in relation to confectionary and flavoured cigarettes.
- An explanation outlining the advantages to the State of Western Australia as a party to the agreement made through the MCDS.

3.3 Standing Order 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral....

3.4 The documents referred to above were provided to the Committee on 11 September 2017, three working days after referral. The Committee extends its appreciation to the Minister for the timely provision of supporting documentation and information.

4 BACKGROUND TO THE BILL

- 4.1 On 18 April 2008 Health Ministers agreed, at the Australian Health Ministers' Conference², to a ban on sales of fruit and confectionary flavoured cigarettes across all Australian jurisdictions and to refer the issue to other Ministerial Councils, including the MCDS.³
- 4.2 The conference was attended by the former Western Australian Minister for Health, Hon Jim McGinty MLA.
- 4.3 The MCDS agreed on 23 May 2008 that all States and Territories would enact legislation to prohibit the sale of fruit and confectionary flavoured cigarettes within their jurisdictions by December 2009.⁴
- 4.4 Western Australia is the only jurisdiction that has not yet banned fruit and confectionary flavoured cigarettes.
- 4.5 In support of the Bill, the Minister for Health has stated that the advantages of banning the sale of fruit and confectionary flavoured cigarettes are:

It will bring Western Australia into line with every other Australian jurisdiction and remove the risk of these products being available throughout Australia pursuant to mutual recognition legislation...

The 2011 Review of the Tobacco Products Control Act 2006 showed strong support for the proposal; and

Prohibiting the sale of fruit and confectionary flavoured cigarettes would remove products that have a particular appeal to children and could entice them to experiment with smoking.⁵

5 THE INTERGOVERNMENTAL AGREEMENT

- 5.1 Following the Australian Health Ministers' Conference on 18 April 2008, Western Australia became a party to a multilateral agreement made by the MCDS (Agreement).
- 5.2 The Communique of the Australian Health Ministers' Conference dated 18 April 2008 confirmed as follows:

The Australian Health Ministers today agreed to ban the sale and investigate banning the importation of flavoured cigarettes across Australia.

² All Australian Government, State, Territory and New Zealand Ministers with direct responsibility for health matters, including the Australian Government Minister for Veterans' Affairs are Members of the Australian Health Ministers' Conference.

³ Hon Roger Cook MLA, Minister for Health, Letter, 11 September 2017, Attachment 1: Australian Health Ministers' Conference Final Decisions and Actions Arising.

⁴ Hon Roger Cook MLA, Minister for Health, Letter, 11 September 2017, Attachment 4: Ministerial Council on Drug Strategy (MCDS) Joint Communique 23 May 2008.

⁵ Hon Roger Cook MLA, Minister for Health, Letter, 11 September 2017, p 2.

It is unacceptable that children are smoking, and unacceptable that tobacco companies are marketing their products to children.

5.3 The Joint Communique of the MCDS dated 23 May 2008 confirms as follows:

MCDS also agreed all states and territories will enact legislation to prohibit the sale of fruit and confectionary flavoured cigarettes within their jurisdictions by December 2009.

5.4 In her second reading speech Hon Alanna Clohesy MLC, the Parliamentary Secretary representing the Minister for Health, advised the Legislative Council that:

Pursuant to Legislative Council standing order 126(1), I advise that clause 5 of the bill ratifies or gives effect to a multilateral agreement to which the government of the state is a party—namely, an agreement made through the Ministerial Council on Drug Strategy. As such, this bill is a uniform legislation bill.⁶

5.5 While only clause 5 of the Bill relates to the Agreement, the Committee considers, and reports back to the Legislative Council on, the entire Bill.⁷

5.6 A comparable situation arose in 2011 when the Residential Tenancies Amendment Bill 2011 was referred to the Committee pursuant to then Standing Order 230A.⁸ Only Part 4 of that Bill, dealing with residential tenancy databases, related to uniform legislation, however the Committee considered the Bill in its entirety.

6 THE TOBACCO PRODUCTS CONTROL AMENDMENT BILL 2017

Structure of the Bill

6.1 The Bill comprises 21 clauses.

6.2 Clause 2 contains the commencement provisions. Most of the provisions in the Bill will commence six months after the Royal Assent. Clause 4 will commence 24 months after the Royal Assent.

6.3 Clause 4 contains a provision that will prohibit the holder of a retailer's licence from authorising or allowing a person under 18 years of age to sell tobacco products.

6.4 Clause 5 contains provisions that will prohibit the sale of fruit and confectionary flavoured cigarettes and prohibit the splitting of packages of cigarettes, capable of being split, into two or more portions containing fewer than 20 cigarettes.

6.5 Clause 6 contains provisions that will progressively limit the defence available to specialist retailers to display tobacco products, packages or smoking implements. The clause also imposes requirements for health warning signs.

