

Health and Other Legislation Amendment Bill 2022

Submission No: 2
Submitted by: The Public Advocate
Publication:
Attachments:
Submitter Comments:

21 December 2022

Committee Secretary
Health and Environment Committee
Parliament House
George Street
Brisbane QLD 4000

Via email: HEC@parliament.qld.gov.au

Dear Committee Secretary

Thank you for the opportunity to provide input into the Health and Other Legislation Amendment Bill 2022 (the Bill).

As members of the Committee will be aware, as the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.¹ There are several conditions that may affect a person's decision-making ability. These include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse.

I note that the Bill proposes to make changes to the *Recording of Evidence Act 1962* in order to facilitate the electronic recording of evidence before the Mental Health Review Tribunal (MHRT), a development which I strongly support and have been discussing with the MHRT. Complete, accurate and accessible records of proceedings are fundamental in any legal proceeding, especially among a cohort of people who may be experiencing impaired decision-making capacity that could affect their recollection and perception of the proceedings. Further, it is vitally important that an advocate for an adult with impaired decision-making capacity can access such records of proceedings in order to fully appreciate, for instance, the circumstances of a person's involuntary treatment.

There would generally be no argument that recording a proceeding is a requirement in a fully accountable, transparent and fair system. However, a recording must also be accurate and complete, as nuance and context during a legal proceeding can greatly affect the outcome and decisions being made. Regarding clause 35 of the Bill, it appears to allow a 'judicial person prescribed by regulation' the discretion of arranging for the recording or transcribing of a record under the *Recording of Evidence Act* through the use of the word 'may'. There should not be a discretion to record a proceeding, and instead all MHRT proceedings should be electronically recorded unless there is a compelling reason not to do so (such as a strong and reasonable objection from the patient themselves). Therefore, clause 35 should be amended to provide that the 'judicial person' must arrange for the electronic recording or transcription of a record under the *Recording of Evidence Act*.

The explanatory notes state that electronic recording will be the 'default' and exceptions will only be made if there are 'compelling reasons' such as a patient's distress. If this is so, this should be expressly stated in the legislation instead of allowing a broad discretion that does not appear to reflect the intention expressed in the explanatory notes.

Other changes proposed in the Bill pertain to the *Mental Health Act 2016*. Clause 15 allows a patient to waive their right to legal representation in other ways rather than exclusively in writing, which would allow the patient to do so orally. The Bill requires that should the waiver be done in a form other than in writing, the tribunal must be satisfied that 'it would not cause injustice to the person.'

¹ *Guardianship and Administration Act 2000* (Qld) s209.

Given how important the right to legal representation is, I suggest that further changes be made to this clause, consistent with other changes being introduced by the Bill. If the waiver of the right to representation is done so verbally, it should only be done in circumstances where there is a recording and transcription of such a waiver. In addition, the MHRT should be required to be satisfied that the patient has the requisite capacity to waive their right to representation, namely that they understand the consequences of such a decision. This would ensure that the right to legal representation was waived by an individual who was fully aware of their rights and the consequences of not having representation before the MHRT were properly discussed.

Thank you again for the opportunity to comment on the Bill.

If you require clarification of any recommendations raised in this correspondence, please contact my office on [REDACTED].

Yours sincerely

A large black rectangular redaction box covering the signature area.

John Chesterman (Dr)
Public Advocate