

Health Legislation Amendment Bill 2019

Explanatory Notes

FOR

Amendments to be moved during consideration in detail by the Honourable Steven Miles MP, Deputy Premier, Minister for Health and Minister for Ambulance Services

Title of the Bill

Health Legislation Amendment Bill 2019

Objectives of the Amendments

Amendments to the Public Health Act 2005

The Health, Communities, Disabilities Services and Domestic and Family Violence Prevention Committee (Committee) tabled its report on the Health Legislation Amendment Bill 2019 (Bill) on 21 February 2020. In response to stakeholder feedback, the Committee recommended that clause 28 of the Bill be amended to provide additional clarity about the definition of conversion therapy and remove any potential doubt about the scope of practices prohibited by the Bill.

During the Committee's consideration of the Bill, some stakeholders expressed concern that the definition of conversion therapy in new section 213F could inadvertently prohibit some legitimate treatments and practices. In particular, concerns were raised that health service providers may be reluctant to engage in practices that do not support or affirm—or that could be perceived as not supporting or affirming—a patient's sexual orientation or gender identity, even if such practices are evidence based or otherwise clinically appropriate.

It is not the intent of the Bill to prohibit legitimate clinical practices or to force practitioners to affirm or support a person's sexual orientation or gender identity or engage in any particular approach to treatment. The Bill recognises that there are reasonable disagreements in the clinical community about how to appropriately treat individuals with symptoms of gender dysphoria and does not prohibit any practice that is based on reasonable clinical decisions about how to provide safe and effective care. The only practices the Bill prohibits are those that are not based on reasonable clinical considerations but on the discredited notion that persons with diverse sexual orientations or gender identities have an illness or abnormality that can be changed or that should be suppressed.

Based on the Committee's recommendations and the views expressed by some stakeholders during the Committee's examination of the Bill, it is appropriate to amend the definition of conversion therapy to remove any doubt about whether it could apply to legitimate clinical practices and to ensure that the intent of the legislation is clear to all stakeholders. The amendments to clause 28 of the Bill provide additional clarity about the definition of conversion therapy and remove any potential doubt about the scope of practices prohibited by the Bill.

Amendments to the *Medicines and Poisons Act 2019*

The amendments to be moved during consideration in detail also amend the *Medicines and Poisons Act 2019*, which was passed by Parliament on 17 September 2019 and received assent on 26 September 2019.

The purpose of the Medicines and Poisons Act is to repeal and replace the existing legislation with a new regulatory framework, which modernises and streamlines the regulation of medicines and poisons, ensuring requirements are easier for industry and the community to understand and apply in practice.

During drafting of the supporting regulations, technical amendments to the Medicines and Poisons Act were identified to enable the regulations to operate as intended and to rectify some minor typographical errors.

The objective of these amendments is to:

- clarify that homeowners and occupiers can use household pesticides for pest control activities on their residential premises, and allow the incidental use of household pesticides at a workplace;
- enable the Office of the Health Ombudsman to access the monitored medicines database to assess or investigate health service complaints or investigate or monitor the activities of persons subject to action under the *Health Ombudsman Act 2013*;
- insert an additional regulation-making power to enable schedule 5 (S5) and schedule 6 (S6) poisons to be dealt with by regulation; and
- rectify some minor technical or typographical errors.

Achievement of the Objectives

Amendments to the *Public Health Act 2005*

Clause 28 of the Bill inserts a new chapter 5B in the *Public Health Act 2005*. The purpose of new chapter 5B is to prohibit health service providers from performing conversion therapy. Conversion therapy is defined in new section 213F(1) as a treatment or other practice that attempts to change or suppress a person's sexual orientation or gender identity. Examples of prohibited conversion therapy practices are provided in new section 213F(1). New section 213F(2) describes a number of practices that are not conversion therapy and lists examples of these practices. New section 213F(3) provides a reasonable professional judgment exception to the prohibition on conversion therapy, which specifies that conversion therapy does not include a practice by a health service provider that, in the provider's reasonable professional judgment, is necessary to provide a health service in a manner that is safe and appropriate or is necessary to comply with the provider's legal or professional obligations.

