From: [redacted]
To: State Development and Regional Industries Committee
Subject: Health and Other Legislation Amendment Bill 2021
Date: Monday, 24 January 2022 3:31:06 PM
Attachments: RANZCP QLD Branch Health and Other Legislation Amendment.pdf

Attn: Stephanie Galbraith
Committee Secretary
State Development and Regional Industries Committee

Dear State Development and Regional Industries Committee

In October last year, the Royal Australian and New Zealand College of Psychiatrists Queensland Branch was invited to comment on the consultation on the proposed *Health and Other Legislation Amendment Bill 2021.* At the time, this submission was drafted to the Legislative Policy Unit, Social Policy and Legislation Branch. The RANZCP Queensland Branch provided feedback on the very first draft of the Bill.

We have since thoroughly reviewed the second draft of the Bill, and can see no substantive changes to this second amended draft. As a result, we have ***attached*** for your consideration the same submission from October last year.

- Queensland Branch Committee Chair, Professor Brett Emmerson AM has kindly been invited to attend a public hearing on Thursday, 27 January. I have advised the State Development and Regional Industries Committee that Professor Emmerson is regrettably unavailable, due to a conflicting commitment.
- Professor Emmerson does not wish to make any further public comments on this *Health and Other Legislation Amendment Bill 2021.*

Best regards

Nada Martinovic
Policy and Advocacy Advisor, Queensland Branch Office

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Our Vision: Improve the mental health of communities through high quality psychiatric care, education, leadership and advocacy.

The RANZCP acknowledges the Traditional Owners of the land, and pays respect to Elders past, present and future.

The Royal Australian & New Zealand College of Psychiatrists

Your Health in Mind

Queensland Branch

15 October 2021

Queensland Health
Office of the Director-General and System Strategy Division
Legislative Policy Unit | Social Policy and Legislation Branch

Via email to: legislation@health.qld.gov.au

To Queensland Health

Consultation on the proposed Health and Other Legislation Amendment Bill 2021

Thank you for the opportunity to respond to the proposed *Health and Other Legislation Amendment Bill 2021* **(the Bill)**, and to confidentially review the consultation draft of the Bill and the Consultation Paper.

Thank you also for the extension of time to submit to this review by Friday, 15 October.

Legislative framework

The RANZCP Queensland Branch endorses the Human Rights Act 2019 (Queensland), the Australian Charter of Healthcare Rights and the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, that outline guiding principles for mental health services and service providers, patients, families and carers.

Treating people living with mental illness and/or disability with dignity and respect is integral to the safe and ethical practice of psychiatry, including respecting and supporting individual patient rights to make informed treatment decisions and empowering patients to take an active role in their healthcare journey.

The broad principles of the Mental Health Act 2016 (Queensland)

The RANZCP Queensland Branch broadly supports the objects of the amended Bill, as it relates to the *Mental Health Act 2016 (Queensland)* **(the Act)**. Overall, the changes are positive, with the objective of achieving a greater balance between safeguarding patient rights and autonomy, employing least restrictive practices and the practical utilisation of the Act.

The RANZCP Queensland Branch has a particular interest in the amendments relating to the Act specifically concerning processes around transferring patients, processes for approving electroconvulsive therapy (ECT) and patient confidentiality requirements.

Below is a summary, commenting on some of the most significant amendments to the Act:

Current provisions in the *Mental Health Act 2016*	***Amended* provisions to the *Mental Health Act 2016***	**RANZCP Queensland Branch Position**
Currently, the Mental Health Court must determine the unsoundness of mind or diminished responsibility of a person charged with a serious or indictable offence.	Under the amended Act, the Mental Health Court can instead return the matter to the state criminal courts, if it is satisfied that a fact that was substantially material to the opinion of an expert was so in dispute that it would be unsafe to determine fitness for trial, or make further orders for that person's fitness or care.	Amendment supported.

