



# Health and Other Legislation Amendment Bill 2021

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Submission to  
State Development and Regional Industries Committee

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## Summary

1. Thank you for the opportunity to make submissions on the Health and Other Legislation Amendment Bill 2021 (**the Bill**). The Bill proposes amendments to legislation, including the *Mental Health Act 2016 (MH Act)* and the *Hospital and Health Boards Act 2011 (HHB Act)*, that improve the operation and provision of health services in Queensland.<sup>1</sup>
2. The Queensland Human Rights Commission (**the Commission**) notes that many of the amendments, particularly in relation to the MH Act, seek to strengthen human rights protections. This submission comments on:
  - a. the current framework for people found unfit for trial under the MH Act;
  - b. sections 790 and 791 of the MH Act which limit the publication of reports of the proceedings of the Mental Health Court and the Mental Health Review Tribunal, and the publication of identifying information of any parties to those proceedings; and
  - c. privacy issues arising from external access to Queensland Health's patient information system known as the Viewer.
3. This submission is not intended to be a complete human rights assessment of the Bill. The absence of comment on a particular issue should not be taken as support or otherwise for that amendment.

<sup>1</sup> Explanatory Notes, Health and Other Legislation Amendment Bill 2021 1.

## Introduction

4. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).
5. The Commission has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
6. The Commission also deals with complaints of discrimination, vilification, and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act.

## Mental Health Act 2016

### Unfitness for trial

7. The Commission supports the proposed insertion of new section 117A into the MH Act, which will allow the Court to return the matter back to the criminal process if there is a substantial dispute about a fact material to an opinion stated in an expert's report, provided the person is fit for trial.
8. However, the Commission holds concerns as to the overall framework where a person is found to be unfit for trial, particularly where there is a substantial dispute about whether the person has committed the offence.

### Current framework

9. Under the MH Act, a person charged with a serious criminal offence may be referred to the Mental Health Court if their mental state, due to a mental illness or intellectual disability, is in question. A finding of unfitness for trial may result where:
  - a. there is a substantial dispute about whether the person committed the offence (**reasonable doubt**);<sup>2</sup>
  - b. under amendments proposed by the Bill, there is a substantial dispute about a fact relied on in the expert report (**substantial dispute**),<sup>3</sup> or

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<sup>2</sup> *Mental Health Act 2016* s 117.

<sup>3</sup> Health and Other Legislation Amendment Bill 2021 s 54 (proposed s 117A).

- c. the court finds that the person was not of unsound mind.<sup>4</sup>
10. If a person is found permanently unfit for trial, criminal proceedings are discontinued. The person *may* be placed on a forensic order or treatment support order, if the order is necessary to protect the safety of the community.<sup>5</sup>
  11. If a person is found temporarily unfit for trial, the proceedings are stayed, and the person *must* be placed on a forensic order or treatment support order, unless and until the Mental Health Review Tribunal determines the person is fit for trial or a prescribed period has passed.<sup>6</sup>
  12. As a result, a person for whom there is reasonable doubt about whether they committed the offence may find themselves on a forensic order or treatment support order. If the person is found temporarily unfit for trial, they must be placed on an order, whether or not it is necessary to protect the safety of the community.

### **Limitations to human rights**

13. While the MH Act provides a framework to divert people not criminally responsible for their actions by reason of mental illness or disability away from the criminal justice system, the resulting involuntary orders still significantly limit human rights.
14. For many people, a forensic or treatment support order will require their admission to hospital, and compliance with a graduated plan of leave before being discharged, with conditions, into the community. Involuntary patient admission is a significant limitation on the rights to liberty and security, freedom of movement, and privacy, family, and home. Depending on its implementation, an involuntary order can also affect many other rights, including a person's right to protection of families and children, cultural rights, humane treatment when deprived of liberty, freedom of expression, education, and health services.
15. The making of an involuntary order where a person has been found of unsound mind or unfit for trial may be justified by the legitimate purpose of protecting the safety of the community. However, where there is a dispute about whether the person has in fact committed the offence, that justification is eroded. A person deemed unfit for trial is unable to challenge the evidence and is not offered the opportunity to be found not guilty, unless they become fit for trial. As a result, a person is deprived of

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<sup>4</sup> *Mental Health Act 2016* s 118.

<sup>5</sup> *Mental Health Act 2016* s 131.

