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Office of the President

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Committee Secretary
State Development and Regional Industries Committee
Parliament House
George Street
Brisbane QLD 4000

By email: sdric@parliament.qld.gov.au

Dear Committee Secretary

Health and Other Legislation Amendment Bill 2021

Thank you for the opportunity to provide feedback on the Health and Other Legislation Amendment Bill 2021 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

This response has been compiled by the QLS Health & Disability Law Committee and the Human Rights & Public Law Committee, whose members have substantial expertise in this area. Our comments on the Bill are limited to the proposed changes to the *Mental Health Act 2016* (Qld) (**MHA**), and we have not considered other parts of the Bill in the time allowed.

QLS commends Queensland Health and the Government for the manner in which they engaged and consulted with stakeholders in the formation of the Bill. This thoughtful process has led to a workable piece of legislation which, as far as is possible, appears to be free from unintended consequences and addresses the substantive policy intent of the desired reforms.

QLS now sees the following measures relating to the MHA as an addition to this suite of reforms:

- an administrative process for adjournments;
- separate representation right of appeal when acting in a best interests capacity; and,
- recording and transcription of Mental Health Review Tribunal (**Tribunal** or **MHRT**) proceedings.

An administrative process for adjournments

Section 749 of the MHA provides the Tribunal with the power to adjourn a hearing in certain circumstances. For an adjournment to be granted, however, the Tribunal must be constituted and sitting, which requires the person subject to a forensic order or treatment authority to attend the tribunal hearing for the hearing to be adjourned. Our members report that this causes unnecessary stress for their clients, and is a waste of the Tribunal's time and resources where

the Tribunal must meet to consider an adjournment. Accordingly, we recommend that the MHA be amended to allow for an administrative process for adjournments.

Appeal rights

Our members have also raised the issue of appeals to the Mental Health Court. Specifically, if the client lacks capacity to instruct and their lawyer is acting in a best interests capacity, neither the client nor their lawyer has standing to appeal a decision of the MHRT to the Mental Health Court (unless there is a legal guardian who is seeking to appeal, or a litigation guardian is appointed). Under s 539 of the MHA, a person mentioned in schedule 2, column 2 may appeal to the Mental Health Court against a decision of the Tribunal mentioned opposite the person in schedule 2, column 1. Schedule 2 lists the person subject to the order, or an interested person acting on behalf of the person, the Chief Psychiatrist, or the Attorney-General. Legal representatives are not considered interested persons under the MHA (an interested person as per Schedule 3 is a person's nominated person or another individual who has sufficient interest in the person, i.e. legal guardian etc.). While a lawyer can be appointed once an appeal is on foot, the difficulty lies in initiating the appeal. This limits the scope to challenge incorrect decisions where a person does not have the capacity to instruct a lawyer.

A useful comparison can be made with child protection matters. Section 110(3) of the *Child Protection Act 1990* (Qld) (**CPA**) provides that a separate representative must act in the child's best interest regardless of any instructions from the child and, as far as possible, present the child's views and wishes to the court. Section 110(4) provides that the separate representative 'may do anything permitted to be done by a party' and section 110(6) directs that the separate representative's role ends when the application is decided or withdrawn, or if there is an appeal in relation to the application, when the appeal is decided or withdrawn. As such, a separate representative acting in the best interests of the child may initiate an appeal. In comparison, a lawyer acting in best interests capacity for a client who lacks capacity to provide instructions is unable to launch an appeal on the client's behalf. Accordingly, QLS recommends that schedule 2, column 2 of the MHA be amended to include legal practitioners acting in a best interests capacity.

Recording of proceedings

QLS understands from correspondence with the MHRT that its Electronic Audio Recording Project is not able to progress to implementation at this time. QLS considers that electronic recording and availability of transcripts to relevant parties across all Queensland courts and tribunals to be a fundamental element of conducting proceedings, and strongly recommends the introduction of a system of electronically recording hearings of the MHRT.

Requirements for courts and tribunals under the *Recording of Evidence Act 1962* (Qld)

Section 5(1) of the *Recording of Evidence Act 1962* (Qld) (the **Recording of Evidence Act**), sets out that all relevant matter in a legal proceeding is to be recorded. All *'relevant matter'* in a legal proceeding is described in section 5(4) as meaning:

a) evidence given in the legal proceeding; and

b) a ruling, direction, address, summing-up or other matter in a legal proceeding."

