

Health and Other Legislation Amendment Bill 2021

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Yvette D'Ath MP, Minister for Health and Ambulance Services and Leader of the House make this statement of compatibility with respect to the Health and Other Legislation Amendment Bill 2021.

In my opinion, the Health and Other Legislation Amendment Bill 2021 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Health and Other Legislation Amendment Bill 2021 (Bill) will make amendments to improve the operation of health legislation and advance the health of Queenslanders. The Bill will amend the:

- *Ambulance Service Act 1991* to ensure the framework for managing confidential information is robust, clear and aligned with the *Hospital and Health Boards Act 2011* and remove the requirement for the Queensland Ambulance Service Commissioner to be no older than 65 years of age;
- *Environmental Protection Act 1994* to provide that development carried out or use of premises that causes environmental nuisance, is not an offence under the Environmental Protection Act to the extent it has been assessed and is explicitly regulated by a requirement of an infrastructure designation by the Planning Minister under the *Planning Act 2016*;
- Hospital and Health Boards Act to enable allied health practitioners to access The Viewer to achieve better health outcomes for patients, and allow designated persons to disclose confidential information to a person performing a function under the *Mental Health Act 2016*;
- Mental Health Act to:
 - clarify how the Mental Health Court can proceed if there is a dispute of facts on which an expert has based their opinion;
 - improve the electroconvulsive therapy (ECT) approval process by providing additional protections and ensuring patients' views, wishes and preferences are taken into account to the greatest extent practicable;
 - ensure the provisions about apprehension and transfer of absent patients are effective and align with least restrictive practice;
 - clarify the requirements for the interstate transfer of forensic and treatment support order patients;
 - promote a stronger rights-based approach for decisions about patient transfers between services;

- allow the Mental Health Review Tribunal (MHRT) to approve requests for international transfers of patients who have been placed under a forensic or treatment support order;
 - strengthen the confidentiality provisions to ensure the obligations for all people performing functions under the Mental Health Act are clear and consistent;
 - extend the duty of confidentiality to experts engaged to provide reports to the Mental Health Court or MHRT;
 - improve support for victims of unlawful acts; and
 - other minor amendments to improve the operation of the Mental Health Act;
- *Public Health (Infection Control for Personal Appearance Services) Act 2003* to improve the operation of the Act in relation to the restoration and renewal of business licences;
 - *Radiation Safety Act 1999* to remove the requirement to prescribe identity verification documents by regulation for particular applications, with identity requirements to be included in departmental policies, informed by the *National Identity Proofing Guidelines*;
 - *Termination of Pregnancy Act 2018* and the *Criminal Code Act 1899* to allow students registered under the Health Practitioner Regulation National Law (National Law) who are undertaking a clinical placement with a health service to assist in a termination of pregnancy;
 - *Transplantation and Anatomy Act 1979* to exclude human milk from the definition of *tissue* in the Act, to ensure sick and pre-term infants can be efficiently provided donated human milk to prevent or treat serious health conditions; and
 - *Corrective Services Act 2006* and *Water Supply (Safety and Reliability) Act 2008* to make consequential amendments to remove references to the repealed *Health Act 1937* and the *Pest Management Act 2001* following the commencement of the *Medicines and Poisons Act 2019*.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 Human Rights Act 2019)

In my opinion, the human rights that are relevant to the Bill are:

- Recognition and equality before the law (section 15)
- Right to life (section 16)
- Protection from torture and cruel, inhuman or degrading treatment (section 17)
- Freedom of movement (section 19)
- Freedom of thought, conscience, religion and belief (section 20)
- Taking part in public life (section 23)
- Right to property (section 24)
- Privacy and reputation (section 25)
- Protection of families (section 26(1))
- Protection of children (section 26(2))
- Right to liberty and security of person (section 29)

- Humane treatment when deprived of liberty (section 30)
- Fair hearing (section 31)
- Rights in criminal proceedings (section 32)
- Right to health services (section 37).

For the reasons outlined below, I am of the view that the Bill protects and promotes the following human rights.

Further analysis of human rights that are limited by the Bill is within the '*If human rights may be subject to limitation if the Bill is enacted*' section.

Amendments to the *Ambulance Service Act 1999*

Recognition and equality before the law (section 15, Human Rights Act); taking part in public life (section 23, Human Rights Act)

Every person has the right to recognition as a person before the law and the right to enjoy their human rights without discrimination. In addition, every person in Queensland has the right and opportunity without discrimination to take part in public life. Every eligible person has the right to vote, be elected, and have access on general terms of equality to the public service and public office.

Section 5(b) of the Ambulance Service Act states that the Commissioner of the Queensland Ambulance Service (QAS) will be disqualified from their appointment once they reach the age of 65 years of age. Clause 4 of the Bill removes this disqualification requirement as it is not relevant to the Commissioner's ability to perform their role.