<sup>6</sup> *Mental Health Act 2016* s 132.

their right to equal protection before the law, the presumption of innocence, and a right to a fair hearing.<sup>7</sup>

16. Other Australian jurisdictions offer an opportunity to test evidence, notwithstanding a finding of unfitness. In South Australia, a finding of unfitness is preceded or followed by a trial of the objective elements of the offence. If the court is satisfied beyond reasonable doubt that the objective elements of the offence are established, the person is liable to South Australia's equivalent of a forensic order, or else is acquitted.<sup>8</sup> In Victoria, NSW, Tasmania, Northern Territory, and ACT, if an accused is considered unlikely to become fit for trial within a 12-month period, the court proceeds to a 'special hearing'. The special hearing is conducted as similarly as possible to a criminal trial, with the accused considered to have entered a plea of not guilty. The special hearing can return a finding of not guilty, an option not available to a person found unfit for trial in Queensland.<sup>9</sup>
17. A second issue is that where there is a finding of temporary unfitness, an involuntary order must be made, and cannot be revoked. Although it may be argued that involuntary treatment and care is necessary to offer the best opportunity for the person to regain capacity, the situation can continue for up to 3 years,<sup>10</sup> at which point the criminal proceedings will discontinue but the forensic order or treatment support order will remain. A person can therefore potentially be subject to an involuntary order for an extended period of time in circumstances where there is reasonable doubt and/or the order was not necessary to protect the safety of the community. Further, a finding of temporary unfitness must be periodically reviewed by the Tribunal: four times in the first year, and every 6 months thereafter, interfering with rights to privacy and to be tried without unreasonable delay, and potentially causing stress and hardship to the individual.
18. A further consequence of the current regime is that, even though there is a dispute as to whether the person committed the offence, the nature of the offence is still a matter to which the Mental Health Court and the Mental Health Review Tribunal must have regard when making or reviewing an order.<sup>11</sup> The nature of the offence attributed to the involuntary order can

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<sup>7</sup> See United Nations Human Rights Council, *Right to access justice under article 13 of the Convention of the Rights of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/37/25 (27 December 2017) [39].

<sup>8</sup> *Criminal Law Consolidation Act 1935* (SA) ss 269M–269N.

<sup>9</sup> For detailed discussion on each jurisdiction, see Ellen Limerick et al, *Declared unfit to plead: Research report* (TC Beirne School of Law, The University of Queensland, 2018). The report does not take into account changes as a result of the *Mental Health And Cognitive Impairment Forensic Provisions Act 2020* (NSW).

<sup>10</sup> If the offence is one that may attract a life sentence, this can be up to 7 years, although there is nothing to prevent the proceedings from being discontinued earlier: MH Act s 491.

<sup>11</sup> *Mental Health Act 2016* ss 133, 432, 464.

also have an impact on the treating team's treatment and risk assessment of the individual.

19. The Statement of Compatibility notes that 'as a matter of practice and history, matters are referred to the Mental Health Court on the basis that the facts of the offence are undisputed, although the facts remain untested'.<sup>12</sup> Table 1 sets out the number of findings of reasonable doubt/substantial dispute and outcomes from the last three annual reports of the Mental Health Court publicly available. An additional 8 people over the same timeframe were found not of unsound mind but temporarily unfit for trial. While the numbers of people found unfit for trial are small, the Commission still considers this an important human rights issue.

**Table 1: Mental Health Court findings of reasonable doubt/substantial dispute and outcome**<sup>13</sup>

	2016-17	2017-18	2018-19
Fit for trial	38	27	31
Temporary unfit for trial (forensic order)	-	1	1
Permanent unfit for trial (no order)	5	3	3
Permanent unfit for trial (forensic order, forensic order disability, or treatment support order)	6	8	3
<b>Total findings of reasonable doubt/substantial dispute</b>	<b>49</b>	<b>39</b>	<b>38</b>

### Recommendations for change

20. The Commission recommends reconsideration of the current framework so that:
- a. Disputes of fact are resolved in a timely way and allow for the person to be found not guilty, even where a person is unfit for trial. Care would need to be taken to ensure rights to a fair hearing, reasonable accommodation, and access to justice for the accused, for example, as outlined in the *International Principles and Guidelines on Access to Justice for Persons with Disabilities* released by the United Nations in August 2020;
  - b. The length of time a person can be found temporarily unfit for trial strikes the appropriate balance between allowing the person

<sup>12</sup> Statement of Compatibility, Health and Other Legislation Amendment Bill 2021 17.

<sup>13</sup> Queensland Mental Health Court, *Mental Health Court Annual Report 2016–2017* (Report) 6; Queensland Mental Health Court, *Mental Health Court Annual Report 2017–2018* (Report) 7; Queensland Mental Health Court, *Mental Health Court Annual Report 2018–2019* (Report) 7.

sufficient time to receive treatment and support to become fit for trial, and to have criminal charges dealt with without unreasonable delay;

- c. Where a person is unfit for trial, a determination regarding a dispute of facts under s 117 or proposed s 117A of the MH Act is clearly recorded and taken into account when making, reviewing, and implementing involuntary orders.