Electroconvulsive therapy (ECT) is a regulated treatment under the Act. Currently, the Mental Health Review Tribunal must approve its use for minors or adults who are unable to provide informed consent, and must consider the views, wishes and preferences expressed by the person about ECT therapy in their *advance care directive*. Currently, the Act does not require the Mental Health Review Tribunal to consider a person's capacity to provide informed consent to ECT therapy.	The amended Act purports to better safeguard the rights of persons subject to applications for approval to perform ECT treatment. It requires first the Mental Health Review Tribunal to be satisfied that a person lacks capacity to consent to the ECT therapy, to be satisfied that the therapy has clinical merit and is evidence-based, and likewise is effective and appropriate for the person in the circumstances, taking into account their views, wishes and preferences. The amended Act will also ensure that involuntary patients (subject to treatment authorities, forensic orders or treatment support orders) are independently reviewed to determine their capacity to consent to ECT (recognising that capacity to consent may fluctuate), to safeguard the autonomy of persons with capacity to make their own treatment decisions, while at the same time protecting a vulnerable cohort of patients that lack capacity.	Amendment supported – ***refer to submission to read more.*** The RANZCP Queensland Branch supports an objective consideration of the individual circumstances of each person and agrees that ECT therapy under the Act (that has clinical merit and is evidence-based, and likewise is effective and appropriate for the person in the circumstances) must be balanced against respecting the dignity of people with mental illness who lack capacity to consent.
The Mental Health Review Tribunal is currently required to appoint a representative (usually a lawyer) for a person in particular proceedings, although this requirement can be waived by an adult with capacity by submitting a *written waiver.*	The amended Act will enable a person with capacity to *verbally* waive their right to representation (cannot waive right if assessed as lacking capacity) at a Mental Health Review Tribunal hearing, without having to put the waiver in writing, and this is expected to expedite dismissal of representatives at proceedings and avoid delays. Verbal waivers will be captured in records of the proceeding, as per the *Recording and Evidence Act 1962.*	Amendment supported. However, it is not clear whether the Mental Health Review Tribunal assessment of a person's capacity to waive their right will occur in the presence, or absence of the appointed representative. The RANZCP Queensland Branch submits it should occur in their *absence*.
Currently, a person who is absent from an	The amended Act purports to recognise relevant interstate legal documents for	Amendment supported – ***refer***

interstate mental health service can be apprehended with a warrant, but not all corresponding interstate laws require a warrant to authorise apprehension and transport, some require a relevant legal document instead. Currently, health practitioners cannot transport or apprehend absent persons (only police can), and neither can interstate officers.	apprehending and returning an absent person to an interstate mental health service. The amended Act aims to expand the category of authorised persons who can transport or apprehend absent persons. The amended Act aims to recognise the powers and functions of interstate officers to return a person located in Queensland to an interstate mental health service.	***to submission to read more.*** The RANZCP Queensland Branch supports this proposed amendment to the Act and would like to see health practitioners specifically named in the amended Act, as an 'authorised officer'. The RANZCP Queensland Branch believes that it is appropriate for authorised mental health practitioners to transport people subject to the provisions of the Act who assent to the transfer, and who are assessed as low risk. However, when risks are identified associated with transfer and there is ambivalence or refusal from the person, it would be inappropriate for authorised health practitioners to apprehend and transfer such a person without police assistance.
Under the current Act, a victim of an unlawful act, or a close relative of the victim, can apply for an	The amended Act aims to improve support for victims of unlawful acts by reframing the provisions relating to information notices to advise the victim if a forensic or treatment	Amendment supported.

