Parliamentary Committees

Mental Health Amendment Bill 2016

Report No. 34, 55th Parliament
Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
February 2017

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Abbreviations and glossary

the Act	*Mental Health Act 2016*
AMAQ	Australian Medical Association Queensland
AMHS	Authorised Mental Health Service
the Bill	Mental Health Amendment Bill 2016
CLS	Court Liaison Service
the committee	Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
Coroners Act	*Coroners Act 2003*
the department	Queensland Health
EEO	Emergency examination order
FLPs	Fundamental legislative principles
LAQ	Legal Aid Queensland
mental health assessment	An assessment conducted for the purposes of assisting a Magistrates Court to decide whether a person was of unsound mind at the time of an offence or is unfit for trial
mental health examination	A mental health examination conducted according to a Magistrates Court-issued examination order, to inform clinical decision-making about a person's mental health care and treatment
MHC	Mental Health Court
MHRT	Mental Health Review Tribunal
the Minister	Minister for Health and Minister for Ambulance Services
OPA	Office of the Public Advocate
POQA	*Parliament of Queensland Act 2001*
PSHSF	Public Sector Health Service Facility
Public Health Act	*Public Health Act 2005*
RANZCP	Royal Australian and New Zealand College of Psychiatrists
Standing Orders	Standing Rules and Orders of the Legislative Assembly

Note: All Acts are Queensland Acts, unless specified.

Chair's foreword

On behalf of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee of the 55th Parliament, I present this report on the committee's examination of the Mental Health Amendment Bill 2016.

The purpose of the Bill is to:

- provide a framework for people undergoing mental health assessments and examinations to do so without risk of self-incrimination, and
- make other amendments to improve the intended operation of the *Mental Health Act 2016* as identified as part of Queensland Health's work to implement the Act.

The committee's task was to consider the policy to be given effect by the Bill, and whether the Bill has sufficient regard to the fundamental legislative principles in the *Legislative Standards Act 1992*. The fundamental legislative principles include whether legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

This report summarises the committee's examination of the Bill, including the views expressed in submissions and by witnesses at the committee's public hearing.

After considering the submitted evidence, Government members of the committee supported the passage of the Bill. However, the committee was unable to reach a majority decision on whether the Bill should be passed.

On behalf of the committee, I would like to thank those individuals and organisations who lodged written submissions and appeared at the committee's public hearing.

Finally, I would like to thank my fellow committee members for their contributions, and the committee secretariat for their support during the examination of the Bill.

I commend the report to the House.

Leanne Linard

Leanne Linard MP
Chair

1 Introduction

1.1 Role of committee

The Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (the committee) is a portfolio committee of the Legislative Assembly.[1] The committee's areas of portfolio responsibility are:

- health and ambulance services
- communities, women, youth and child safety
- domestic and family violence prevention, and
- disability services and seniors.[2]

The committee is responsible for examining each Bill in its portfolio areas to consider:

- the policy to be given effect by the legislation, and
- the application of fundamental legislative principles (FLPs).[3]

Further information about the committee's work can be found here.

1.2 Referral and committee's process

On 30 November 2016, the Minister for Health and Minister for Ambulance Services, Hon Cameron Dick MP (the Minister), introduced the Mental Health Amendment Bill 2016 (the Bill) into the Legislative Assembly.

The Bill was referred to the committee on 30 November 2016, and the committee was required to report to the Legislative Assembly by 21 February 2017.

During its examination of the Bill, the committee:

- invited submissions from stakeholders and the public; a list of the six submissions received and accepted by the committee is at **Appendix A**
- received written advice from Queensland Health (the department), and
- held a public hearing on 24 January 2017. A list of the witnesses who appeared at the hearing is at **Appendix B**.

The material published relating to this inquiry is available on the committee's webpage.

1.3 Outcome of committee considerations

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed.

After its examination of the Bill and consideration of the information provided by the department, submitters and witnesses at the public hearing, the committee was unable to reach a majority decision as to whether the Bill should be passed.

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1 The committee was formerly the Health and Ambulance Services Committee, which was established on 27 March 2015 under the *Parliament of Queensland Act 2001* (the POQA) and the Standing Rules and Orders of the Legislative Assembly (Standing Orders). On 16 February 2016, the Parliament amended the Standing Orders, renaming the committee and expanding its areas of responsibility.