## Confidentiality of patient information

21. The Bill makes amendments to sections 776, 778, and 779 of the MH Act, which clarify, extend, and tighten confidentiality obligations of relevant persons who acquire personal information in their capacity as a relevant person. Importantly, these obligations do not limit a person's use or disclosure of their own information, and they can still consent to relevant parties using or disclosing their personal information.
22. The remainder of this section relates to confidentiality obligations imposed by sections 790 and 791 of the MH Act, which are not amended by the Bill.
23. Section 790 of the MH Act prohibits the publication of a 'report of a proceeding' of the Mental Health Review Tribunal or Mental Health Court, whether or not it contains personal information, unless leave of the Tribunal or Court has been granted. Leave may only be granted if publication is in the public interest and does not contain identifying information. Section 788 of the MH Act defines 'report, of a proceeding' as 'includes a report of part of the proceeding.'
24. Section 791 prohibits the publication of 'identifying information' of a person who has been a party to a Tribunal or Court proceedings, except with the leave of the Tribunal or Court.
25. The MH Act dictionary in Schedule 3 provides:
 

***publish*** means—

  - (a) publish to the public by way of television, newspaper, radio, the internet or other form of communication; and
  - (b) the public dissemination of information, including, for example, distributing information by leaflets in letterboxes, or announcing information at a meeting.
26. While the definition of 'publish' appears not to apply to information communicated in private, people applying the Act are very cautious when disclosing information. This has made it difficult for the Commission to obtain information to assess whether or not it should intervene in

proceedings under section 51 of the HR Act. For example, the Commission was unable to obtain a copy of the Tribunal's statement of reasons for a decision under appeal until the Commission decided to intervene and became a party to the appeal.<sup>14</sup> Further, sections 790 and 791 may limit what a person can do with their own personal information, including engaging in systemic issues and increasing public awareness.

27. Further, due to section 790 of the MH Act, before a Court or Tribunal will publish its reasons for the decision, it must first be satisfied that it is in the public interest to do so. This is at odds with the right to fair hearing protected by section 31(3) of the HR Act which states 'All judgments or decisions made by a court or tribunal in a proceeding must be publicly available'.
28. The Commission sets out in Table 2 the decreasing number of Mental Health Court judgments publicly available on the Supreme Court Library Queensland website over the past 10 years. As far as can be ascertained, this cannot be attributed to changes in the number of matters dealt with by the Court, which have sat between 252 and 335 matters each reporting year.<sup>15</sup> The 2018-19 Annual Report of the Mental Health Court at page 4 explains 'Ordinarily, decisions are delivered orally at the conclusion of the hearing of a matter. Decisions in matters where an important point of law is raised, or which are factually complex, are reserved, and delivered in writing after the Judge has had time to consider the issues raised.' Nonetheless, the lack of publicly available jurisprudence of the Mental Health Court is of concern given the general principle that the publication of judgments supports the integrity, impartiality, and public confidence in the court's process.<sup>16</sup>

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<sup>14</sup> *Attorney-General for the State of Queensland v GLH* [2021] QMHC 4.

<sup>15</sup> This is based on a review of annual reports of the Mental Health Court from 2011-12 to 2018-19.

<sup>16</sup> *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248; [2010] VSCA 51 [35]; *PQR v Secretary, Department of Justice and Regulation (No 1)* (2017) 53 VR 45; [2017] VSC 513 [38].



**Table 2 – Written judgments of the Mental Health Court by calendar year**

	Judgment publicly available	Not publicly available	Total
2011	32	0	32
2012	31	1	32
2013	21	1	22
2014	12	0	12
2015	15	2	17
2016	10	2	12
2017	9	2	11
2018	12	3	15
2019	3	1	4
2020	1	2	3
2021	2	2	4

29. The Explanatory Notes to section 525 of the *Mental Health Act 2000*, the predecessor to section 790 of the MH Act in almost identical terms, justifies the MH Act's approach to the publication of judgments as follows:

Clause 525 prohibits the publication of any report about a proceeding of the Mental Health Review Tribunal and proceedings before the Mental Health Court on an appeal from a decision of the Mental Health Review Tribunal or the Court's inquiry into the detention of a patient. However, the clause sets out the circumstances in which the Tribunal or Mental Health Court can permit publication. It is recognised that the material being considered is personal in nature; being principally concerned with medical matters. Accordingly, the material should remain confidential unless the Tribunal or Mental Health Court permits publication. Permission to publish may only be granted if the Court or Tribunal is satisfied it is in the public interest and the report will not contain information identifying a person involved in the hearing.