Consistent with the recommendation of the Committee, the amendments to clause 28 of the Bill make clear that legitimate clinical practices, including those that do not affirm a person's sexual

orientation or gender identity, are not included in the definition of conversion therapy and are not prohibited. This is achieved principally by:

- removing the word ‘treatment’ from the definition and prohibition of conversion therapy, as treatments may connote practices that serve a clinical function;
- substituting more specific examples of prohibited conversion therapy practices in new section 213F(1); and
- clarifying the exception for reasonable professional judgment and providing specific examples of practices covered by the exception.

Significantly, the amendments clarify that practices that are part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support of a person, are not conversion therapy and are excluded under the reasonable professional judgment exception to conversion therapy. The reasonable professional judgment exception is new section 213(3) in the Bill; the amendments renumber the provision as 213(2).

The exception for reasonable professional judgment is also amended to prevent it from being interpreted more narrowly than intended. As originally framed, the exception extended to practices that a health service provider reasonably believes are *necessary* to provide a health service in a manner that is safe and appropriate or to comply with their legal or professional obligations. The requirement of necessity, if construed narrowly, may not protect clinically appropriate conduct that has a basis in evidence or clinical practice but is not strictly necessary to provide the health service safely. The amendments clarify that practices that, in a provider’s reasonable professional judgment, *enable or facilitate* the provision of a health service in a safe and appropriate manner are not conversion therapy.

The Bill, at new section 213(2), sets out several practices that are not conversion therapy. The amendments clarify that the practices set out in that provision are not conversion therapy because they fall under the reasonable professional judgment exception, specifically, because they form part of the clinically appropriate assessment, diagnosis, treatment or support of a person. The amendments also update the examples provided in this provision to include practices that may not be, or may not be perceived to be, affirming of a person’s sexual orientation or gender identity but are clinically appropriate, including exploring psychosocial factors with a person or probing a person’s experience of sexual orientation or gender identity or advising a person about the potential side effects of sex-hormonal drugs or the risks of having, or not having, surgical procedures. The amendments renumber the amended new section 213(2) in the Bill to new section 213(3) to clarify the provision’s relationship with the professional judgment exception.

Taken together, these amendments provide additional clarity about the definition of conversion therapy and remove any potential doubt about the scope of practices prohibited by the Bill.

Amendments to the *Medicines and Poisons Act 2019*

In addition to a home owner or occupier being able to use a household pesticide for pest control activities on their residential premises, the intention is that the Medicines and Poisons Act also allows a person to carry out a pest control activity for other activities involving incidental and minor use of a household pesticide as part of the person’s duties, provided they are not performing the duties for a pest management business. For example, using a household pesticide to kill cockroaches at a house or spraying a water meter box in a nature strip for wasps using a household pesticide before working on the meter box. Clause 19C, which amends section 44 (Offence to

carry out pest management activities), clarifies the activities in which a household pesticide can be used to carry out a pest control activity.

On 1 March 2020, amendments to the Health Ombudsman Act commenced clarifying that authorised persons' powers include not only investigating, but also monitoring compliance with conditions, orders and other requirements imposed by the Health Ombudsman. The Medicines and Poisons Act includes a head of power to establish a real-time prescription monitoring system for dependence-forming medicines. Given the recent amendments to the Health Ombudsman Act, it was considered appropriate to amend the Medicines and Poisons Act. Clause 19H amends section 224 (Chief executive to keep database) to include this function and for the monitored medicines database to be used for assessing complaints.

The Medicines and Poisons Act requires a head of power to enable the implementation of the part 2 requirements of the Standard for the Uniform Scheduling of Medicines and Poisons for S5 and S6 poisons. These provisions relate to the labelling, packaging, storage, disposal, hawking and supply of S5 and S6 poisons. S5 and S6 poisons can cause minor or moderate adverse effects to people in normal use and this harm can be mitigated with appropriate controls, for example, by the correct labelling and packaging of poisons. Clause 19I amends section 240 (Regulation-making power) of the Medicines and Poisons Act by inserting a regulation-making power, which provides that the Governor in Council may make regulations under the Medicines and Poisons Act in relation to dealing with S5 and S6 poisons and matters related to dealing with those poisons.