The removal of section 5(b) of the Ambulance Service Act promotes and protects the right of a person to take part in public life by providing for greater equality in terms and conditions of appointment to the role of Commissioner of the Queensland Ambulance Service (section 23(2)(b), Human Rights Act).

Privacy and reputation (section 25, Human Rights Act)

A person has the right not to have their privacy, family, home and correspondence unlawfully or arbitrarily interfered with. A person has the right not to have their reputation unlawfully attacked.

On 13 October 2013, QAS was amalgamated with Queensland Health. Prior to the amalgamation, QAS was governed by the confidentiality provisions in the Ambulance Service Act. After the amalgamation, QAS became subject to the confidentiality provisions in both the Ambulance Service Act and the Hospital and Health Boards Act.

There are several differences in definitions, wording, scope, offences and authorisations for disclosure between the Ambulance Service Act and the Hospital and Health Boards Act, such as:

- what is confidential information;
- who has a duty of confidentiality; and
- when and how confidential information can be disclosed.

The differences in the confidentiality provisions in the Acts cause confusion for QAS officers and increases the risk of staff unintentionally disclosing confidential information without proper authorisation.

To limit these risks, the Bill amends the Ambulance Service Act to align with the confidentiality provisions in the Hospital and Health Boards Act. The Bill addresses the risk of unauthorised disclosure of confidential information by making it clear the confidentiality provisions in the Ambulance Service Act apply to all QAS employees. It does so by broadening the definition of ‘designated officer’ to include all QAS employees, irrespective of the basis of their employment.

The Bill promotes the right to privacy by providing clarity to QAS officers about their obligations in protecting the confidentiality of personal information. The Bill will ensure that officers have a simpler form of obligations and guidance about when confidential information may be disclosed in particular circumstances, such as disclosure with consent or where it may be in the best interests of a child.

Protection of families and children (section 26, Human Rights Act)

Families are recognised as the fundamental unit of society and are entitled to protection. Every child has the right, without discrimination, to the protection that is in their best interest as a child.

The Bill inserts a new provision into the Ambulance Service Act, which allows the disclosure of confidential information by designated officers for the protection, safety or wellbeing of children. The new provision covers a situation where, for example, the parent of a child is injured in an accident to allow a designated officer to disclose information about the injured parent to another adult to help ensure the child is cared for.

This amendment promotes the right to the protection of families and children by allowing for the disclosure of confidential information for the protection, safety or wellbeing of a child. This will ensure that parents of a child can be informed about a service or treatment that has been provided to a child by a QAS officer, which will support in identifying the ongoing care and attention the child may need.

Amendments to the *Mental Health Act 2016*

Recognition and equality before the law (section 15, Human Rights Act)

Every person has the right to recognition as a person before the law and the right to enjoy the person’s human rights without discrimination.

The Bill replaces the requirements for administrators of authorised mental health services or the MHRT to consider the ‘best interests’ of particular patients when making a decision in relation to the transfer of the patient from one service to another in Queensland or interstate.

Instead, the Bill requires the MHRT to take into account, to the greatest extent practicable, the patient’s views, wishes and preferences, together with the appropriateness of the transfer. These changes represent a stronger rights-based approach than the current ‘best interests’ test and will better support a person to participate in decisions about their potential transfer. Therefore, the amendments are considered to promote a person’s right to recognition and equality before the law.

Freedom of movement (section 19, Human Rights Act) – Interstate transfers

Every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live.

The Bill amends sections 515 and 523 of the Mental Health Act to remove the requirement that an application for the transfer of a person subject to a forensic order (mental health), forensic order (disability) or treatment support order into, or out of, Queensland be supported by a statement from the Chief Psychiatrist or Director of Forensic Disability confirming that the interstate transfer requirements under ‘a corresponding law’ may be satisfied. Currently the relevant interstate jurisdiction must have legislation recognised by Queensland as ‘a corresponding law’ for the purposes of an interstate transfer. Not all jurisdictions are able to be recognised as a corresponding law by Queensland because their legislation does not specifically provide for transfer, or because the interstate transfer requirements are not consistent enough with Queensland’s to allow recognition. The Bill amends the Mental Health Act to allow a person to apply for approval of a transfer even if there are no applicable interstate transfer requirements provided that the application is supported by a statement from the Chief Psychiatrist or Director of Forensic Disability confirming matters such as clinical suitability and safety of the proposed transfer.

The amendments support the right to freedom of movement as they will enable a person under a forensic order or treatment support order to apply for a transfer to or from any state or territory in Australia, not just a state or territory with ‘a corresponding law’. The amendment will improve the ability of this cohort of patients to move into, or out of, Queensland and as such engages and protects the right to freedom of movement. Existing limitations on freedom of movement will be reduced and people will be enabled to be closer to family and other support networks. The amendments will be subject to safeguards that mitigate safety risks and ensure the transfer is clinically appropriate for the patient.