Section 5B of the Recording of Evidence Act deals with the obligation of courts and tribunals to make available copies of records and transcriptions of proceedings. Section 5B(1) refers to the obligation to ensure that:

> *"appropriate arrangements are in place to ensure the availability to any person, by purchase or otherwise, of –*
>
> *(a) copies of records under this Act; and*
> *(b) copies of transcriptions of records under this Act."*

QLS understands that, in the absence of electronic recording being available to the MHRT for use in proceedings, Tribunal Members routinely take notes during a hearing and seek to capture as much information as possible. QLS has previously consulted with the MHRT in relation to its Electronic Audio Recording Project and notes the Tribunal's most recent report indicates that while Tribunal Members found the technology easy to use, the requirement to record the audio of the hearing as well as take written notes, was an additional administrative burden on Tribunal Members.[1] Additionally, our members report that Tribunal Members do not have any substantive administrative support and (where hearings are conducted remotely) are responsible for setting up and facilitating audio visual equipment.

QLS considers that relying upon Tribunal Members to both engage in the hearing and simultaneously ensure the handwritten recording of every 'relevant matter', places an onerous and unfair burden on members. The method also leaves the MHRT exposed to claims which call into question the reliability of the record. Implementation of an appropriate model for electronically recording proceedings and providing transcription services will significantly alleviate this burden.

We understand that the MHRT has some concerns that electronically recording proceedings will be problematic, and possibly distressing, for some persons who come before the Tribunal whilst suffering from chronic disorders which may cause or contribute to their discomfort at being recorded. While QLS acknowledges these concerns, similar issues arise in other courts and tribunals, of which all record proceedings to ensure compliance with the requirements of the Recording of Evidence Act. As such, QLS remains of the view that a suitable model of electronic recording is required under the Recording of Evidence Act and should be implemented and routinely relied upon during Tribunal hearings.

Preserving natural justice

The issues of accountability, transparency and the right to due process are inextricably linked. In the absence of a system of electronic recording it is difficult for legal practitioners, patients and the MHRT to ensure that these fundamental elements are upheld during a hearing, and in the continuance of a matter where a person continues to appear before the Tribunal over time. This difficulty is amplified for particularly vulnerable persons who are without legal representation, and who may not be able to effectively recall their previous hearing, including its outcome.

Further, the feedback provided by QLS members has commonly reported that reasons are rarely given, and in the event that they are given, tend to be cursory. The vast number of

[1] Mental Health Review Tribunal, *Electronic Audio Recording of Hearings Trial Report* (November 2020).

persons who appear before the MHRT do so without legal representation, and are likely to be unaware that they are permitted to request that reasons be provided to them.

QLS considers that reasons ought to be provided as a matter of course. It is difficult to comprehend how a person appearing before the Tribunal, their treating team, support person/s or legal representative can fully understand the legal implications of the process which will affect their future treatment and possibly facilitate their release from an order or otherwise, without being provided appropriately detailed reasons. The absence of reasons being provided automatically, coupled with the inability to access a complete and full transcript or electronic recording of a proceeding means that it is virtually impossible to understand what has gone before. From a legal practitioner's perspective, the inability to understand and clarify the history of a client's appearances before the MHRT constitutes a barrier to the assurance of natural justice in the jurisdiction.

In our view, this furthers the critical need for electronic recording. Access to an accurate and complete record, whether that be in the form of the electronic recording or a transcript, will empower the affected person, support persons and/or legal practitioner to better understand the history and current status of a matter. This improved awareness will provide several benefits – allowing a person their full legal rights to better understand their own situation, equipping support and legal representatives to deliver customised and more appropriate advice, and ensuring that MHRT Members are afforded greater insight and context of the matter before them.

A lack of recordings and reasons also results in two other sensitive, but relevant, consequences. Firstly, Tribunal Members' personal notes are unable to capture the "tone" of proceedings (for example, insensitive and at times judgemental). Secondly, without recordings and reasons there is often a need to re-litigate issues that have already been dealt with, because the Tribunal is rarely constituted by the same Members. This leads to patients being mandated to take the same actions repeatedly and can demotivate patients from actively participating in proceedings and working towards positive treatment outcomes.

We also note that the recording of MHRT proceedings occurs in other Australian jurisdictions. For example, s 159(1) of the *Mental Health Act 2007* (NSW) provides that '[p]roceedings before the Tribunal are to be recorded', and s 467 of the *Mental Health Act 2014* (WA) provides that '[t]he registrar must ensure that each hearing is recorded and the recording is kept in a form from which a transcript of the hearing can be prepared if required.'

If you have any queries regarding the contents of this letter, please do not hesitate to contact [redacted].

Yours faithfully

Kara Thomson
President