

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

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Submission to the Queensland Parliamentary Health and Environment Committee – Health and Other Legislation Amendment Bill (No. 2) 2003

11th January 2024

Summary

- We support in principle the proposed amendments to S 157 and S 157A of the Mental Health Act with the limitation that reports provided to the Mental Health Court can only be used in unrelated criminal matters at the instigation of the defendant.
- While the preferred option would have been no changes to S 160 of the Mental Health Act we support the requirement for the Court to provide leave before release of material, and the right of the Court to make any release conditional.
- We encourage the committee to ensure that the limitation on the release of material from Mental Health Court proceedings under S 160 also apply to records obtained by the Chief Psychiatrist as a party to the proceedings (i.e. that it can only be used clinically with leave of the Court).

Proposed Changes to Mental Health Act:

The Mental Health Lived Experience Peak Queensland (MHLEPQ) was invited by the Queensland Health Strategy, Policy and Reform Division (the Division) to make a submission in relation to four proposed changes to the Queensland Mental Health Act:

1. Allowing exhibits (such as expert reports) from Mental Health Court proceedings to be introduced in unrelated criminal trials.
2. Allowing transcripts from Mental Health Court proceedings to be introduced in unrelated criminal trials.
3. Allowing expert reports filed with the Mental Health Courts but not yet received in evidence before the court to be released for other purposes.
4. Allowing for exhibits from the Mental Health Courts to be recorded on a person's health records on the CIMHA system, available to clinicians according to policies developed by the Chief Psychiatrist (CP).

The MHLEPQ is a charity established to provide a collective voice in systems change and advocacy for Queenslanders with a lived experience of mental illness and / or suicidality. We are funded by the Queensland Health Community Services Funding Branch to provide systems advice and advocacy relating to the Queensland public mental health sector.

A Human Rights Perspective:

Section 15 of the Queensland Human Rights Act 2019 (the Act) provides all Queenslanders equality before the law and to protect against discrimination. The Act provides general freedom of expression (section 21), the right to privacy (section 25), the right to a fair hearing (section 31), rights in criminal proceedings and the right to health services (section 37). The Act also provides the right to not be compelled to testify against oneself or to confess guilt (section 32(2)(k)). Section 29 (7) of the Act also provides that “a person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person’s detention.” Any limitations on these rights must be justified in meeting the stated purpose (section 13).

Australia is a signatory to the United Nations Convention on the Rights of Persons with Disabilities. The purpose of this convention is to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all regardless of disability, and respect for inherent dignity. These rights extend to matters such as the right to privacy and equality before the law.

Any proposed changes to the Mental Health Act regarding the treatment of evidence and transcripts must only be done in a manner and for an outcome that enhances and protects the human rights of Queenslanders, particularly vulnerable Queenslanders with a reduced mental capacity. We urge caution, full and proper consideration, and investigation prior to any legislative changes. We note the Human rights statement accompanying the Bill.

Proposed amendments to S. 157 of the Mental Health Act:

Section S. 157 of the Queensland Mental Health Act (MHA) is concerned with the health of persons with major disturbance in mental capacity and is intended to protect records and rights of individuals who have been before the Mental Health Court. People may have appeared before the Court to determine whether they are of unsound mind, fit for trial and / or to inform sentencing in a particular criminal matter. Currently, any expert reports received in evidence by the Mental Health Court are only admissible at the trial for which the particular report was generated.

The proposed changes to S 157 would dramatically expand the scope to include ANY criminal matters, allow the admission of transcripts from other unrelated criminal matters in addition to expert reports, and include unrelated criminal matters before the Magistrates Court.

The explanatory memorandum accompanying the bill the committee is considering states:

These limitations on the use of expert reports are necessary to ensure that relevant evidence is available in criminal proceedings, while at the same time protecting the privacy of a person’s health information and allowing a person to participate in Mental Health Court proceedings without fear of self-incrimination.

The Mental Health Act is specific in only allowing admission of expert reports for consideration where they relate to the same offence being determined by a criminal court. However, expert reports related to a different offence may still be of relevance for a criminally charged person. For example, a person may wish to have the criminal court consider an expert’s opinion as to their psychiatric health and history. Limiting the

admissibility and use of such evidence therefore deprives an individual of the ability to have their personal mental condition accounted for during trials.

We agree with this existing reasoning in relation to both the use of expert reports and transcripts. A person before a court on a criminal matter should have access to any evidence that can mitigate or defend the person as freely as is practicable and possible. It also makes sense that if a person has engaged in the development of a report concerning their mental health and or a court procedure that they can consent to use such assessments and records for other purposes.

The MHLEPQ is concerned that the proposed change prima facie goes further than this. It allows any relevant party to use this information for any criminal matters in court proceedings for eternity with or without the consent of the person with whom they concern.

In our advice to the Queensland Health Strategy, Policy, and Reform Division in September 2023 we recommended:

We recommend that any change to the use of expert reports in unrelated criminal matters specifically be limited in the legislation to the defendant having the right to use such reports, and further that no detriment should be inferred on a defendant for choosing not to do so.

While we recommended that no changes should be made to the admissibility of Mental Health Court transcripts in future unrelated criminal matters, we would suggest as a minimum that a similar restriction is placed on the use of transcripts.

Proposed amendment to S 160 regarding release of reports prior to being received in evidence:

While the MHLEPQ would have preferred no change to S 160 we are pleased that the drafters have adopted the MHLEPQ's recommendations made to the Queensland Health Strategy, Policy and Reform Division (the Division) in the consultation phase. We find it important that any release of material submitted to the Court Registrar only be made with Leave of the Court and that the Court has the power to impose any conditions on such release it finds appropriate.

Matters not covered in this Bill:

We note that the fourth amendment proposed in the consultation paper released by the Queensland Health Strategy, Policy, and Reform Division (the Division) for this Bill has not proceeded. The amendment related to the storage of Mental Health Court exhibits on a person's health records. As the Chief Psychiatrist is a party to any Mental Health Court proceedings there has been a practice of storing the records as a health record on the Queensland Health CIMHA system. The Chief Psychiatrist has the obligation to make policy regarding the storage of mental health records. We were concerned that this could mean that reports generated for the purpose of proceedings in the Mental Health Court would be available across the Queensland State Mental Health system at the discretion of the Chief Psychiatrist and not by leave of the court as provided in S 160 of the Act. We are pleased that these proposed amendments does not appear to infer additional rights for the release and use of Mental Health Court reports outside those provided in S 160. We encourage the committee to carefully consider and ensure that the requirement of leave by the court to release reports (for other purposes than stated in S 157 and S 157A) be maintained. The view of the MHLEPQ is that proceedings before the Mental Health Court are legal proceedings for legal purposes and that material generated for this purpose

should only be used for other purposes where a careful assessment of the individual case concludes that there are good reasons for the care or the person or safety of the staff to use it for other purposes.

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