

Health and Other Legislation Amendment Bill 2022

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Committee Secretary
Health and Environment Committee
Parliament House
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By email only: HEC@parliament.qld.gov.au

Dear Committee Secretary

Health and Other Legislation Amendment Bill 2022

Thank you for the opportunity to provide submissions on the above Bill.

The Queensland Human Rights Commission's submissions are confined to amendments proposed to the *Recording of Evidence Act 1962*, to ensure that the Mental Health Review Tribunal is legislatively obliged to accurately record its proceedings, for example, by way of electronic audio recording.

Relevant human rights

Section 30 of the *Human Rights Act 2019* protects a person's right to a fair and public hearing, and for judgments to be publicly available. Publicity of hearings and decisions ensures the transparency of proceedings and provides an important safeguard for the interest of the individual and of society at large.¹ Recording and/or transcription of proceedings enhances accuracy, transparency and safeguarding, particularly in jurisdictions such as the Mental Health Review Tribunal where there are good reasons for proceedings and decisions not to be made public.

Section 15 of the *Human Rights Act* provides for recognition and equality before the law, in particular, that every person is equal before the law and is entitled to the equal protection the law without discrimination. It follows that a person before the Mental Health Review Tribunal should have the same protections as another person appearing

¹ United Nations Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 19th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [28].

before another court or tribunal where determinations regarding liberty and self-determination are made, including access to an accurate record of proceedings.

The recording of proceedings involves the collection, use and disclosure of personal information, and therefore has the potential to limit the right to privacy under section 25 of the *Human Rights Act*.

Recording of hearings before the Mental Health Review Tribunal

Currently, section 5(1) of the *Recording of Evidence Act* requires that all relevant matter in a legal proceeding is to be recorded. The notes provide examples of recording such as 'in shorthand' and 'by recording equipment'.

The history of section 5 of the *Recording of Evidence Act* can be summarised as follows:

- Prior to the current provision being inserted on 26 February 2013, section 5 gave discretion to courts or judicial persons to record legal proceedings, if a shorthand reporter was available, in shorthand, or, if recording equipment and a recorder were available, by the recording equipment.
- The current provision was inserted by the *Classification of Computer Games and Images and Other Legislation Amendment Act 2013*. The Queensland Civil and Administrative Tribunal (QCAT), but not the Mental Health Review Tribunal, were consulted on the proposed amendments.² The Explanatory Note indicates the intention of amendments to section 5 to change from merely authorising recording, to requiring the recording of legal proceedings. There was also the intention to clarify that the obligation to record extends to tribunal proceedings.³

The Mental Health Review Tribunal intends to, but does not currently, electronically record their proceedings. In the Mental Health Review Tribunal's view, their current practice of taking notes by one of the sitting tribunal members is sufficient to meet the requirements of the *Recording of Evidence Act*.⁴

In the Commission's view, the current practice is not sufficient to meet the requirements of the *Recording of Evidence Act*, nor the obligations imposed by the *Human Rights Act* under the rights to fair hearing and equality. Limitations to these rights are not outweighed by considerations of the right to privacy of the individual, particularly in view of the protections regarding access to the recordings proposed by amendments to the *Mental Health Act 2016* by this bill.

² Explanatory Note, Classification of Computer Games and Images and Other Legislation Amendment Bill 2012 8.

³ Ibid 19.

⁴ State Development and Regional Industries Committee, Queensland Parliament, *Health and Other Legislation Amendment Bill 2021* (Report No. 17, February 2022) 26-27.

According to the Explanatory Notes, the bill ‘aims to ensure that persons subject to proceedings and relevant entities such as their mental health service and courts can request and obtain *accurate* records of hearings. *Accurate* records of hearings can assist a person who has had a hearing and their treating team to recall and understand the MHRT’s decision, and, if needed, support them to seek advice. *Accurate* records also support the Mental Health Court where a person before the Court has had a relevant MHRT matter’ (emphasis added).⁵

For clarity, the Commission submits that further amendment to the *Recording of Evidence Act* may be needed to require the Mental Health Review Tribunal to take ‘accurate records’ of hearings, which in the Commission’s respectful submission, can only be achieved through electronic audio recording, professional short hand recording, or similar practice.

The Commission acknowledges that it might be appropriate for there to be an exception to electronic recording where it would cause significant distress to the individual, such that it would justify limitation to rights to fair hearing and equality, and the practice may amount to torture, cruel, inhuman or degrading treatment of that individual (under section 17 of the *Human Rights Act*). However, it is anticipated such circumstances would be exceptional and may be avoided if a proper explanation of the purpose of recording is provided (ideally, before the hearing).

Yours sincerely



Neroli Holmes
A/g Queensland Human Rights Commissioner

⁵ Explanatory Notes, Health and Other Legislation Amendment Bill 2022 6.