Freedom of movement (section 19, Human Rights Act) – International transfer of patients

Every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live.

The Bill inserts a new provision into the Mental Health Act to allow a person subject to a forensic order (mental health), forensic order (disability) or treatment support order to apply to the MHRT for approval to be transferred internationally, subject to safeguards that appropriate care and treatment is available in the relevant country and that safe transfer arrangements are in place.

These types of transfers reduce the existing limitations on freedom of movement, and will enable people to be closer to family or other support by allowing them to return to a country that shares the person’s cultural, religious, racial or linguistic background. This supports various other rights protected by the Human Rights Act including cultural rights and freedom of thought, conscience, religion and belief.

Privacy and reputation (section 25, Human Rights Act) – Confidentiality obligations

A person has the right not to have their privacy, family, home and correspondence unlawfully or arbitrarily interfered with. A person has the right not to have their reputation unlawfully attacked. The right to privacy is broadly construed and includes a specific right against

interference with a person's physical integrity and self-determination, as well as a person's personal information.¹

The people listed in section 778 of the Mental Health Act include: the Chief Psychiatrist, the administrator of an authorised mental health service, an authorised doctor, an authorised mental health practitioner, a member of the staff of the MHRT or Mental Health Court registry, another designated person performing a function under the Mental Health Act, an independent patient rights adviser, an inspector or an authorised person. While the section permits the use and disclosure of confidential information, a penalty for unauthorised disclosure under the Act does not apply.

The people listed in section 779 of the Mental Health Act include: a person who is or has been a member of the MHRT, an assisting clinician, a person representing another person at the hearing of a proceeding before the MHRT or a support person accompanying another person at the hearing of a proceeding before the MHRT. The section permits the use and disclosure of confidential information and provides a penalty of 100 penalty units for the unauthorised use or disclosure of confidential information.

The Bill will omit sections 778 and 779 of the Mental Health Act and replace with a new section 778, which clarifies the confidentiality obligations of people who perform functions under the Act and will ensure the confidential information of people subject to the Act is treated and protected consistently. These amendments engage and protect a person's right to privacy as penalties will now apply to all people who inappropriately deal with personal information they have received when performing a function under the Mental Health Act.

Specifically, the Bill proposes to include the Director of Forensic Disability and practitioners engaged by the Mental Health Court or MHRT to conduct examinations of people subject to the Mental Health Act in the relevant provisions. This will strengthen the protections for confidential personal information under the Mental Health Act and improve consistency between the protections provided by the Mental Health Act and the Hospital and Health Boards Act. It will be an offence for all persons performing a function under the Mental Health Act to inappropriately use or disclose confidential information.

The maximum penalty for breaching the confidentiality requirements in the Act will be 100 penalty units, which is consistent with the existing penalty under the Mental Health Act and section 142 of the Hospital and Health Boards Act.

Right to a fair hearing (section 31, Human Rights Act) – Information notices for victims

A person has the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing. There is an exception to the right to a public hearing, whereby a court or tribunal may exclude certain people from a hearing if it is in the public interest or the interests of justice.

The amendments to the Mental Health Act relating to the duration of information notices for victims engages the right to a fair hearing. Under section 318 of the Mental Health Act, a victim of an unlawful act, a close relative of the victim, or another individual who suffered harm, or has a sufficient personal interest may apply for an information notice about a patient subject to a forensic order or treatment support order who committed an unlawful act. Some provisions

¹ *A-MV v Finland* (2018) 66 EHRR 22 [76].

of the Act which make it mandatory for the Chief Psychiatrist to revoke an information notice will be reframed, so that the notice will instead cease to have effect. The intention of this amendment is to provide greater clarity to victims of unlawful acts.

The ending of an information notice by operation of law will not be an appealable decision. Currently, under the Mental Health Act, recipients of information notices are able to appeal a decision to revoke an information notice and must be provided with information on the process of appeal. This causes confusion because, currently, if there is a mandatory revocation of an information notice by the Chief Psychiatrist, there is no possibility for the decision to be overturned on appeal because there is no basis on which the information notice could be reinstated.

The amendments will eliminate this confusion by providing that an information notice comes to an end, rather than requiring it to be revoked, in cases where mandatory revocation is required. On its face, the amendment may appear to limit the right to a fair hearing by reducing the decisions for which recipients of information notices may seek review. However, in practice the amendment has no effect on a recipient's right to a fair hearing as it merely removes reference to instances where there is already no possibility of an appeal resulting in a different decision.

Public Health (Infection Control for Personal Appearance Services) Act 2003

Property rights (section 24, Human Rights Act)

Every person has the right to own property alone or in association with others. A person must not be arbitrarily deprived of their property.

The amendments to the Public Health (Infection Control for Personal Appearance Services) Act engage a person's right to property as a licence granted under the Act may be considered to be a form of property. The Bill amends the Act to protect a person's right to property as it allows for greater flexibility in renewing or restoring a licence for a business regulated by the Act. Therefore, the amendments promote a person's right to property.