⁶ Hon Alanna Clohesy MLC, Parliamentary Secretary representing the Minister for Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 September 2017, p 3382.

⁷ Legislative Council Standing Order 126.

⁸ Standing Order 230A was replaced by the current Standing Order 126 in 2012.

- 6.6 Clause 7 contains provisions relating to health warning signs and penalties.
- 6.7 Clause 8 contains provisions relating to shopper loyalty reward schemes.
- 6.8 Clauses 10 and 11 contain provisions relating to the issuing and renewing of licences for the sale of tobacco products.
- 6.9 Clauses 12 to 15 contain provisions relating to restricted investigators.⁹
- 6.10 Clauses 16 and 18 contain provisions relating to forfeiture orders.
- 6.11 Clause 17 contains provisions relating to penalties.
- 6.12 Clause 19 contains a consequential amendment to the Governor's regulation making power in relation to health warning signs.
- 6.13 Clause 20 contains transitional provisions.
- 6.14 Clause 21 amends the glossary.

Overview of the Bill

- 6.15 The Bill amends the *Tobacco Products Control Act 2006* (Act) which controls the sale and supply of tobacco products. The Explanatory Memorandum notes that the Bill:

Provides various measures to protect children and young people from exposure to tobacco products;

Improves and strengthens existing provisions in relation to the retail sale of tobacco products; and

*Simplifies and streamlines administrative arrangements for tobacco licences.*¹⁰

- 6.16 Clause 5 of the Bill provides for new sections 21A and 21B to be inserted into the Act.
- 6.17 Proposed new section 21A states:

The holder of a licence must not sell, or authorise or allow to be sold, cigarettes in a package that is designed to be, or is capable of being, split into 2 or more portions each containing fewer than 20 cigarettes.

- 6.18 Proposed new section 21B states:

The holder of a licence must not sell, or authorise or allow to be sold, a cigarette that, when smoked, has a flavour or aroma of -

(a) any kind of fruit; or

⁹ Currently, restricted investigators may be appointed by the CEO (the chief executive officer of the Department as defined in the *Health Legislation Administration Act 1984* section 3) and have the functions of an investigator that are specified in the instrument of appointment. (Sections 77 and 78 of the *Tobacco Products Control Act 2006*).

¹⁰ Tobacco Products Control Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 1.

(b) *mint (but not menthol), chocolate, vanilla, caramel, coconut or any other flavour (but not a spice) commonly used in the production of confectionary.*

6.19 Proposed new sections 21A and 21B impose penalties for contravention by individuals and corporations.

Clauses that preserve Parliamentary sovereignty and law-making powers

Clause 2 - Commencement

6.20 The proposed Act is to come into operation on dates that have been prescribed in the Bill, rather than being left to the Executive. Commencement is set for:

- The date of Royal Assent for sections 1 and 2.
- The day after the period of 24 months beginning on assent day for section 4.
- The day after the period of six months beginning on assent day for the rest of the Act.¹¹

6.21 Clause 2 preserves Parliament's sovereignty by allowing for the Parliament to determine when the proposed Act is to come into force.

Opt out mechanism

6.22 It is a matter for the State to decide if it wishes to opt out of the Agreement. There is no requirement in the Communique of the AHMC and MCDS or the Bill for Western Australia to be bound by the terms of the Agreement. Accordingly, the State can opt out of the Agreement by repealing the Act or amending it in a manner that is inconsistent with the Agreement.

Clauses that may impinge upon Parliamentary sovereignty and law-making powers

Clause 12 – Inserting new section 77 Appointment of restricted investigators

6.23 Clause 12 of the Bill inserts a new section 77 into the Act. Relevant to the issue of parliamentary sovereignty are the following subsections:

77. Appointment of restricted investigators

(1) *In this section —*

enforcement agency means —

(a) *the CEO; or*

(b) *a local government; or*

¹¹ Tobacco Products Control Amendment Bill 2017, cl 2.

(c) a person or body, or a person or body within a class of persons or bodies, prescribed by the regulations for the purposes of this definition.

(2) *An enforcement agency may appoint, by instrument in writing, a person to be a restricted investigator.*

(3) *An enforcement agency must not appoint a person under subsection (2) unless the agency —*

(a) considers that the person has the appropriate qualifications and experience to perform the functions referred to in section 78(1); and

(b) has regard to any guidelines issued under subsection (4).

(4) *The CEO may issue guidelines that describe the qualifications and experience that are appropriate for a person to be appointed to be a restricted investigator under subsection (2).*

6.24 The CEO referred to is the Chief Executive Officer of the Department of the State prescribed by section 3 of the *Health Legislation Administration Act 1984*.