2 POQA, s 88 and Standing Orders, Standing Order 194 and schedule 6.

3 POQA, s 93(1).

2 Background to the Bill

2.1 *Mental Health Act 2016*

On 4 March 2016, the *Mental Health Act 2016* (the Act) received Royal Assent. The Act is scheduled to commence on 5 March 2017, when it will replace the *Mental Health Act 2000*. The Act provides a regulatory framework for managing the health and wellbeing of people with a mental illness[4] - providing for the respectful treatment of people who do not have the capacity to make decisions about their own care and treatment, and balancing treatment needs with the needs of the community.[5]

The main objectives of the Act are to:

- improve and maintain the health and wellbeing of people who have a mental illness and who do not have the capacity to consent to treatment
- enable persons to be diverted from the criminal justice system if found to have been of unsound mind at the time of committing an unlawful act or to be unfit for trial, and
- protect the community if persons diverted from the criminal justice system may be at risk of harming others.[6]

2.1.1 Mental health assessments and examinations

The Act rectified a perceived deficiency in the previous mental health legal framework in Queensland by expressly enabling Magistrates to discharge persons who appear to have been of unsound mind at the time of an alleged offence or are unfit for trial.[7]

Under the Act, if a person is charged with a simple offence[8] (eg traffic offences, disorderly behaviour and minor criminal offences) and a Magistrates Court is satisfied they were of unsound mind at the time of the offence or are unfit to stand trial, the court may dismiss the charge or, if the person is temporarily unfit, adjourn the hearing. To assist the court in determining the person's soundness of mind or fitness to stand trial, a mental health assessment may be conducted by the Court Liaison Service (CLS).[9]

If the court dismisses the charge or adjourns the hearing, or otherwise believes it would benefit the person, the court may make an examination order. To make an examination order, the court must be satisfied the person has a mental illness, or is unable to decide whether the person has a mental illness or another mental condition.[10]

An examination order allows the person to be temporarily detained for examination in a public sector health service facility (PSHSF), or an authorised mental health service (AMHS). A mental health examination is used to decide whether to:

- make a treatment authority for the person – providing lawful authority to treat them if they lack the capacity to consent to treatment
- make a recommendation for the person's treatment and care, or
- change the nature and extent of treatment and care provided to the person under an existing authority or order.[11]

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4 *Mental Health Act 2016*, s 10, defines *mental illness* as a condition characterised by a clinically significant disturbance of thought, mood, perception or memory.

5 Explanatory notes, p 2.

6 *Mental Health Act 2016*, s 3(1).

7 Mental Health Bill 2015, explanatory notes, p 5.

8 *Justices Act 1886*, s 4, defines a *simple offence* as any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise.

9 Explanatory notes, p 2, Queensland Health (the department), *Correspondence*, 15 December 2016, p 1.

10 *Mental Health Act 2016,* s 177.

11 *Mental Health Act 2016*, ss 177-178; Explanatory notes, p 3.

A mental health examination is intended to inform clinical decision-making about the person's mental health care and treatment, not to inform the court about criminal responsibility or fitness to stand trial.[12]

However, under section 180 of the Act, the examination report, including details of the examination,[13] would be admissible against the person in the criminal or civil proceeding for which the examination order was made and any future proceeding to which it is relevant.[14]

2.2 Issues identified during implementation planning for the Act

Following the Act receiving assent, the department has undertaken implementation work in a range of forums, including the CLS steering committee.[15]

The department advised that the CLS steering committee raised concerns about the current admissibility in evidence of statements made by a person during a mental health examination in criminal or civil proceedings against a person's interests. Similar concerns were raised regarding the admissibility of statements made during mental health assessments.

The CLS steering committee considered that allowing statements to be admitted in evidence may deter individuals from being open and honest about the circumstances of the alleged offence, compromising the mental health assessment or mental health examination process, to the person's detriment. The CLS steering committee consequently recommended amendments to the Act, supported by the Chief Magistrate, which are incorporated in the Bill.[16]

The implementation planning process also identified other areas under the Act where clarifying and technical amendments, such as clarifying the start or duration of certain statutory periods, removing redundant references, and providing for the delegation of certain powers, would improve the intended operation of the Act.[17]

[12] Explanatory notes, p 3.

[13] *Mental Health Act 2016*, s 179.

[14] *Mental Health Act 2016*, s 180.

[15] The Court Liaison Service Steering Committee comprises representatives from Queensland Health, Queensland Magistrates Court, Queensland Mental Health Commission, Office of the Director of Public Prosecutions, Legal Aid Queensland, Aboriginal and Torres Strait Islander Legal Service, Department of Communities, Child Safety and Disability Services, Queensland Law Society, Queensland Bar Association, Police Prosecutions and the Public Guardian, explanatory notes, pp 5 – 6.

[16] Explanatory notes, pp 1 – 6.

[17] Explanatory notes, pp 4 – 5.