Termination of Pregnancy Act 2018 and Criminal Code Act 1899

Right to education (section 36, Human Rights Act) and health services (section 37, Human Rights Act)

Every person has the right to have access, based on their abilities, to further vocational education and training that is equally accessible to all and every person has the right to access health services without discrimination.

The amendments to the Termination of Pregnancy Act and Criminal Code engage the right to education and health services by allowing students to assist in the termination of a pregnancy.

Clinical placement in a health facility is an integral and compulsory component for approved programs of study for professions regulated by the Australian Health Practitioner Regulation Agency. Students on clinical placement are required to undertake supervised practical training activities aligned with their health discipline, expected competency, years of study and course level. During a placement, students could be involved in terminations in a limited capacity or could have a role in caring for women prior to, or after, a termination procedure, which could be interpreted as assisting in a termination procedure.

The exclusion of students on clinical placements from assisting in a termination limits their ability to learn and gain experience in termination procedures. This is likely to impact the overall workforce capability to perform these procedures.

The Bill includes amendments to enable students to assist in the performance of a termination, subject to supervision, and limited to the extent necessary to fulfil the requirements of their clinical placement. The amendments promote a person's right to health services by improving workforce capability to perform terminations.

Freedom of thought, conscience, religion and belief (section 20, Human Rights Act)

Every person has the right to think and believe what they want and to have or adopt a religion, free from external influence. This includes the freedom to demonstrate a religion individually or as part of a group, in public or in private.

The amendments to the Termination of Pregnancy Act promote the right to hold a particular thought, conscience, religion or belief. The Bill provides that any student asked to assist in the termination of a pregnancy who has a conscientious objection to the performance of the termination must disclose to the person asking them to assist of their conscientious objection, so the person can request assistance from another registered student or other health practitioner. Therefore, the amendments to the Termination of Pregnancy Act will protect the rights of a person to hold a thought, conscience, religion or belief.

Transplantation and Anatomy Act 1979

Protection of families and children (section 26, Human Rights Act)

Families are recognised as the fundamental unit of society and are entitled to protection. Every child has the right, without discrimination, to the protection that is in their best interest as a child.

The amendments to the Transplantation and Anatomy Act promote the right to protect families and children by ensuring the Act does not inappropriately capture human milk as tissue and apply restrictions when it is being used legitimately. The amendments will provide clarity for hospitals and milk banks who are providing human milk, which is a recognised treatment for certain conditions to which pre-term infants are vulnerable. It is anticipated the amendments will provide greater access to human milk to support the treatment of infants and as a result, support the families of those infants.

Right to health services (section 37, Human Rights Act)

Every person has the right to access health services without discrimination. A person must not be refused necessary emergency medical treatment.

The amendments to the Transplantation and Anatomy Act engage the right to health services by clarifying that human milk is not considered *tissue* under the Act. Human milk is a recognised treatment for certain conditions to which pre-term infants are vulnerable, such as necrotising enterocolitis, neonatal sepsis, and other negative effects stemming from their prematurity. Where a baby's mother is unable to commence breastfeeding, it is critical that a supply of human milk is available for hospitals when a need is determined. Any delay or hesitancy on the part of hospitals in purchasing human milk could have serious health implications for these infants.

The amendments promote the right to health services by clarifying for hospitals purchasing human milk to treat vulnerable pre-term infants that the prohibition on the trade in human tissue in the Transplantation and Anatomy Act does not apply.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Amendments to the Hospital and Health Boards Act 2011

Privacy and reputation (section 25, Human Rights Act)

(a) the nature of the right

Every person has the right to their privacy, family, home and correspondence and must not be unlawfully or arbitrarily interfered with. The right to privacy is subject to an internal limitation in that it applies only to interferences with privacy that are ‘unlawful’ or ‘arbitrary,’ including interferences that are unreasonable, unnecessary or disproportionate. Further, the right to privacy can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Part 3, division 2 of the Bill will expand access to The Viewer to allied health professionals who are not registered under the National Law. The Viewer is Queensland Health’s read-only web-based application that displays a consolidated view of patients’ clinical and demographic information from a variety of Queensland Health clinical and administrative systems. This impacts on the right to privacy and reputation of patients receiving care, as a greater number of health practitioners will have access to patient records and data.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of expanding access to The Viewer is to achieve better health outcomes for patients. The amendment will facilitate a greater level of patient care, particularly for patients who are transitioning from hospital to receiving treatment in the community from other health practitioners, community services or aged care facilities. This promotes the right to life and right to health services. In fact, as the UN Human Rights Committee has recognised, the right to life is ‘the supreme right’ because life is ‘the prerequisite for the enjoyment of all other human rights.’² Therefore the purpose of the limitation is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

By expanding access to The Viewer to *prescribed health professionals*, a broader range of professionals will have access to patient records. It is intended to prescribe by regulation audiologists, social workers, dietitians, speech pathologists, exercise physiologists, orthoptists, orthotists and prosthetists as *relevant health professionals* who may access The Viewer. This

² UN Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 1 [2].

will improve the level of care that is able to be provided to the patient and remove administrative and procedural burdens in obtaining the relevant records, which can have an adverse effect on patient outcomes.