The amendments also rectify some minor technical or typographical errors in the Medicines and Poisons Act.

Alternative Ways of Achieving Policy Objectives

There are no alternative ways of achieving the policy objectives.

Estimated Cost for Government Implementation

The costs of the amendments will be met from within existing departmental resources.

Consistency with Fundamental Legislative Principles

The amendments are consistent with fundamental legislative principles.

The amendments to clause 28 of the Bill implement the Committee's recommendation to provide additional clarity about the definition of conversion therapy and to remove any potential doubt about the scope of practices prohibited by the Bill. As the amendments do not change, but merely clarify, the scope and operation of clause 28, they do not raise any new issues with respect to fundamental legislative principles. Clause 28 remains consistent with fundamental legislative principles for the reasons set out in the explanatory notes to the Bill and for the additional reasons set out below.

The amendments to the Medicines and Poisons Act are consistent with fundamental legislative principles for the reasons set out below.

Whether the legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act 1992, s 4(2)(a))

The amendments do not engage any of the rights and liberties of individuals in section 4(3) of the Legislative Standards Act. However, the former Scrutiny of Legislation Committee took an expansive approach in identifying rights and liberties. These can encompass, for example, rights that are only incompletely recognised at common law (for example, the right to privacy) and rights (especially human rights) that arise out of Australia's international treaty obligations¹.

Right to Privacy

Clause 224 (Chief executive to keep database) of the Medicines and Poisons Act provides the chief executive must keep the monitored medicines database to record information about the prescription and supply of monitored medicines. The clause sets out the purposes of keeping the database, including to promote safe practices for the therapeutic use of monitored medicines and reduce community harm caused by them, and to enable particular health practitioners to access the database to record and review information for the therapeutic treatment of persons.

Granting users access to and use of the database is justified to support the operation of the scheme and to implement the Health Ombudsman's recommendation in the 2016 Investigation report, *Undoing the knots constraining medicine regulation in Queensland*, to introduce a real-time prescription monitoring system. It is also justified to support the implementation of recommendation I(a) of the Coroners Court of Queensland Findings of Inquest into the deaths of William John House, Vanessa Joan White, Jodie Anne Smith and Daniel Keith Milne, delivered in 2018. The report recommended Queensland Health urgently consider and determine how a real-time prescription monitoring system could be implemented in Queensland at the earliest opportunity.

Granting users access to the database is also strongly advocated for by peak medical, pharmacy and consumer bodies, including the Australian Medical Association, the Pharmaceutical Society of Australia, the Pharmacy Guild of Australia, the Royal Australian College of General Practitioners, Consumers Health Forum of Australia and others. Appropriate safeguards have been included in the Medicines and Poisons Act, with the Office of the Health Ombudsman bound by their professional obligations in relation to confidentiality of patient information.

Right to freedom of thought, conscience, religion and belief and right to freedom of expression

The amendments to clause 28 of the Bill may potentially limit the right to freedom of thought, conscience, religion and belief and the right to freedom of expression, which are protected under the *Human Rights Act 2019*. The amendments clarify the practices prohibited under the ban on conversion therapy by updating the examples of practices that are prohibited. The examples include techniques or interventions that encourage a person to believe that being lesbian, gay, bisexual, transgender or intersex (LGBTI) is a defect or disorder.

Some religions are not supportive of, or condemn, diverse sexual orientations and gender identities, and teachings of these religions may promote the idea that diverse sexual orientations and gender identities require correction. Health practitioners who hold such religious beliefs may perceive that their right to freedom of religion is limited by the prohibition of these practices. Similarly, some health practitioners may hold opinions about the effectiveness of conversion therapy or about the correctness or morality of being an LGBTI person and may believe that their right to express this opinion is being limited by the inability to practice conversion therapy.