information notice about a patient subject to a forensic order or treatment support order. This requires the Chief Psychiatrist to provide advice about appeal options, even when there is no prospect of a successful appeal. The Act currently allows a government entity to use or disclose personal information to assist in identifying victims and to provide victims with support services. But it does not recognise that the provision of support services may require *ongoing* use or disclosure of personal information to provide ongoing support.	support order is revoked, or the person is transferred interstate (and there is no prospect of a successful appeal). The amended Act will clarify that a government entity may use and disclose personal information for both the initial identification of victims, and also to provide *ongoing* support.	
Currently, an application for transfer of a person subject to a forensic order, or a treatment support order from interstate cannot be made if another state does not have legislation recognised as a corresponding law to facilitate interstate transfers.	The amended Act allows a person to apply for approval of a transfer, even if there are not applicable interstate transfer requirements in place, although applications to the Mental Health Review Tribunal for transfer will still require a written statement from the relevant person and will need to be assessed against considerations of the appropriateness of treatment and care available at the transfer location, safety arrangements in place to facilitate the interstate transfer and the person's views, wishes and preferences.	Amendment supported – ***refer to submission to read more.***
As noted above, currently persons subject to a forensic order, or a treatment support order from interstate can apply to the Mental Health Review Tribunal for transfer, but there are no equivalent provisions to approve an international transfer (noting such transfers are exceptionally rare).	The amended Act will empower the Mental Health Review Tribunal with the ability to approve the international transfer of people subject to forensic orders (mental health), forensic orders (disability) or treatment support orders, subject to a statement from the Chief Psychiatrist or Director of Forensic Disability and taking into consideration factors like the appropriateness of treatment and care available in the destination country, safety arrangements in place to facilitate the international transfer and the person's views, wishes and preferences. Queensland orders will not be time-limited and will continue while the criteria for the order are satisfied.	Amendment supported – ***refer to submission to read more.***
There are currently inconsistencies between the Act and the *Hospital and Health Boards Act*	The amended Act purports to create an offence for relevant persons (including health practitioners) to inappropriately access, use or disclose confidential information, and to	Amendment supported – ***refer to submission to read more.***

2011 (Queensland) around patient confidentiality provisions, concerning personal information provided to examining practitioners.	extend the duty of confidentiality to experts engaged to provide reports to the Mental Health Court, or the Mental Health Review Tribunal.	The RANZCP Queensland Branch endorses the proposal to create an offence for all persons captured by sections 778 and 779 of the amended Act to inappropriately access, use or disclose confidential information and the penalty of 100 penalty units.
Other minor and operational amendments.	The amended Act purports to make other minor amendments to improve the operation of the current Act.	Amendments supported.

Strengthen processes around transferring patients

The RANZCP Queensland Branch broadly supports the objective of the amended Act, to ensure that the provisions about apprehension and transfer of patients are safe and align with least restrictive practices.

Apprehension and transfer of persons by health practitioners

Currently, health practitioners cannot transport or apprehend absent persons (this privilege is reserved only for police officers), and neither can interstate officers.

The amended Act aims to expand the category of authorised persons who can transport or apprehend absent persons. The RANZCP Queensland Branch supports this proposed amendment to the Act and would like to see health practitioners specifically named in the amended Act, as an 'authorised officer'.

The RANZCP Queensland Branch has some concerns however around the expectation that authorised practitioners both 'apprehend' and 'transport' absent persons. Any person needing to be apprehended and/or who does not assent to the transfer is unlikely to be an appropriate person to transport by a health practitioner (in the absence of police support).

The RANZCP Queensland Branch believes that it is appropriate for authorised mental health practitioners to transport people subject to the provisions of the Act who assent to the transfer, and who are assessed as low risk. However, when risks are identified associated with transfer and there is ambivalence or refusal from the person, it would be inappropriate for authorised health practitioners to apprehend and transfer such a person without police assistance. It does not appear to be the intention of the proposed amendment to have clinicians inappropriately undertaking high-risk transfers. However, the change creates a grey area that will impose a burden on Queensland Health and give rise to potential conflicts with the Queensland Police Service.

This proposed legislative amendment is also likely to introduce some practice issues worth considering. The RANZCP Queensland Branch expects that the Queensland Police Service will very likely regularly push back on requests to assist with transfers. This imposes a considerable time burden on clinicians to coordinate transfers, and often escalation within Queensland Health may be required.

Overall however, the RANZCP Queensland Branch supports the proposed amendment as it reflects a step towards less restrictive treatment. Police based transport can be stigmatising and distressing for consumers, and when this mode of transport can be avoided, it should be.

Treatment of highly complex patients with high-risk within general adult mental health wards

Queensland's mental health services are tasked with managing increasing caseloads and highly complex patients with high-risk. The RANZCP Queensland Branch believes that general adult mental health wards are not a clinically appropriate treatment setting for complex patients, such as extremely violent patients, and those with a combination of mental and substance use disorders and high-acuity patients transferred from custody.