The limitation on a person's right to privacy will help to achieve the purpose of the amendment as it will enable a patient to receive appropriate and necessary medical treatment from allied health practitioners. This is because allied health professionals will be able to access the person's medical records, x-rays, pathology and other health data and information. By having access to this information, allied health professionals will be able to view the existing health and treatment information for a person to allow them to provide the most appropriate level of care to the person. At present, allied health professionals must manually apply to have the information released to them. This can take a considerable period due to administrative requirements for processing the release of personal health information.

While the proposed amendments expand the number of people who are able to access the data and records contained in The Viewer, the existing safeguards that apply to other health practitioners, such as offences relating to inappropriate access, disclosure and use, will also apply to any allied health professionals who access The Viewer.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The amendment to the Hospital and Health Boards Act will enable allied health professionals who are not registered under the National Law to access The Viewer where the profession is prescribed in regulation. These allied health professionals are not currently captured by the definition of 'registered health practitioner' in the part of the Act relevant to the sharing and disclosure of confidential information. Currently, the definition only applies to health practitioners registered under the National Law, which does not capture some allied health professionals. There are no less restrictive or reasonably available ways to achieve the purpose of the amendment. The purpose can only be achieved with legislative amendment.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

By amending the Hospital and Health Boards Act and making further amendments to the *Hospital and Health Boards Regulation 2012*, some classes of allied health professionals will be prescribed to enable them to access The Viewer. The Hospital and Health Boards Act contains strict safeguards to protect the person's confidential information, including by making it an offence for a practitioner, with access to The Viewer, to inappropriately access information that is not directly related to the provision of care or treatment to the person. The maximum penalty for breaching this requirement is 600 penalty units.

Allowing allied health professionals access to The Viewer will have significant benefits for the health of the persons whose information is accessed. Allied health professionals will have timely access to relevant health information about the previous condition of the person and treatment provided so that they can provide considered and appropriate ongoing care to the person. Allowing allied health professionals to access The Viewer will also reduce the administrative burdens and delays associated with processing individual requests for the release of the confidential information of the person to whom they are providing care.

While the amendments to the Hospital and Health Boards Act impact a person's right to privacy, it is considered this is outweighed by the benefits and promotion of other human rights outlined above. Any impacts on human rights are only to the extent that are reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act.

Amendments to the *Mental Health Act 2016*

Recognition and equality before the law (section 15, Human Rights Act)

(a) the nature of the right

Every person has the right to recognition as a person before the law. Every person is equal before the law and is entitled to the equal protection of the law without discrimination. Every person has the right to equal and effective protection against discrimination.

Clauses 63 and 84 of the Bill amend sections 236 and 509 of the Mental Health Act, which set out when a doctor must apply for MHRT approval to perform ECT on a person and the matters that the MHRT must take into account when deciding an application. The amendments introduce additional safeguards for the approval of the performance of ECT on adults who cannot consent to the treatment and an independent safeguard and oversight mechanism for all persons subject to involuntary orders, including a treatment authority, forensic order or treatment support order.

The amendments to the framework for approving the performance of ECT on adults who cannot consent to its use and, in particular, involuntary patients who have consented, limit a person's right to recognition and equality before the law. Under the Bill, the MHRT must approve the use of ECT on persons subject to an involuntary treatment authority, forensic order or treatment support order, including in circumstances where the person has provided consent to the treatment.

The requirement for an involuntary patient who has capacity to provide consent to ECT to have their ability to provide informed consent reviewed by the MHRT prior to treatment being provided limits a person's immediate exercise of legal capacity, and impacts on the recognition of the person as an autonomous individual before the law. As the framework only applies to persons with mental illness, it limits a person's right to be protected by the law without discrimination.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to enhance protections for persons with mental illness who cannot consent to ECT or may have specific vulnerabilities in relation to consent to its use which warrants additional oversight. The Bill introduces a safeguard independent of a treating medical practitioner as a further protection against a person potentially being provided involuntary medical treatment in inappropriate circumstances. This supports the right to health services without discrimination (section 37, Human Rights Act). It is worth noting that the value underlying the right to access health services in section 37(1) is human dignity. Without health, it is difficult to enjoy other human rights.