¹ The Scrutiny of Legislation Committee Annual Report 1998–1999 at page 6, paragraph 2.13.

Any limitation on these rights is minor in nature. The amendments and the Bill do not prohibit religious teachings or practices, unless those practices are engaged in as part of the provision of a health service. The amendments do not prohibit a person from having a religion, holding a belief or demonstrating that religion or belief. Health service providers are not required to engage in any practice that may be contrary to their religions or beliefs. The amendments also do not prohibit anyone from holding an opinion about conversion therapy and the basis for that therapy. Any limitations on the rights are justified on the basis that conversion therapy is known to be ineffective and harmful. Patients have a right to expect that health service providers will offer services that are based in evidence or accepted clinical practice. Any health service provider who engages in these practices breaches the trust placed in them by the community and it is entirely appropriate to ensure these practices do not occur in a clinical context.

A full analysis of the potential limitation on these rights and the justification for any limitation is set out in the statement of compatibility accompanying the amendments.

Whether the legislation has sufficient regard to the institution of Parliament (Legislative Standards Act, s 4(2)(b))

Amendment of an Act only by another Act (Henry VIII clauses)

Section 4(4)(c) of the Legislative Standards Act states that whether legislation has sufficient regard to the institution of Parliament depends on whether the legislation authorises the amendment of an Act only by another Act.

Clause 240 (Regulation-making power) of the Medicines and Poisons Act provides a head of power for regulations to be made under the Act. Clause 19I provides that dealing with S5 and S6 poisons may be prescribed under regulation. This provision is considered to have sufficient regard to the institution of Parliament because the matters to be prescribed are consistent with the policy objectives and purpose of the authorising law and the matters to be prescribed are technical in nature. Some flexibility for Queensland Health to be able to respond rapidly and decisively to matters that pose a risk to public health and safety, such as the unsafe disposal of a S6 poison, (for example rodenticide), is considered appropriate. Any changes to regulations will be tabled in the Legislative Assembly and subject to parliamentary scrutiny and disallowance.

Consultation

The amendments to the Bill implement the recommendation of the Committee and reflect extensive consultation with stakeholders during the Committee's inquiry into the Bill. The Committee considered 152 written submissions and held multiple public briefings and hearings over several days, at which over seven hours of testimony was provided by 13 organisations and individuals representing a diverse range of stakeholders, including survivors of conversion therapy, LGBTIQ individuals, medical and health professionals, academics, researchers and advocacy groups.

Public consultation was not undertaken on the amendments to the Medicines and Poisons Act. However, a wide range of stakeholders were consulted in the development of the Act.

The Office of the Health Ombudsman was consulted on the amendments to section 224 enabling the Office of the Health Ombudsman to access the monitored medicines database for additional purposes, such as to assess or investigate health service complaints. The Office of the Health Ombudsman supports the amendments.

Consultation with stakeholders on the supporting regulations is proposed to be undertaken before commencement of the Medicines and Poisons Act.

Consistency with legislation of other jurisdictions

No other State or Territory in Australia has introduced legislation prohibiting conversion therapy.

NOTES ON PROVISIONS

Amendment 1

Amendment 1 inserts new part 3A (Amendment of Medicines and Poisons Act 2019), which contains new clauses 19A to 19N.

Clause 19A (Act amended) provides that part 3A amends the Medicines and Poisons Act.

Clause 19B amends the note in section 31(c) (Meaning of authorised way) by omitting ‘at the places’. This amendment has the effect that the substance management plan will provide for dealing with regulated substances at regulated places.

Clause 19C replaces section 44(2)(d) (Offence to carry out pest management activities). This amendment provides clarification that homeowners and occupiers are permitted to use household pesticides for pest control activities on their residential premises, or that a person who carries out a pest control activity is permitted to use a household pesticide as a minor and incidental part of the person’s duties, provided they are not performing the duties for a pest management business. Examples of permitted uses under this provision are using a household pesticide to kill cockroaches at a house or spraying a household pesticide on wasps in a water meter box in a nature strip before working on the meter box.