Some Fellows of the RANZCP Queensland Branch have reported that the pressure to treat and be accountable for complex, high-risk individuals, within general mental health services has an impact on staff safety and morale, recruitment and reputation. Furthermore, the therapeutic atmosphere of a ward is impacted when high-risk, complex patients share wards with the general public.

The RANZCP Queensland Branch advocates that some high-risk patients presenting in mental health crisis, including those in transition from places of custody, would benefit from specialist treatment in a purpose-built facility. To be eligible for this specialist treatment, patients would be assessed as beyond the capacity of general adult authorised mental health services, who are not classified as being at the offending level for the High Security Inpatient Service, and who are not suitable for rehabilitation in a Secure Mental Health Rehabilitation Unit.

The RANZCP Queensland Branch recommends that such patients should be transported to an appropriate secure environment for the purposes of assessment and acute risk management. The aim of legislating for such a provision is to ensure that assessment of patients is to be carried out by suitably qualified health practitioners and in an appropriately designed environment.

Intellectual and developmental disability (IDD) services

In addition, there is a particular lack of services in Queensland for people with intellectual and developmental disability (IDD), who exhibit challenging behaviours. When challenging behaviours result in involvement with the criminal justice system, the Queensland forensic disability service relies upon placing these people in mental health inpatient units due to a lack of alternative placement options. Many people with complex IDD or on forensic orders (disability) require care from specialist IDD trained staff and stable, long-term supported living arrangements which inpatient units are not designed for.

The RANZCP Queensland Branch recommends the development of a new state-wide specialist inpatient and integrated community service to support and treat people with IDD, and also people on forensic orders (disability). We envisage that the service would be government operated and staffed by a multidisciplinary team of trained specialist medical (including specialist psychiatrists), nursing, allied health and disability support staff, and operate in parallel yet separate to mental health services. Inpatient units would provide intensive support to those with complex IDD who require hospitalisation, and integrated community teams would

provide both direct care and support, plus consultation–liaison services for the non-government sector.

The RANZCP Queensland Branch:

- **would like to see health practitioners specifically named in the amended Act, as an 'authorised officer'**
- **believes that it is appropriate for authorised mental health practitioners to transport people subject to the provisions of the Act who assent to the transfer, and who are assessed as low risk**
- **believes, when risks are identified associated with transfer and there is ambivalence or refusal from the person, it would be inappropriate for authorised health practitioners to apprehend and transfer such a person without police assistance**
- **recommends that the Queensland Government legislate that highly complex patients with high-risk presenting in mental health crisis, including those in transition from places of custody, should be transported to an appropriate secure environment for the purposes of assessment and acute risk management**
- **recommends that the Queensland Government develop and operate a state-wide specialist inpatient and integrated community service to support and treat people with intellectual and developmental disability (IDD) and people on forensic orders (disability)**
- **recommends that the Queensland Government improve access for people with IDD to quality mainstream health care services and improve integration and collaboration between health and disability services.**

Least restrictive practices

The current Act (ss5, 242-253, 268-270) regulates physical and mechanical restraint in different ways. Physical restraint may be authorised if it is the only practicable way to prevent harm (to the patient and others), serious damage to property or the patient absconding, or to provide treatment and care.

The length of time restraint that can be applied currently varies across Australian and New Zealand Mental Health Acts. Psychiatrist members of the RANZCP have reported instances of brisk application of mechanical restraint in public health settings, with a tendency for health staff to bypass other viable management strategies and/or utilise de-escalation techniques.

The RANZCP has released the updated (August 2021) Position Statement 61 on minimising the use of seclusion and restraint in people with mental illness.

Seclusion and restraint are generally used in the hope of preventing injury and reducing agitation, but studies have reported substantial deleterious physical, and more often psychological effects on both patients and staff.

It is acknowledged that there are situations where it is appropriate to use restraint and/or seclusion but only as a safety measure of last resort where all other interventions have been tried or considered and excluded.

Under these circumstances, seclusion and restraint should be used within approved protocols by properly trained professional staff in an appropriate environment for safe management of

the patient. Seclusion and restraint are not a substitute for inadequate resources (such as lack of trained nursing staff) and should never be used as a method of punishment.