The Bill requires a doctor for an authorised mental health service who is treating a person subject to a treatment authority, forensic order or treatment support order to seek the approval of the MHRT before ECT is performed on the person even if the person has provided consent

to the treatment. The purpose of the amendments for people subject to involuntary orders has three aspects:

1. In the case of people subject to treatment authorities, to give a higher level of independent oversight of a person's capacity to consent and ensure that the person's capacity to consent to ECT has not been incorrectly assessed. This is warranted due to the fluctuating nature of capacity, differing clinical opinions about a person's capacity to consent and because of the potential for and incorrect application of the differing capacity tests in the Mental Health Act.
2. In the case of people subject to a forensic order or treatment support order, to ensure that capacity to consent is not incorrectly assessed and that informed consent to the treatment is provided. Given the high level of control over the treatment of people under forensic orders and treatment support orders, they may consent to ECT because they mistakenly believe that they are required to receive the treatment as a condition of their order. In both cases, people under these involuntary orders are uniquely vulnerable and require special protection to ensure that ECT is only performed in appropriate circumstances.
3. The amendments will ensure appropriate medical treatment is not withheld from a person who is deprived of their liberty because they lack the capacity to consent.

Every person deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person (section 30(1), Human Rights Act). The additional protections in the Bill for patients subject to involuntary orders promotes this right.

Overall, the purpose of the limitation is consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation helps achieve its purpose by adjusting the criteria under which the MHRT can approve, or not approve, the use of ECT on a person with mental illness. For a person subject to a treatment authority, forensic order or treatment support order, the MHRT will be required to ensure the person has freely provided informed consent to ECT.

Although patients on forensic orders or treatment support orders may have capacity to make treatment decisions, including decisions about ECT, the high level of monitoring and specific requirements attached to the treatment provided under their orders may make them susceptible to providing consent under the mistaken belief they are required to undergo ECT as a condition of their order. The limitation therefore provides additional protections for a uniquely vulnerable cohort.

For patients on involuntary orders who cannot provide informed consent, the limitation will ensure ECT is only approved where the treatment has clinical merit and evidence supports its effectiveness for the person's particular mental illness; and the therapy is appropriate for the person in the circumstances.

In all the circumstances, the MHRT will be required, to the greatest extent practicable, to take account of a person's views, wishes and preferences about ECT when considering an application for its use. This promotes the right to recognition as a person before the law (section 15(1), Human Rights Act).

Where the MHRT has determined a person subject to an involuntary order has capacity to consent and has not consented to the performance of ECT, it cannot be performed. This recognises the person's autonomy and ensures the person's voice is heard in the proceeding. It also upholds right to recognition as a person before the law (section 15(1), Human Rights Act). As ECT is a treatment for mental illness, it is appropriate that the framework only apply to people with mental illness.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The approach taken is the least restrictive way to achieve the purpose of the Bill and there are no other reasonably available ways to achieve the purpose. The framework for the approval of ECT by the MHRT is set out in the Mental Health Act and the purpose cannot be achieved without making the legislative amendments outlined above. It could be viewed as less restrictive to continue to allow patients subject to involuntary orders to consent to the performance of ECT without MHRT oversight. However, this would not achieve the purpose of ensuring that ECT is only performed on individuals in appropriate circumstances and where consent has been freely and voluntarily given.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The Bill balances the importance of providing appropriate care to people who cannot consent to treatment, or specifically requiring consideration of an adult's capacity to provide informed consent where relevant, with the right to recognition and equality before the law. It is important that people with mental illness are protected by provisions that put the rights of the individual first and that the use of ECT on this cohort with specific vulnerabilities is subject to rigorous oversight.

While some elements of the right to recognition and equality before the law are impacted by the amendment, other human rights are promoted. For example, the Bill supports the right to recognition as a person before the law as it requires the MHRT to have regard to any views, wishes and preferences the person has expressed about ECT to the greatest extent practicable. Also, the enhanced oversight of the use of ECT for persons subject to involuntary orders promotes the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person.

On balance, any limits on the human right are reasonable and justified and are outweighed by the purpose and promotion of other human rights.

Right to privacy and reputation (section 25, Human Rights Act); right to protection from torture and cruel, inhuman or degrading treatment (section 17, Human Rights Act)

(a) the nature of the right

Every person has the right not to have their privacy, family, home and correspondence unlawfully or arbitrarily interfered with (section 25(a), Human Rights Act). The right to privacy

is interpreted as protecting a person's right to self-determination and personal inviolability, including protecting a person's right to make their own decisions about medical treatment.³

Every person has the right to not be treated or punished in a cruel, inhuman or degrading way. Section 17(c) of the Human Rights Act states that a person must not be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.

The Bill amends sections 236 and 509 of the Mental Health Act, which set out when a doctor must seek MHRT approval to perform ECT on a person and the matters that the Tribunal must take into account when considering an application to approve the performance of ECT. The amendments introduce additional safeguards for the rights of people with a mental illness and insert a more rights-based criteria for the approval of ECT.