Clause 19D amends section 63(2)(b) (What is a manufacturing licence) to insert the word ‘of’ after ‘manufacture’. This amendment provides that a manufacturing licence may, if stated in the licence, authorise the manufacture of, and disposal of waste from, another stated regulated substance that is a by-product of the manufacture of the final product.

Clause 19E amends the definition of *substance management plan* in section 92 (Definitions for part) by omitting ‘at the regulated place’ and replacing with ‘at, or in connection with, the regulated place’. This amendment addresses issues with developing and using substance management plans for general approvals under which approved persons will operate a mobile service at various locations, such as remote mines, and away from their primary place of approved business or activity.

Clause 19F amends section 93(2)(a)(iv) (Requirements for substance management plan) by omitting ‘at the place’. This amendment has the effect that the substance management plan will provide for dealing with a regulated substance at a regulated place.

Clause 19G amends section 157(2) (Application of division) by inserting after ‘enters’ ‘a place’. This amendment has the effect that if the inspector enters a place under their general powers, the powers are subject to any conditions of the consent or terms of the warrant. A place includes premises, vacant land, a place in Queensland waters, a place held under more than one title or by more than one owner or land or water on or in which a building or other structure, or a group of buildings or other structures, is situated.

Clause 19H(1) amends section 224(2)(b) (Chief executive to keep database) by omitting ‘the requirements of a National Health Practitioner Board established under the Health Practitioner Regulation National Law’ and replaces with ‘any applicable requirements under the Health Practitioner Regulation National Law’. This amendment has the effect that it changes the

requirements of a National Board to requirements under the Health Practitioner Regulation National Law generally.

Clause 19H(2) replaces section 224(2)(c) (Chief executive to keep database). This amendment enables the Office of the Health Ombudsman to have access to the monitored medicines database for additional purposes. These purposes include facilitating the assessment or investigation of health service complaints under the *Health Ombudsman Act 2013* and the investigation or monitoring persons subject to actions or orders under the Health Ombudsman Act.

Clause 19I amends section 240(2) (Regulation-making power) by inserting a regulation-making power, which provides that the Governor in Council may make regulations under the Medicines and Poisons Act in relation to dealing with Schedule 5 (S5) and Schedule 6 (S6) poisons and matters related to dealing with those poisons. S5 and S6 poisons are not covered by the offence provisions as they are extensively used in domestic situations, for example, household cleaners. S5 and S6 poisons can cause minor or moderate adverse effects to people in normal use and this harm can be mitigated using appropriate controls, for example, by the correct labelling and packaging of poisons.

Clause 19J amends the definition of medicated animal feed in section 242 (Definitions for part) by removing the hyphen from ‘food-producing’.

Clause 19K amends section 271(1) (Requirements made by Health Act inspectors) by omitting ‘(each an enforcement provision)’ as the phrase is not repeated in the provision and is therefore unnecessary.

Clause 19L amends section 272(1) (Requirements made by Pest Management Act inspectors) by omitting ‘(each an enforcement provision)’ as the phrase is not repeated in the provision and is therefore unnecessary.

Clause 19M amends a minor typographical error in section 279(1) (State analysts) by omitting ‘an’ before State analyst and replacing it with ‘a’.

Clause 19N amends the schedule 1 (Dictionary) definition of *standing order* by inserting after ‘place’, ‘or in stated circumstances’. This amendment ensures that a standing order could be prepared to manage outbreaks, for example, a disease outbreak in multiple locations, or to manage a sexually transmitted outbreak in a specific location.

Amendment 2

Amendment 2 amends clause 28 (Insertion of new ch 5B). The amendment replaces new section 213F (Meaning of conversion therapy) to make clear that legitimate clinical practices, including those that do not affirm a person’s sexual orientation or gender identity, are not included in the definition of conversion therapy and are not prohibited by the Bill.