3 Examination of the Bill

3.1 Overview

3.1.1 Objectives of the Bill

The Bill's objectives are to:

- provide a framework for people undergoing mental health assessments and mental health examinations to do so without the risk of self-incrimination, and
- make clarifying and technical amendments to improve the intended operation of the Act upon its commencement on 5 March 2017.[18]

The Bill also makes clarifying amendments to the *Public Health Act 2005* (Public Health Act) to ensure the provisions of that Act operate as intended, and makes consequential amendments to the *Coroners Act 2003* (Coroners Act). In his introductory speech, the Minister stated:

> *… the amendments proposed in this bill will strengthen protections for people living with a mental illness who find themselves caught up in the legal system.*[19]

3.1.2 Consultation on the Bill

The explanatory notes state that consultation on the Bill was undertaken through the CLS steering committee. The explanatory notes also state that the Chief Magistrate supports the proposed amendments regarding the admissibility of statements made during assessment by the CLS steering committee or examination by an authorised doctor, and that the legal members of the steering committee also support the amendments in the Bill.[20]

3.2 Admissibility of statements and examination reports

The Bill aims to provide an environment for people to undergo mental health assessments and mental health examinations without risk of self-incrimination. To achieve this, clause 15 inserts new sections into the Act preventing statements made during a mental health assessment or examination and an examination report from being admitted as evidence against the person in a criminal or civil proceeding.[21]

The department advised that information is collected during a mental health assessment or examination to assess a person's soundness of mind at the time of an offence or fitness to stand trial, and to inform clinical decision-making about health care and treatment. The department stated that if this information is admissible as evidence, individuals may be reluctant to disclose the circumstances surrounding an alleged offence, potentially compromising the assessment process or impeding effective clinical examination and treatment.[22]

The department stated that excluding oral and written statements from being admitted as evidence may promote frank discussions with the health professional and supports the purpose of the mental health assessments and examinations.[23]

Under the Bill, examination reports would be admissible at a trial only to allow a court to decide whether to make another examination order or whether to refer the person to the Mental Health Court (MHC).[24] Examination reports and statements made during mental health assessments may also be provided, with

[18] Explanatory notes, p 1.
[19] Queensland Parliament, Record of Proceedings, 30 November 2016, p 4702.
[20] Explanatory notes, pp 5 – 6.
[21] Mental Health Amendment Bill 2016, cl 15; Explanatory notes, pp 2 – 3.
[22] Explanatory notes, pp 2 – 4.
[23] Explanatory notes, pp 2 – 4.
[24] Mental Health Amendment Bill 2016, cl 15; Department, *Correspondence*, 15 December 2016, p 2.

the court's leave and on the conditions the court considers appropriate, to an AMHS or forensic disability service so that appropriate treatment and care can be given to a person.[25]

The proposed amendment does not preclude statements made during a mental health assessment or examination from being used in relation to a charge of contempt of court or a charge under chapter 16 of the *Criminal Code Act 1899* for an offence relating to the administration of justice.[26]

A table outlining the approaches taken to the admissibility of examination reports and assessment statements in other jurisdictions is at **Appendix C**.

Submitters' views and department's response

Submitters were broadly supportive of the proposed changes at clause 15. The Royal Australian and New Zealand College of Psychiatrists (RANZCP) stated that they, '…respect[s] patient confidentiality and encourage[s] engagement with mental health professionals, allowing for best practice psychiatric diagnosis…'[27] Legal Aid Queensland (LAQ) stated that the provision is designed to incentivise defendants to undergo a mental health assessment without the concern that potentially incriminating information may be used against them.[28] LAQ considered that this will lead to a better outcome for those who undergo a mental health assessment, as well as the community generally.[29]

LAQ submitted that an accused person should be able to consent to an examination report, a statement made by them in an examination, or a statement made by them to a health practitioner, being admissible in proceedings.[30] LAQ suggested that this approach would make the process of obtaining information on a defendant's mental health quicker and cheaper because:

> *… allowing a defendant to use information obtained through an examination report has the potential to save cost because, rather than going away and obtaining independent evidence that there is someone who suffers from a mental health condition and it is relevant to either their trial or their sentence, the defendant can just use the information that the state has already paid for by way of an examination report or feedback to the magistrate from a mental health nurse…*[31]

The department advised that the reports provided by the CLS to the Magistrates Court will be brief in nature and deal solely with helping the Magistrate determine if at the time of the alleged offence the defendant was, or appears to have been, of unsound mind or is unfit for trial. Use of the reports other than for this purpose would be outside the scope of the report. The department also advised:

> *To ensure accurate clinical assessment of those who are referred to the Court Liaison Service, a full and frank discussion about the matter with a senior mental health professional or psychiatrist is required. Open disclosure may be limited in the clinical examination if the defendant is aware, or advised by legal representatives, that the reports may be used in proceedings other than for the purpose of assisting the Magistrates in determining criminal responsibility or unfitness for trial.*
>
> *The limitations proposed in the Bill protect the rights of the defendant, aims to ensure accurate clinical assessment and secures the integrity of the Court Liaison Service as designed to prepare reports solely for the purpose assisting the Magistrate in their function under sections 172 and 173 of the Act [dismiss a complaint or adjourn hearing due to unsound mind or unfitness to stand trial]. The service is not designed to prepare reports to be used in other parts of the proceedings, including sentencing.*

25 Mental Health Amendment Bill 2016, cl 15; Explanatory notes, p 4.
26 Mental Health Amendment Bill 2016, cl 15; Department, *Correspondence*, 15 December 2016, p 2.
27 Royal Australian and New Zealand College of Psychiatrists, submission 1, p 1.
28 Mr Mark Schofield, Legal Aid Queensland, Assistant Director, *Public Hearing Transcript*, 24 January 2017, p 2.
29 Mr Mark Schofield, Legal Aid Queensland, Assistant Director, *Public Hearing Transcript*, 24 January 2017, p 2.
30 Mr Mark Schofield, Legal Aid Queensland, Assistant Director, *Public Hearing Transcript*, 24 January 2017, p 3.
31 Mr Mark Schofield, Legal Aid Queensland, Assistant Director, *Public Hearing Transcript*, 24 January 2017, p 3.

> *Given the specific and limited purpose of these reports, and the fact that the statutory protection applies where the statement may be used against the person in proceedings, it is not envisaged that there would be circumstances where a person may wish to consent to it being admitted in court.*[32]

In addition, LAQ submitted that the proposed inadmissibility of statements or examination reports should apply to many of the offences in chapter 16 of the Criminal Code. LAQ stated that certain offences in chapter 16 (eg an offence of retaliation against a witness), are offences that could well be committed by persons who would be the subject of an application under section 172 of the Act to dismiss a complaint or adjourn a hearing on the grounds of unsound mind or unfitness for trial.[33]

In response, the department stated:

> *New section 180A(3) provides that the protections against admissibility of statements do not apply for proceedings for contempt of court or an offence against the Criminal Code, chapter 16. This provision mirrors section 158 of the Act in relation to the Mental Health Court. Legal stakeholders on the Court Liaison Service Steering Committee, other than Legal Aid Queensland, did not express any concern with this approach when consulted on the draft Bill.*[34]

3.3 Clarifying and technical amendments

The Bill makes clarifying and technical amendments to the Act and the Public Health Act to address issues identified during preparation for the implementation of the Act. The Bill also makes consequential amendments to the Coroners Act.

3.3.1 Time limits on detention for examination, assessment or review

The Bill proposes a range of amendments regarding the time a person may be detained for examination, assessment or review. These amendments are aimed at providing clarity, strengthening individual rights, and better reflecting current processes. The proposed amendments include:

- imposing specified limits on the period of time a person may be detained for an examination, rather than relying on the current reference in the Act to a 'period reasonably necessary'. The proposed detention periods are up to six hours (with an extension of an additional six hours, if required) in a AMHS or PSHSF or up to one hour in any other place[35], and
- specifying that the maximum time a person may be detained for examination, assessment or review begins when a person attends or arrives at the AMHS or PSHSF, instead of when they are admitted as a patient, as currently provided for in the Act.[36] The department advised that not all persons are admitted as patients.[37]

Submitters' views and department's response

The Australian Medical Association Queensland (AMAQ) and RANZCP questioned whether compliance with timeframes in the Bill would be feasible in rural and remote areas. RANZCP stated that the proposed timeframes should be removed from the Bill, or should only apply in locations where access to services and practitioners allows for compliance.

The department considered that the timeframes proposed in the Bill were achievable, even in rural and remote areas. The department stated that the time periods in the Bill were included because, 'people

[32] Department, *Correspondence – Response to issues in submissions,* 30 January 2017, p 3.
[33] Mr Mark Schofield, Legal Aid Queensland, Assistant Director, *Public Hearing Transcript*, 24 January 2017, p 2.
[34] Department, *Correspondence – Response to issues in submissions,* 30 January 2017, p 3.
[35] Mental Health Amendment Bill 2016, cl 3.
[36] Mental Health Amendment Bill 2016, cls 4, 8, 14, 27 and 33.
[37] Explanatory notes, p 8.