ECT is a regulated treatment that can be effective for some types of mental illness, including severe depressive illness. While the amendments in the Bill intend to enhance human rights for individuals, the fact that they relate to the framework for approving ECT means they engage human rights in a way that could be viewed as limiting. It is important to thoroughly analyse any human rights impacts in relation to ECT because it is considered an intrusive process that should only be used when necessary.

The ability for the MHRT to approve the use of ECT on a person who is unable to give informed consent takes away the person's fundamental right to refuse that treatment. This limits a person's right to privacy and reputation.⁴

If ECT is approved by the MHRT on a person who is unable to give informed consent, a doctor may carry out treatment on the patient that if not for the approval of the Tribunal might otherwise be assault. This limits the right of a person to protection from torture and cruel, inhuman or degrading treatment.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments is to enhance protections for persons with mental illness who cannot consent to ECT or may be vulnerable in relation to providing informed consent to its use. The purpose is also to ensure ECT is only used on these persons where it is likely to be effective and appropriate for the person's recovery. By introducing additional safeguards for the approval and use of ECT, the amendments uphold the rights of individuals with mental illness and will help to ensure they only receive the most clinically available treatment.

While the approval of the performance of ECT on a person who cannot give informed consent limits the right to privacy and the right to protection from torture and cruel, inhuman or degrading treatment, the purpose of the amendments in the Bill promotes human rights. It promotes the right to life, right to health services, right to privacy and reputation and the right to protection from torture and cruel, inhuman or degrading treatment. This is consistent with a free and democratic society based on human dignity, equality and freedom.

³ *Kracke v Mental Health Review Board (General)* [2009] VCAT 646; *PBU & NJE v Mental Health Tribunal* [2019] VSC 564 [126]-[128].

⁴ *PBU & NJE v Mental Health Tribunal* [2019] VSC 564 [107].

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation helps to achieve the purpose of enhancing protections for persons with mental illness who cannot consent to ECT or may be vulnerable in relation to providing informed consent by amending the criteria and requirements for the approval of ECT to better protect the rights of individuals. Clause 84 of the Bill provides for adults, the MHRT must have regard to whether the adult is able to give informed consent to the therapy. The MHRT may only approve ECT for a person who cannot provide informed consent and for minors where the treatment has clinical merit and evidence supports the effectiveness of the therapy for the person's particular mental illness; and the therapy is appropriate for the person in the circumstances. For a minor, the MHRT must also be satisfied that evidence supports the effectiveness of the therapy for persons of the minor's age. This means the treatment will not be approved and carried out unless it is likely to be effective and appropriate for the individual. Where an adult is subject to particular involuntary orders and has consented to ECT, the MHRT must be satisfied the person has given, freely and voluntarily, informed consent to the treatment.

Additionally, the amendments expand the requirements for the MHRT to have regard to an adult's views, wishes and preferences to the greatest extent practicable when considering an application for ECT. Under the current Mental Health Act, the MHRT must only consider the views, wishes and preferences expressed by an adult about ECT if they are contained in an advance health directive. The Bill requires an adult's views, wishes and preferences to be considered to the greatest extent practicable regardless of how they are expressed. The current Act already requires the MHRT to have regard to a minor's views, wishes and preferences, and those of the minor's parents. The Bill does not change this requirement.

The Bill also replaces the 'best interests' test for adults under the current Act with the more rights-based and individual-focused criteria for approving ECT, outlined above. However, the 'best interests' test will continue to apply to applications for the approval of ECT on minors in accordance with the *United Nations Convention on the Rights of a Child*.⁵

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The amendments are the least restrictive way to achieve the purpose of the Bill. It is likely that the amendments do not limit rights as their purpose is to safeguard the rights of individuals and implement a more rights-based criteria for the approval of ECT by the MHRT. It is not a reasonable alternative to remove the entire regulatory framework for ECT from the Mental Health Act. This is because there is strong evidence that ECT can be effective for some types of mental illness, and will be the most appropriate treatment for some patients. However, if the amendments do restrict rights, the only option to avoid this would be to maintain the status quo and make no change, which would not achieve the purpose. Overall, the Bill applies the least restrictive approach reasonably available.

⁵ *Convention on the Rights of the Child*, GA Res 44/25 (2 September 1990) art 3(1).

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The purpose of the Bill will ensure that, to the greatest extent possible, a person's autonomy continues to be respected while ensuring they are not prevented from receiving appropriate treatment for their mental illness. Where the performance of ECT is approved for a person with mental illness because it has clinical merit, is appropriate in the circumstances and evidence supports its effectiveness, it could save the person's life. This upholds the right to life, which includes an obligation on states to take steps to protect the lives of individuals (section 16, Human Rights Act).⁶ Under international law, this right is an absolute right which must be realised and outweighs the potential impacts on any one individual's rights.⁷

On balance, the purpose of the amendments outweighs any potential limitation that may occur on the rights to privacy and reputation and protection from torture and cruel, inhuman or degrading treatment. Overall, the amendments will improve the Mental Health Act's compatibility with human rights and any limitations are reasonable and demonstrably justifiable under section 13 of the Human Rights Act.