The amendment omits the phrase ‘treatment or other’ from new section 213F(1). The concept of ‘treatment’ is removed because this term could be associated with evidence-based practices. The Bill does not prohibit evidence-based practices; it only prohibits practices that are not based on evidence but rather on the discredited notion that LGBTIQ individuals are ‘broken’

and need to be cured. Removing the reference to treatments will not affect the operation of the Bill, since the term ‘practice’ is broad enough to capture treatments that are not evidence-based.

The examples accompanying new section 213F(1) are omitted and replaced with a new list of examples. The revised examples better illustrate the types of practices to which new section 213F(1) applies. The revised examples are more specific and are as follows:

- inducing nausea, vomiting or paralysis while showing the person same-sex images;
- using shame or coercion to give the person an aversion to same-sex attractions or to encourage gender-conforming behaviour; and
- using other techniques on the person encouraging the person to believe being lesbian, gay, bisexual, transgender or intersex is a defect or disorder.

The revised examples avoid referencing specific treatments such as psychoanalysis and counselling to avoid any perception that there is a legislative presumption that these treatments are a form of conversion therapy.

New section 213F(2) lists several practices that are excluded from the definition of conversion therapy on the basis that the practice, in the health service provider’s reasonable professional judgment:

- is part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support for a person; or
- enables or facilitates the provision of a health service for a person in manner that is safe and appropriate; or
- is necessary to comply with the provider’s legal or professional obligations.

By carving out these categories, the provision narrows the definition of conversion therapy in new section 213F(1) and ensures that it is narrowly tailored to practices that are harmful and not based in evidence.

Amendment 2 expands the exception for reasonable professional judgment to clarify the scope of the exception and ensure it is not construed more narrowly than intended. The exception will ensure that legitimate treatment decisions and other clinically reasonable conduct is excluded from the definition of conversion therapy and will not be prohibited by the Bill, even if it does not affirm a person’s sexual orientation or gender identity. As originally framed in new section 213F(3) of the Bill, the exception only extended to practices that a health service provider reasonably believes are *necessary* to provide a health service in a manner that is safe and appropriate or to comply with their legal or professional obligations. The requirement of necessity, if construed narrowly, may not protect clinically appropriate conduct that has a basis in evidence or clinical practice but is not strictly necessary to provide the health service safely. The amendment clarifies that practices that, in a provider’s reasonable professional judgment, *enable or facilitate* the provision of a health service in a safe and appropriate manner are not conversion therapy. To remove any doubt, the exception also includes an additional category of exempt practices that are part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support for a person.

The amendment clarifies that the practices enumerated in new section 213F(3) (previously new section 213(2) of the Bill) are examples of practices that fall within the exception for reasonable professional judgment at new section 213F(2) and are excluded from the definition of conversion therapy on that basis.

To provide practical guidance and further assist interpretation, the amendment inserts the following illustrative examples of practices that are covered by the exception for reasonable professional judgment:

- exploring psychosocial factors with a person or probing a person’s experience of sexual orientation or gender identity;
- providing a speech pathology or gender transition service for a trans-gender or gender-diverse person wishing to alter the person’s voice and communication to better align with the person’s gender identity; and
- advising a person about the potential side effects of sex-hormonal drugs or the risks of having, or not having, surgical procedures.

Amendment 3

Amendment 3 amends the definition of ‘vulnerable person’ in new section 213H (Prohibition of conversion therapy) by replacing ‘treatment’ in subsection (3)(b) with ‘service’. The amendment is necessary for consistency with the amended definition of conversion therapy in new section 213F(1). As discussed in the explanatory notes for that amendment, the definition of conversion therapy no longer refers to ‘treatment’ because this term could be associated with evidence-based practices. Also, the term ‘service’ better captures the full range of activities engaged in by health service providers.

Amendment 4

Amendment 4 amends the definition of ‘vulnerable person’ in new section 213H (Prohibition of conversion therapy) by replacing ‘treatment’ in subsection (3)(c) with ‘service’. The basis and effect of this amendment are the same as for amendment 3.

Amendment 5

Amendment 5 amends the long title of the Bill to refer to the amendments to the Medicines and Poisons Act.