30. While section 790 of the MH Act protects individual privacy, this purpose can still be satisfied by the removal of identifying features as required by section 790(3)(b).
31. It is submitted that sections 790 and 791 of the MH Act, which have been in place since the *Mental Health Act 2000*, still has at its core the 'best interests' of the patient, rather than the more 'rights-based approach' the Bill seeks to achieve.

### Recommendations for change

32. The Commission recommends reconsideration the terms of section 790 and 791 to ensure:

- a. the person to whom the information relates is not limited in using and disclosing their own information.
- b. the person's privacy is sufficiently protected;
- c. clarity regarding the meaning of 'report of a proceeding', and when this information can be shared in private; and
- d. any limitation on the right to have decisions of the Mental Health Court and the Mental Health Review Tribunal publicly available is justified.

## Hospital and Health Boards Act 2011

### The Viewer

33. The Viewer is a read-only, secure information system that displays a consolidated view of a patient's clinical and demographic information collected as a result of their interactions with Queensland Health. This information can include 'radiology and pathology results, emergency department discharge summaries, medications and alerts, outpatient appointments, as well as instructions for a patient's follow up treatment'.<sup>17</sup>
34. Section 161C of the HHB Act, inserted in 2016,<sup>18</sup> allows for 'prescribed health practitioners' to access The Viewer. These practitioners are prescribed by the *Hospital and Health Boards Regulation 2012*, which lists health professionals registered under the Health Practitioner Regulation National Law.<sup>19</sup>
35. The Bill proposes to expand access to The Viewer to 'prescribed health professionals', which would include allied health professionals not registered under the National Law, but 'are regulated in other ways'.<sup>20</sup> This is for the purpose of improving transfer of care from inpatient settings to community care.
36. The Bill itself does not articulate the expanded categories of people with access to The Viewer; this is a matter for regulation. However, the Explanatory Notes state:

It is intended to prescribe audiologists, social workers, dietitians, speech pathologists, exercise physiologists, orthoptists, and orthotists and prosthetists as relevant health professionals.

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<sup>17</sup> Explanatory Notes, Health and Other Legislation Amendment Bill 2021 4.

<sup>18</sup> By the *Health and Other Legislation Amendment Act 2016* s 31.

<sup>19</sup> See *Hospital and Health Boards Regulation 2012* s 34A, sch 2C.

<sup>20</sup> Explanatory Notes, Health and Other Legislation Amendment Bill 2021 4.

The regulation will also list the health professional's qualification requirements.<sup>21</sup>

37. Information on The Viewer can only be accessed if necessary, or incidental, to facilitate the care or treatment of the individual, and is otherwise an offence.<sup>22</sup> This restriction would remain the same for all prescribed health professionals under the Bill.

### Right to privacy and safeguards

38. Section 25 of the HR Act protects a person from arbitrary or unlawful interference with their privacy. The collection, use and disclosure of private information has the potential to limit this right. In particular, the Commission holds concerns regarding access to sensitive medical information without the individual's knowledge, that could contribute to stigma and conscious or unconscious bias in health service delivery.
39. While the purpose of allowing access to The Viewer by health professionals outside of Queensland Health may be a legitimate purpose, it should still be done in the least restrictive way. This means ensuring that there are adequate procedural safeguards against unauthorised access and disclosure. Further, the person to whom the information belongs should be made aware of who else may have access to that information, and as far as possible, be able to control who can access their information.<sup>23</sup> These responsibilities are consistent with the:
- a. National Privacy Principles, which apply to Queensland Health and Hospital and Health Services, as set out in the *Information Privacy Act 2009* (Qld);<sup>24</sup> and
  - b. Australian Privacy Principles, which apply to health service providers, as set out under the *Privacy Act 1988* (Cth).<sup>25</sup>
40. It is important that any additional allied health professionals included in regulations to access to The Viewer are covered by the Australian Privacy Principles. The list of providers set out in the Explanatory Notes appears

<sup>21</sup> Explanatory Notes, Health and Other Legislation Amendment Bill 2021 15.

<sup>22</sup> *Hospital and Health Boards Act 2011* s 161C.

<sup>23</sup> See United Nations Office of the High Commissioner for Human Rights, *CCPR General Comment No 16: Article 17 (Right to Privacy)* 32<sup>nd</sup> sess, Human Rights Committee (8 April 1988) 10 which states '...every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.'