have a right to get seen. We need to resolve matters.'[38] The department advised that there was sufficient staff to be able to adhere to these timeframes:

> *We anticipate under the act there will be about 1½ thousand authorised doctors. In the current act there are around 3,000 authorised mental health practitioners, so there are quite a number of people on the books who will be available to do that.*[39]

The department also advised:

> *There is a good enough network through our telehealth system and through the network of clinicians that we can meet the time frames in terms of the days for reviews of hearings.*[40]

The AMAQ highlighted that the proposed detention period of up to 12 hours is longer than the current length of time for emergency examination orders (EEOs), which have a maximum detainment period of six hours. AMAQ submitted that:

> *As the current policy in mental health is to respect, to the greatest extent possible, a person's right to self-determination, it is concerning that EEO's could now be used to detain a person for up to half a day. This concern could be ameliorated somewhat in practice by ensuring that appropriate assessment and decision-making processes are set in place so that a 12-hour EEO is the exception and not the norm.*[41]

The department advised that the proposed time periods for detaining a person of six and 12 hours are:

> *… the same periods that apply for examination orders made by magistrates and emergency examination authorities under the Public Health Act 2005. These time periods strike a reasonable balance between examination requirements and individual rights.*[42]

3.3.2 Periods of seclusion or restraint

The Bill amends the Act to provide that the maximum time periods (nine hours in 24 hours) that a relevant patient may be kept in seclusion or have mechanical restraint applied, refer to the actual periods of seclusion or restraint, rather than the periods for which seclusion or restraint were authorised but not used.[43]

The explanatory notes provide the following example:

> *… where three periods of restraint of three hours each have been authorised over the course of a day but the patient has only be restrained for eight of those hours, a further restraint of one hour may be authorised during that day.*[44]

The Bill also provides that an extension of seclusion is to be approved by a clinical director, rather than a senior medical administrator. The clinical director of an AMHS is a senior position. Clinical directors have specific knowledge of the treatment and care of patients with a mental illness. The explanatory notes state that:

> *It is appropriate that the senior medical position with clinical responsibility for patients in an AMHS is vested with responsibility for ensuring seclusion is appropriately used within that AMHS.*

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[38] Associate Professor John Allan, Acting Executive Director, Mental Health, Alcohol and Other Drugs Branch, Department, *Public Hearing Transcript*, 24 January 2017, p 11.

[39] Associate Professor John Allan, Acting Executive Director, Mental Health, Alcohol and Other Drugs Branch, Department, *Public Hearing Transcript*, 24 January 2017, p 11.

[40] Associate Professor John Allan, Acting Executive Director, Mental Health, Alcohol and Other Drugs Branch, Department, *Public Hearing Transcript*, 24 January 2017, p 11.

[41] Australian Medical Association Queensland, submission 2, p 2.

[42] Department, *Correspondence – Response to issues in submissions,* 30 January 2017, p 2.

[43] Mental Health Amendment Bill 2016, cls 21 and 22; Explanatory notes, pp 13 – 14.

[44] Explanatory notes, p 13.

> *By empowering the clinical director with the authority to extend seclusion, the use of seclusion can be more appropriately monitored at the service level.*[45]

In addition, the Bill replaces a reference to senior medical administrator, as the officer who must take particular steps following the extension of a seclusion period, with a reference to the authorised doctor.[46]

The Bill also omits the restriction in the Act that the power to authorise an extension of a seclusion period may only be used once for each occasion the patient receives treatment and care. The explanatory notes state:

> *It is more appropriate to manage the use of seclusion through policy made by the Chief Psychiatrist rather than legislation, due to a range of operational and implementation issues*.[47]

Submitters' views and department's response

The AMAQ noted the maximum timeframes for seclusion, and questioned whether they meant a reduction and elimination plan must be ready within 21 hours if a person needs to be kept in seclusion.

The department advised:

> *If it is necessary to extend seclusion beyond the 9 hours, section 259 of the Act enables this to occur while a reduction and elimination plan is prepared. Clause 23 of the Bill requires this to be approved by the clinical director, rather than the senior medical administrator as currently in the Act. This can occur at any time prior to the end of the 9 hour period.*[48]

3.3.3 Operation of the Mental Health Review Tribunal

The Bill also proposes amendments seeking to improve the operation of the Mental Health Review Tribunal (MHRT), including:

