

Health and Other Legislation Amendment Bill (No. 2) 2023

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

Via online submission

Inquiry into the Health and Other Legislation Amendment Bill (No. 2) 2023

Thank you for the opportunity to provide feedback regarding the Health and Other Legislation Amendment Bill (No. 2) 2023 (the Bill).

As you would be aware, as Public Advocate I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.

The *Mental Health Act 2016* (the Act) limits the use and release of information that has been used in Mental Health Court proceedings due to the sensitive and confidential nature of that information. My submissions in this letter relate to proposed changes that affect the rights of people who are subject to Mental Health Court proceedings. I want to ensure that any changes are consistent with the main objects of the Act, which are to safeguard the rights of persons, be least restrictive of people's rights and liberties and promote the recovery of a person who has a mental illness.¹

Admissibility and release of Mental Health Court exhibits in criminal proceedings

The Bill seeks to amend sections 157 and 157A of the Act to allow expert reports given in evidence in the Mental Health Court to become admissible in unrelated criminal proceedings.

Section 157 currently allows an expert report to be admissible in a criminal proceeding if a court is deciding whether a person is unfit for trial, was of unsound mind, had diminished responsibility, or if the court is considering the making of a forensic order (*Criminal Code*) or sentencing the person.² The section currently only allows the report to be admitted if the criminal proceeding is for the same offence that the Mental Health Court was considering.

This can limit the ability of relevant reports to be used when the person is before a court for another offence, including offences that are related, or if the actual offence with which the person has been charged has been changed for the purposes of a criminal trial but rests on the same set of facts relevant to the original charge.

The Bill seeks to change the wording of section 157 to allow the admissibility of the reports for any offence.

This could be helpful for the person, as a mitigating expert report could be used to assist the person in a criminal matter without them needing to obtain another report that may contain the same information.

¹ *Mental Health Act 2016* (Qld) s 3(2).

² *Mental Health Act 2016* (Qld) s 157.

The changes still include the existing protections that the report can only be admitted in limited circumstances, such as determining whether a person was of unsound mind or during sentencing, as noted above.

Although I support the proposal in principle, on the basis that the person who is the subject of the report should be permitted to use the report to their benefit, further safeguards should be in place before the provision is changed.

Currently, section 157 allows the admissibility of reports as long as relevant criteria are met. It is not specified who is allowed to admit the report into evidence. Therefore, the prosecution could, in a future criminal proceeding, rely on the provision to admit the report into evidence.

The Bill should include further safeguards to ensure that only the person who is the subject of the report can choose to admit the report into evidence, as allowing the prosecution to admit reports into evidence at any future trial could unfairly prejudice the person.

For example, during sentencing for an unrelated offence, the prosecution may wish to admit a past report where the person has stated some negative intentions towards a particular group of people that the unrelated offence has some connection to, potentially aggravating the person's culpability. Even though the person's statement was never intended to be used for anything other than the assessment of the person's mental state at the time, and may have even been a reflection of a mental illness, the report could then potentially be used to seek a harsher sentence than the person would have otherwise received for that offence.

Another example is if the person has been charged with an unrelated offence and is attempting to rely on a Criminal Code defence of unsoundness of mind or diminished responsibility. If there is no restriction on who can admit previous reports into evidence, the prosecution could tender an old report that the person was not of unsound mind at the time of a previous offence, which may be contradictory to a more contemporaneous report. This could confuse a jury, who should generally be relying upon the more recent report.

Therefore, although I support the broadening of section 157 to assist in the mitigation of a person's offending, there should be a restriction on who can admit past reports into evidence, and this should only be allowed with the consent of the person who is the subject of the report.

It should be noted that there does not appear to be an equivalent provision in the *Mental Health Act* to section 130 of the *Evidence Act 1977*. Section 130 of the *Evidence Act* clearly states that nothing in that Act derogates from the power of the court to exclude evidence if it is unfair to the person charged. Therefore, allowing broad admissibility under the *Mental Health Act* in section 157 may force a court to admit the evidence even though it may violate a person's right to a fair trial.

Moving on to section 157A, this section currently allows an expert report made for the Mental Health Court to be used by a Magistrates Court in relation to the same matter to determine whether to dismiss a complaint on the basis that the person is of unsound mind or unfit for trial, or adjourn the matter on the basis that the person is temporarily unfit for trial.

The proposed changes seek to amend this section to allow the Magistrates Court to consider a report for those purposes that has been provided in relation to any offence, not just the offence considered by the Mental Health Court. Although the proposed changes broaden admissibility of expert reports independent of what offence is being considered, given the far more limited circumstances in which section 157A allows the admissibility of reports, and the fact that such reports will only be considered by a magistrate, I have no objection to the changes proposed to this section.

Admissibility of Mental Health Court transcripts in criminal proceedings

The Bill also seeks to amend sections 157 and 157A to enable transcripts of Mental Health Court proceedings to be admitted in criminal proceedings.

It appears that this change is based upon the fact that during a Mental Health Court proceeding, there may be relevant discussions by assistant psychiatrists in relation to a person's condition.

However, a number of issues arise regarding this proposal, as it appears to apply to 'transcripts' generally, not just parts that contain relevant discussions about a person's condition.

The whole transcript of a proceeding should not be admissible in other proceedings, as it will contain information irrelevant to the person's condition. It would contain submissions made by various parties, and potentially information from witnesses who were examined.

Any changes to allow transcripts to be admitted should be restricted to evidence given by assistant psychiatrists and other experts about a person's condition.

I have the same concerns regarding admissibility of transcripts as I discussed in relation to the admissibility of expert reports above, such as the potential use of transcripts to disadvantage the person or confuse a jury, and my view is that the transcript should also only be admitted with the consent of the person.

Thank you again for the opportunity to comment on the Health and Other Legislation Amendment Bill (No. 2) 2023. I look forward to monitoring the progress of these amendments and further consultation opportunities.

Should you wish to discuss any of the matters I have raised in this submission further, please do not hesitate to contact my office via email [REDACTED] or phone [REDACTED]

Yours sincerely

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John Chesterman (Dr)
Public Advocate