6.25 A restricted investigator's functions will be limited to investigating suspected offences relating to the regulation or prohibition of smoking in public places.¹²

6.26 The guidelines issued by the CEO referred to in proposed section 77(4) are not regulations for the purposes of the *Interpretation Act 1984* and therefore not subject to Parliamentary scrutiny through the disallowance process.¹³

6.27 The Parliamentary disallowance process and the power of the Joint Standing Committee on Delegated Legislation to scrutinise subsidiary legislation are important aspects of the Parliament's sovereignty.

6.28 The Committee wrote to Hon Roger Cook MLA, Minister for Health on 19 September 2017 seeking an explanation of the rationale for proposed section 77(4).

6.29 Hon Simone McGurk MLA, Acting Minister for Health, responded as follows on 29 September 2017:

Proposed section 77(4) provides that the CEO may issue guidelines that describe the qualifications and experience that are appropriate for a person to be appointed as a restricted investigator. The proposed provision is modelled on section 122(2) of the Food Act 2008.

¹² Tobacco Products Control Amendment Bill 2017, cl 13 and *Tobacco Products Control Act 2006*, s 125.

¹³ Section 42 of the *Interpretation Act 1984* provides that all regulations must be laid before each House of Parliament and either House may disallow regulations. The Joint Standing Committee on Delegated Legislation has the power to scrutinise all subsidiary legislation on behalf of the Legislative Council that is referred to it within its Terms of Reference. For further information, refer to the Joint Standing Committee on Delegated Legislation's Terms of Reference: Schedule 1, clause 10 of the Standing Orders of the Legislative Council.

The policy rationale behind the issuing of guidelines, rather than having these prescribed in regulations, is that appropriate qualifications and experience change over time. Relevant training courses are intermittently added, varied or no longer offered by training providers. The provision of guidelines is intended to ensure that such administrative changes do not affect the appointment of persons, who would otherwise hold appropriate qualifications and experience. By providing guidelines the CEO will be able to make any changes in qualifications and experience that occur from time to time in a responsive and timely way.

In developing the guidelines, the CEO will consult with relevant agencies, including local governments, to determine what are the qualifications and experience most appropriate for this role. The commitment to consultation around such guidelines is ongoing. Issued guidelines will be publicly available and will be issued under the authority of the CEO.¹⁴

- 6.30 The Committee accepts the explanation provided by Hon Simone McGurk MLA, Acting Minister for Health.
- 6.31 The Committee takes the view that proposed section 77(4) is, on balance, of an administrative nature and it is reasonable for the CEO to issue guidelines governing who would be a person appropriate to be appointed as a restricted investigator, rather than having their qualifications and experience prescribed by regulations. The Committee notes that restricted investigators have functions limited to investigating matters related to regulations about smoking in public places.¹⁵
- 6.32 The Committee considers that, in the circumstances, proposed section 77(4) does not erode the sovereignty and law making powers of the Parliament.

Finding 1: The Committee finds for the reasons outlined that proposed section 77(4) does not erode the sovereignty and law-making power of the Parliament in that the Chief Executive Officer's guidelines are, on balance, administrative in nature.

7 CONCLUSIONS

- 7.1 The Committee concludes that the Bill is materially consistent with the MCDS Communique which outlines the agreement by all jurisdictions to prohibit the sale of fruit and confectionary flavoured cigarettes.

¹⁴ Hon Simone McGurk MLA, Acting Minister for Health, Letter, 29 September 2017.

¹⁵ Tobacco Products Control Amendment Bill 2017, cl 13 and *Tobacco Products Control Act 2006*, s 125, refer to footnote nine.

- 7.2 The Committee is satisfied with the explanation, by the Acting Minister for Health, of the rationale for providing for the CEO to issue guidelines describing the qualifications and experience appropriate for the appointment of a restricted investigator, rather than having these prescribed in regulations.
- 7.3 The Committee concludes that clause 12 of the Bill does not erode the sovereignty and law-making power of the Parliament.
- 7.4 Under its terms of reference, the Committee is confined to investigating whether the Bill has an impact on the parliamentary sovereignty and law-making powers of the Parliament of Western Australia. Notwithstanding that an issue was identified that might have had the potential to affect parliamentary sovereignty and Parliament's law-making powers, the Committee is of the opinion that it has been explained and justified.

Recommendation 1: The Committee recommends that the Legislative Council note the Committee's finding and comments during consideration of the Tobacco Products Control Amendment Bill 2017.



Hon Michael Mischin MLC
Chairman

31 October 2017

Standing Committee on Uniform Legislation and Statutes Review

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'6. Uniform Legislation and Statutes Review Committee

- 6.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
 - (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
 - (d) to review the form and content of the statute book; and
 - (e) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'



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