- clarifying that if the MHRT makes a treatment authority, it is not obligated to undertake an initial review of its own order within 28 days[49]
- providing that the administrator of an AMHS has a right to appear at a MHRT hearing if the hearing relates to an application for an examination authority made by the administrator[50]
- protecting the privacy of a person subject to an application for an examination by not disclosing their contact or health information in the MHRT's written decision provided to a third party[51]
- removing the automatic adjournment of a hearing if a patient is absent – allowing the MHRT to determine whether to proceed in the person's absence or adjourn the matter,[52] and
- providing that the MHRT may dismiss an appeal, without a hearing, if it is satisfied the appeal is 'frivolous or vexatious'.[53]

Submitters' views and department's response

The MHRT submitted that if a patient is absent for a hearing:

> *… a hearing should be conducted and all treatment in the community be reviewed as this is the best way of protecting the community until the patient is located and back in treatment.*[54]

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45 Explanatory notes, p 14.
46 Mental Health Amendment Bill 2016, cl 23.
47 Mental Health Amendment Bill 2016, cl 23; Explanatory notes, p 14.
48 Department, *Correspondence – Response to issues in submissions,* 30 January 2017, p 2.
49 Mental Health Amendment Bill 2016, cls 37 – 38.
50 Mental Health Amendment Bill 2016, cl 47.
51 Mental Health Amendment Bill 2016, cl 48.
52 Mental Health Amendment Bill 2016, cls 45 – 46.
53 Mental Health Amendment Bill 2016, cl 42.
54 Mental Health Review Tribunal, submission 4, p 6.

The MHRT explained that if a patient is absent without authorisation, then they have stopped their treatment. If the patient was on a treatment support order or a forensic order, there is the potential for the patient to be a risk to the community. The MHRT explained that if the hearing does not proceed, then the patient's:

> *… category cannot be changed, their limited community treatment cannot be changed and it might be more appropriate for them to then be changed to the category of inpatient or to have certain limited community treatment restricted so that when they are in contact with a clinical service ... that is the decision that service will operate on, rather than 'this person has been approved to be in the community' …*[55]

The department noted that:

> *Clause 45 of the Bill amends this section [section 730 of the Act] to give the Tribunal the discretion to adjourn the hearing…*
>
> And:
>
> *... rather than requiring it [MHRT] to do so. It enables a review to proceed where there are important matters to consider, such as the level of community treatment. This amendment was requested by the Mental Health Review Tribunal.*[56]

3.3.4 Operational amendments

The Bill makes a number of other amendments aimed at improving the operation of the Act, including:

- providing that where an obligation may be discharged by a public sector health service employee, that obligation may also be discharged by an employee of a private AMHS[57]
- allowing the chief psychiatrist to request and receive a copy of the brief of evidence against a person to aid in preparing a psychiatrist report about that person[58]
- confirming that persons subject to custodial provisions of another Act who are detained in an AMHS can access on-grounds escorted leave in appropriate circumstances[59]
- clarifying that the purpose of an examination authority is to encourage a person to seek a voluntary examination, rather than voluntary treatment[60]
- clarifying that the Queensland Civil and Administrative Tribunal may disclose information about an administrator appointed under the *Guardianship and Administration Act 2000* to an employee of a Hospital and Health Service or the executive officer of the MHRT[61]
- providing a power for the Rules Committee established under the *Supreme Court Act 1991* to approve forms needed for Supreme Court, District Court and Magistrates Court processes relating to the operation of the Act[62]
- clarifying that the administrator of an AMHS must ensure the statement of rights is explained and given to patients, rather than being personally required to explain and provide a copy of the statement[63]

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55 Mr Barry Thomas, President, Mental Health Review Tribunal, *Public Hearing Transcript*, 24 January 2017, pp 5 – 6.
56 Department, *Correspondence – Response to issues in submissions,* 30 January 2017, p 3.
57 Mental Health Amendment Bill 2016, cls 5, 17, 18, 26, 29, 33, and 35.
58 Mental Health Amendment Bill 2016, cl 9.
59 Mental Health Amendment Bill 2016, cls 16, 17 and 18.
60 Mental Health Amendment Bill 2016, cl 40.
61 Mental Health Amendment Bill 2016, cl 49.
62 Mental Health Amendment Bill 2016, cl 50.
63 Mental Health Amendment Bill 2016, cl 24.

- replacing the current requirement to include details of a patient's treatment and care in both their treatment authority and health record, with a requirement to include a patient's treatment and care in their health record only[64]
- allowing corrective services officers and youth detention employees to transport persons to or from a court[65]
- clarifying that a person found temporarily unfit to stand trial for a serious offence may only apply to be transferred interstate if the criminal proceeding has been discontinued,[66] and
- providing that where the MHC is required to make a treatment support order for a person subject to an existing order, it may do so by amending the order or by revoking it and making a new order.[67]

Submitters' views and department's response

The RANZCP expressed concern that the Bill does not require that a delegation process must be formalised to legitimise the delegation and ensure it is not ad hoc. RANZCP suggested that clause 26 should include such a stipulation.[68] The department confirmed any delegations would, 'need to be properly documented'.[69]

The Office of the Public Advocate (OPA) expressed concerns about the proposal at clause 6 to remove the requirement for information about the nature and extent of treatment provided under a treatment authority to be recorded in the patient's health records and treatment authority.[70] The OPA considered that the proposed amendment might reduce patients' and support persons' ability to access information about a patient's treatment and care.