The RANZCP Queensland Branch acknowledges that there are situations where it is appropriate to use restraint and/or seclusion, but advocates to the Queensland Government that such practices should only be used as a safety measure of last resort where all other interventions have been tried or considered and excluded.

The goal of limiting restraint and/or seclusion should be supported by increased resourcing of existing services and investment in new service capacity to better meet the needs of highly complex patients, and with high risk.

Strengthen processes for approving electroconvulsive therapy (ECT)

The RANZCP Queensland Branch recognises that ECT is considered a regulated treatment for the purposes of the current Act (ss234–6, 507–9).

The RANZCP Queensland Branch advocates that valid consent is essential for patients considering ECT and should be sought in line with principle 5 of the RANZCP Code of Ethics (on page 12):[1] *"Psychiatrists shall seek valid consent from their patients before undertaking any procedure, treatment, or provision of a report for legal or other purposes."*

The RANZCP Queensland Branch considers that valid consent broadly includes providing an adequate explanation to the patient of the procedure. This explanation should include discussion and disclosure of possible risks or discomforts, alternative treatments, any financial interests involving the practitioners and the facility, as well as the person's right to obtain legal/medical advice, withdraw consent at any time, and have any questions answered.

Currently, the Act does not require the Mental Health Review Tribunal to assess a person's capacity to provide informed consent to ECT therapy.

The amended Act purports to better safeguard the rights of persons subject to applications for approval to perform ECT treatment. The amended Act will now require the Mental Health Review Tribunal to be satisfied that a person lacks capacity to consent to the ECT therapy. Likewise, the amended Act will ensure that involuntary patients (subject to treatment authorities, forensic orders or treatment support orders) are independently reviewed by the Mental Health Review Tribunal to determine their capacity to consent to ECT.

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[1] Principle 5: Psychiatrists shall seek valid consent from their patients before undertaking any procedure, treatment or provision of a report for legal or other purposes.
5.1 In seeking consent, psychiatrists shall inform and ensure that the patient understands the purpose, nature, benefits, side-effects, risks and costs of a proposed procedure or treatment. They shall also inform the patient of reasonable alternatives. They should also ensure that the patient understands the implications of not having the proposed procedure or treatment.
5.2 In seeking consent, psychiatrists shall communicate with patients using vocabulary that enables the patient to comprehend the relevant information.
5.3 Psychiatrists shall ensure that the patient consents freely.
5.4 When psychiatrists need to assess a patient's capacity to provide consent, they should be aware that certain decisions require a higher level of capacity and that capacity may fluctuate.
5.5 Psychiatrists shall provide the patient with new information, if it becomes available, that might influence the patient's original consent.
5.6 Psychiatrists shall support the decision-making of a patient with impaired capacity so that, where poss ble, a decision can be validly made.
5.7 Psychiatrists shall seek consent from an appropriate substitute decision-maker when valid consent cannot be given by the patient. This should respect the rights, will and preferences of the patient, and take into account any advance health directive.

The RANZCP Queensland Branch recognises that the intention behind this provision is encouraging, in the sense that it aims to safeguard the autonomy of persons with capacity to make their own treatment decisions, while at the same time protecting a vulnerable cohort of patients that lack the capacity to consent.

However, the RANZCP Queensland Branch has some reasonable concerns with this new proposal. One such concern is that the proposal seeks to call into question the clinical judgement and capacity of authorised health practitioners, including psychiatrists, to obtain informed consent from patients. This is despite health practitioners like psychiatrists having a thorough understanding of the patient's clinical background and a strong existing therapeutic relationship with the patient.

The RANZCP Queensland Branch supports that a second psychiatric opinion of capacity to consent to ECT should always be sought for persons subject to applications for approval to perform ECT treatment under the Act and involuntary patients, but that the authorised psychiatrist second opinion is entirely sufficient, without requiring further referral to the Mental Health Review Tribunal.

The RANZCP Queensland Branch appreciates that this recommendation intends to safeguard the rights of vulnerable people, but this three-tier approach of assessments and cross assessments threatens undue delay for evidence-based ECT treatment under the Act, which may be contrary to the person's best interests.