<sup>24</sup> *Information Privacy Act 2009* (Qld) sch 4, see NPP 1, NPP 2 and NPP 4.

<sup>25</sup> *Privacy Act 1988* (Cth) sch 1, see APP 1, APP 3, APP 6 and APP 11.

to meet the broad definition of providers of health services set out in section 6FB of the Commonwealth *Privacy Act 1998*.<sup>26</sup>

41. A person with access to The Viewer should also be a health service within the scope of authority of the Health Ombudsman, who can also receive complaints for breaches of privacy against registered and unregistered health service providers.<sup>27</sup>
42. The Explanatory Note to the 2016 Bill, which introduced external access to The Viewer, envisaged further conditions on accessing The Viewer to be prescribed by regulation. The example given was ‘the health practitioner must not access information for persons to whom the health practitioner has not provided care or treatment and access being subject to a direction by the patient to whom the information relates that no health practitioner can access that information’.<sup>28</sup> No regulations have been made. It might be necessary to consult with appropriate bodies, such as those that deal with health privacy complaints, as to whether or not further conditions are necessary to safeguard patient privacy.
43. Other steps Queensland Health could take, outside of legislative amendment, to ensure the right to privacy are:
  - a. providing policy guidance for prescribed health professionals on privacy obligations in relation to The Viewer, including reference to the Australian Privacy Principles and the Criminal Code;
  - b. providing confidential information access and privacy training and/or resources for prescribed health professionals;
  - c. investigating whether The Viewer has the capability to restrict access to information by certain providers and/or to certain information, at the direction of the patient;<sup>29</sup>
  - d. privacy awareness campaigns for both providers and patients – patients should, as far as possible, be aware of who may have access

<sup>26</sup> See also ‘What is a health service provider?’, *Office of the Australian Information Commissioner* (Web Page) <<https://www.oaic.gov.au/privacy/health-information/what-is-a-health-service-provider>>.

<sup>27</sup> *Health Ombudsman Act 2013* s 7.

<sup>28</sup> Explanatory Notes, Health and Other Legislation Amendment Bill 2016 24.

<sup>29</sup> It appears that patients can limit access to The Viewer to particular professions or entirely: see Public Briefing – State Development and Regional Industries Committee Inquiry into the Health and Other Legislation Amendment Bill 2021, Queensland Parliament, Transcript of Proceedings, 14 December 2021, 9 (James Liddy), <<https://documents.parliament.qld.gov.au/com/SDRIC-F506/HOLAB2021-09E5/Proof%20-%2014%20December%202021.pdf>>.

to their Queensland Health records and their options for restricting access if they wish.<sup>30</sup>

## Conclusion

44. In summary, the Commission recommends:
45. The current framework for people found unfit for trial under the MH Act be reconsidered so that:
  - a. disputes of fact are resolved in a timely way, even where the person is found unfit for trial, and which allow for the person to be found not guilty;
  - b. the length of time a person can be found temporarily unfit for trial strikes the appropriate balance between allowing the person sufficient time to receive treatment and support to become fit for trial, and to have criminal charges dealt with without unreasonable delay;
  - c. where a person is unfit for trial, a determination regarding a dispute of facts under s 117, or proposed s 117A, of the MH Act is clearly recorded and taken into account when making, reviewing, and implementing involuntary orders.
46. Amendment of sections 790 and 791 of the MH Act, which prohibit the publication of certain information relating to matters before the Mental Health Court and the Mental Health Review Tribunal, to ensure:
  - a. the person to whom the information relates is not limited in using and disclosing their own information;
  - b. the person's privacy is sufficiently protected;
  - c. clarity regarding the meaning of 'report of a proceeding', and when this information can be shared in private; and
  - d. any limitation on the right to have decisions of the Mental Health Court and the Mental Health Review Tribunal publicly available is justified.
47. In relation to amendments to the HHB Act that expand the categories of health professionals who have access to The Viewer:

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<sup>30</sup> Some of these options have been adapted from recommendations made by the Crime and Corruption Commission Queensland in their report, *Operation Impala: Report on misuse of confidential information in the Queensland public sector* (February 2020).

- a. ensuring that people with access to The Viewer are subject to appropriate safeguards and oversight, such as the Australian Privacy Principles and the Health Ombudsman;
- b. consulting with appropriate bodies to determine whether further conditions on accessing The Viewer are necessary, either in legislation or by regulation, to protect patient privacy;
- c. while not a matter for legislative amendment, that Queensland Health provide policy guidance, training, and resources for prescribed health professionals with access to The Viewer, and ensure patients, as far as possible, are aware of who may have access to their information in The Viewer and the extent to which they are able to control who can access that information.