The potential FLP issues raised by clause 6 are discussed in section four of this report.

3.3.5 Amendments to the *Public Health Act 2005* and *Coroners Act 2003*

The Bill aims to ensure the provisions inserted into the Public Health Act and the Coroners Act by the Act operate as intended by making clarifying technical amendments, including:

- removing redundant references to 'authorised mental health services' and the 'administrator of an authorised mental health service'[71]
- improving the operation of provisions, eg by ensuring ambulance officers may transport absent persons, adjusting the approved forms to be used for particular purposes, and correcting a reference to the category of health practitioner who may authorise a person's transport from a PSHSF[72]
- more accurately identifying the start of the period during which a person may be detained under an EEO,[73] and
- permitting the person in charge of a PSHSF to delegate their power to authorise or request the return of an absent person to an appropriately qualified health service employee (this will reflect the power to delegate the corresponding power under the Act).[74]

64 Mental Health Amendment Bill 2016, cl 6.
65 Mental Health Amendment Bill 2016, cl 29.
66 Mental Health Amendment Bill 2016, cl 41.
67 Mental Health Amendment Bill 2016, cls 12 and 25.
68 Royal Australian and New Zealand College of Psychiatrists, submission 1, p 2.
69 Department, *Correspondence – Response to issues in submissions,* 30 January 2017, p 2.
70 Office of the Public Advocate, submission 5, p 2.
71 Mental Health Amendment Bill 2016, cl 54.
72 Mental Health Amendment Bill 2016, cl 52.
73 Mental Health Amendment Bill 2016, cl 52.
74 Mental Health Amendment Bill 2016, cl 52.

3.4 Other suggested amendments to the Act

While not related to the provisions of the Bill, the MHRT suggested a number of other amendments to the Act to improve its effectiveness.[75]

The department noted that a number of MHRT's proposed amendments had been raised during the review of the *Mental Health Act 2000* and addressed in the Act. The department also advised that departmental officers would meet with the MHRT's President to clarify the issues the MHRT raised, as part of the implementation of the Act.[76]

[75] Mental Health Review Tribunal, submission 4.

[76] Department, *Correspondence – Response to issues in submissions,* 30 January 2017, p 1.

4 Fundamental legislative principles and explanatory notes

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that the fundamental legislative principles (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the FLPs to the Bill and brings the following potential FLP issues to the attention of the Legislative Assembly.

4.1.1 Rights and liberties of individuals

Clause 6 – removing the requirement for a treatment authority to contain information about treatment

A treatment authority is a lawful authority to provide treatment and care to a person with a mental illness who does not have capacity to consent to be treated.[77]

Section 50(1) of the Act sets out the requirements of a treatment authority, including that it must state, 'the nature and extent of the treatment and care to be provided to a person', as set out in section 50(1)(b)(v). Section 202(2) of the Act requires that, '[t]he authorised doctor must record in the patient's health records the treatment and care planned to be provided, and that is provided, to the patient'.

Clause 6 of the Bill proposes to remove the requirement that a treatment authority must state the nature and extent of the treatment and care to be provided to a person, so that information about a patient's treatment and care is only to be recorded in their health records.

Removing the requirement to include information about treatment and care in a treatment authority raises the issue of whether the Bill has sufficient regard to the rights and liberties of individuals, in accordance with section 4(2)(a) of the *Legislative Standards Act 1992*. It is arguable that the omission of this requirement could compromise the basic right of a person to be appropriately advised about the treatment they will receive. It may also be the case that the content of a treatment authority is an important source of information for the patient's support network and legal representatives.