There is also some minor concern around patients that are unable to provide consent due to conditions like catatonia, though noting such concerns are addressed by the emergency ECT provisions of the Act.

The RANZCP Queensland Branch acknowledges that requests for voluntary ECT under the Act are rare. On occasion however, such requests are referred for a hearing, and in some cases the voluntary nature of the consent is brought into question. If a *voluntary* ECT application is declined at a hearing of the Mental Health Review Tribunal, it is not clear whether for example a second and separate hearing is then required in that instance to assess an application to *involuntarily* approve ECT treatment, where this is clinically appropriate. While the RANZCP Queensland Branch supports reasonable checks and balances, it cautions that an arduous process of approvals for ECT treatment threatens to unnecessarily delay access to ECT therapy that has clinical merit and is evidence-based, and likewise is effective and appropriate for the person in the circumstances.

Another issue for the RANZCP Queensland Branch is the requirement for the Mental Health Review Tribunal to take into consideration the 'views, wishes and preferences of the person', prior to approving ECT. Some people, for whom an application for ECT approval is referred to the Mental Health Review Tribunal, may be deprived of the capacity to express their views, wishes and preferences, for example in cases of severe catatonia and profound thought disorder in psychosis. While the Mental Health Review Tribunal may be able to consider their historically expressed preferences, for many patients this option would be unavailable. It would be problematic if rigid interpretation of the expectation by the Mental Health Review Tribunal delayed commencement of appropriate treatment.

Another minor comment, while it is not a proposed change per se, the Consultation Paper does make reference to the ongoing expectation that the Mental Health Review Tribunal consider 'if the therapy has been previously performed on the person' and 'if the therapy has been effective for the person'.

While history of past response or non-response to ECT is an important consideration in the appropriateness of future treatment, past non-responsiveness does not necessarily infer that a future course of ECT therapy will likewise be ineffective. There are several reasons for this, for one the symptom profile may change within an established diagnosis, for example the emergence of catatonic features in someone diagnosed with schizophrenia. Several other treatment factors may impact the likelihood of a response to ECT, including whether the person received an adequate course of treatment, taking into consideration the number of ECT sessions, dosing and seizure induction, as well as consideration of factors that may have potentially undermined treatment effect such as anaesthetic or psychotropic medications altering the seizure threshold. Rigid interpretation of this expectation, as drafted in the Consultation Paper, may result in an appropriate and potentially life-saving treatment being denied or delayed.

To better safeguard the rights of persons subject to applications for approval to perform ECT treatment, the amended Act proposes to require approval by the Mental Health Review Tribunal before ECT can be performed on a person subject to a treatment authority, forensic order or treatment support order.

The RANZCP Queensland Branch cautions that forensic patients and patients on treatment support orders may be more susceptible to consenting to ECT under the mistaken belief that they are required to undergo the treatment as a condition of their order. The RANZCP Queensland Branch supports that the test for capacity in such cases should be the same as for adults who do not have capacity to provide informed consent, as is proposed by the amended Act.

The RANZCP Queensland Branch supports an objective consideration of the individual circumstances of each person and agrees that ECT therapy under the Act (that has clinical merit and is evidence-based, and likewise is effective and appropriate for the person in the circumstances) must be balanced against respecting the dignity of people with mental illness who lack capacity to consent.

Strengthen confidentiality requirements

The amended Act proposes to strengthen the confidentiality provisions of the current Act to ensure the obligations for all people performing functions under the amended Act are clear and consistent.

It also proposes to extend the duty of confidentiality to experts engaged to provide reports to the Mental Health Court, or the Mental Health Review Tribunal.

Respecting patient confidentiality is consistent with principle 4 of the RANZCP Code of Ethics (on page 11): *"Psychiatrists shall maintain the privacy and confidentiality of patients and their families."*

The RANZCP Queensland Branch endorses the proposal to create an offence for all persons captured by sections 778 and 779 of the amended Act to inappropriately access, use or disclose confidential information and the penalty of 100 penalty units.

[redacted]

Yours sincerely

Professor Brett Emmerson AM
Chair, RANZCP Queensland Branch Committee