The OPA opposed the removal of section 50(1)(b)(v), stating it has:

> *… significant concerns that this amendment to the Act undermines the rights of people subject to a treatment authority to be properly informed about the care and treatment to which they will be involuntarily subject. The proposed amendment to section 50 is not in keeping with the objectives of the Act.*[78]

The department explained that the amendment is:

> *… consistent with good clinical practice in that all treatment and care, including changes to treatment and care over time, would be recorded in the one place. This amendment will not adversely affect patient rights. The Act* requires *an authorised doctor to discuss the proposed treatment and care with the patient (section 53). Also, under section 286 of the Act, an authorised doctor is* required *to discuss these matters with a nominated support person or, if the patient does not have a nominated support person, one or more of the patient's family, carer or other support person.*
>
> *A patient may request access to their own health records at any time.*[79]

[77] *Mental Health Act 2016*, s 18.
[78] Office of the Public Advocate, submission 5, p 2.
[79] Department, *Correspondence – Response to issues in submissions,* 30 January 2017, pp 3 – 4.

Committee comment

The committee considers that, on balance, clause 6 of the Bill has sufficient regard to the rights and liberties of patients, their support network and legal representative in relation to access to information about a patient's treatment and care.

In reaching this view, the committee noted that an authorised doctor will be required to discuss the proposed treatment and care with the patient and nominated support person, and that patients may request access to their health records, including details of their treatment and care, at any time.

4.2 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 of the *Legislative Standards Act 1992* and a reasonable level of background information and commentary to help understand the Bill's aims and origins.

Appendix A – List of submitters

Sub #	Submitter
001	Royal Australian and New Zealand College of Psychiatrists
002	Australian Medical Association Queensland
003	Legal Aid Queensland
004	Mental Health Review Tribunal
005	Office of the Public Advocate
006	Australian Counselling Association

Appendix B – Witnesses at public hearing

Tuesday 24 January 2017
Legal Aid Queensland • Mark Schofield, Assistant Director
Mental Health Review Tribunal • Barry Thomas, President • Robert Troy, Executive Officer
Queensland Health • Associate Professor John Allan, Acting Executive Director, Mental Health, Alcohol and Other Drugs Branch • Paul Sheehy, Director, Mental Health Act Implementation

Appendix C – Jurisdictional comparison of admissibility of mental health examination reports and assessment statements

New South Wales	Victoria	South Australia and Tasmania	Western Australia	Northern Territory	ACT
The legislative framework does not expressly limit the admissibility of statements made during a mental health assessment or examination in civil and criminal proceedings, instead the framework limits the court's ability to consider the statement. For example, a Magistrate may inform himself or herself as the Magistrate thinks fit when considering whether a person is unfit to stand trial, but not so as to require a defendant to incriminate himself or herself. *Mental Health (Forensic Provisions) Act 1990 (NSW)*	Any document prepared solely for the purpose of hearing to decide whether a person is unfit to stand trial is not admissible in any civil or criminal proceeding, except: • a proceeding arising out of the hearing • a proceeding for an offence against s.314(1) of the *Crimes Act 1958* (perjury) or any other offence involving interference with administration of justice, or • with consent of affected person. A court, tribunal or person acting judicially may rule that a document is admissible in a proceeding if satisfied, on an application of a party to a proceeding, that it is in the interests of justice to do so. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*	A finding made on an investigation into a defendant's fitness to stand trial or on a special hearing does not constitute an issue estoppel against the defendant in any later civil or criminal proceedings, and evidence of any such finding is not admissible against the defendant in criminal proceedings against the defendant. *Criminal Law Consolidation Act 1935 (SA)* *Criminal Justice (Mental Impairment) Act 1999 (Tas)*	*Mental Health Act 2014* and *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* do not make any provision in relation to the admissibility of mental health examination reports or statements.	*Mental Health and Related Services Act (NT)* and the *Criminal Code Act (NT)* do not make any provision in relation to the admissibility of mental health examination reports or statements.	*Mental Health Act 2015 (ACT)* and *Crimes Act 1990 (ACT)* do not make any provision in relation to the admissibility of mental health examination reports or statements.

Statement of Reservation

Statement of Reservations

The Non-Government member's note the Committee could not reach a majority decision and raise two questions:

(a) Clause 3 allows the detention of a 'person' in "an authorised mental heal service or public sector health service facility – for a period of not more than 6 hours ……."

The question that arises is in relation to regional and remote areas where there may be limited numbers of qualified practitioners who can perform the examination. Could the Minister provide details of availability of such practitioners' across Queensland with a focus on regional and remote areas and what will be the outcome if the period of six hours expires without the examination having been completed?

(b) Clause 15 imposes limits on the circumstances in which an examination report "is admissible at the trial of the person……" This question is dealt with in some Australian jurisdictions but not in others with a table appearing in the Report listing the various approaches in the jurisdictions.

We note the new provision arose as a result of work undertaken by the Court Liaison Service. Can the Minister provide instances where such legislation has been implemented and the benefit that has flowed from it and examples where it does not exist and the negative consequences that have resulted?

Mark McArdle Mark Robinson Sid Cramp