Rights in criminal proceedings (section 32, Human Rights Act)

- (a) the nature of the right

Section 32 of the Human Rights Act sets out the rights of Queenslanders in criminal proceedings. A person who is charged with an offence has a right to minimum guarantees, without discrimination, about how they will be treated and how the criminal proceedings will be conducted. These rights include the guarantee to be tried without unreasonable delay (section 32(a)(c), Human Rights Act).

Clause 54 of the Bill includes an amendment to the Mental Health Act to provide that the Mental Health Court may not make a decision as to a person's mental state at the time an offence was committed if there is a substantial dispute about a fact that is material to the opinion of an expert. Instead, if the Mental Health Court determines the person to be fit for trial, may to return the matter to the criminal jurisdiction so the factual issues can be resolved. This may result in a delay in a person's proceedings being finalised and a limitation on the right to be tried without unreasonable delay.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Although the Mental Health Court is a civil court constituted under the Mental Health Act, it conducts proceedings on reference from criminal courts. The functions of the Mental Health Court include deciding whether an alleged offender was of unsound mind or diminished responsibility when they committed an offence and whether they are fit for trial. The amendment to allow the Mental Health Court to abstain from deciding a person's mental state at the time of an offence, when there is a substantial dispute of fact that is material to the

⁶ *Rabone & Anor v Pennine Care NHS Foundation* [2012] UKSC 2.

⁷ UN Human Rights Committee, *General Comment No. 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) 1 [2].

opinion of witness, may result in the Mental Health Court referring a matter back to the criminal court. This is likely to result in a delay in the criminal trial of a person.

The Mental Health Court's role is to make a finding as to a person's mental state, make orders for a person's treatment or care, or refer the matter back to the criminal courts. Matters are referred to, and decided by, the Mental Health Court on the basis that they are undisputed, although the facts remain untested. It is an established rule that the Mental Health Court does not test the facts of a matter.

The purpose of the amendment to ensure persons charged with a criminal offence are given a fair hearing by requiring a court with appropriate jurisdiction to test issues of fact. The right to a fair hearing reaffirms the right of all individuals to procedural fairness when coming before a court or tribunal and access to justice.⁸ The right to a fair hearing is complementary to the rights in criminal proceedings. As the legislative proposal is designed to protect the right to a fair hearing (section 31, Human Rights Act), it is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The proposed amendment will result in some matters being returned to a criminal jurisdiction, provided a person is fit for trial, in order for the disputed facts to be tested. The reference back to the criminal court is likely to result in a delay of proceedings on the criminal charges. The criminal court will be able to make determinations regarding unsoundness of mind or diminished responsibility. Alternatively, the issues of fact may be resolved and the matter referred back to the Mental Health Court.

Achieving the Bill's purpose of ensuring decisions of fact are made by the appropriate decision-making body may delay the person's trial in the criminal courts. However, this limitation is considered reasonable and justified because decisions about a person's state of mind made by the Mental Health Court on the basis of disputed facts may result in an unsafe decision by the Mental Health Court. This is because the Mental Health Court proceeds on the lower standard of proof, that is, on the balance of probabilities, rather than beyond reasonable doubt, in making determinations. The delay, on one hand, limits human rights. This is an unavoidable consequence, on the other the hand, of promoting human rights and ensuring the appropriate body makes decisions on the matter.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill. As a matter of practice and history, matters are referred to the Mental Health Court on the basis that the facts of the offence are undisputed, although the facts remain untested. It is not expected that this amendment will be frequently relied upon to refer a matter back to the criminal jurisdiction. The amendment is required as a safeguard, however, because disputes of fact can arise at various times throughout the course of proceedings. Although a referral to the Mental Health Court may be made on the basis that the facts are undisputed, this may change during the course of the Mental Health Court proceedings.

⁸ United Nations Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [9].

A less restrictive alternative would be to not make the amendment. However, without the amendment, the Mental Health Court would need to determine unsoundness of mind or diminished responsibility of a person where there may be uncertainty about the facts on which expert witnesses have based their opinions. This would not achieve the purpose of the Bill and may result in an unsafe finding by the Mental Health Court and infringe upon a person's right to a fair hearing and equality before the law (section 15, Human Rights Act).

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The Bill appropriately balances the right to a fair hearing with the right to a criminal trial without unreasonable delay. To ensure a safe decision about a person's state of mind, it is preferable that the findings of fact are made in relation to disputed facts by the criminal court on the basis of the higher standard of proof – beyond reasonable doubt – rather than the Mental Health Court which makes findings on the balance of probabilities. Although referrals back to the criminal courts for this reason may result in a delay in proceedings, this delay is not considered to be unreasonable in the circumstances. Overall, any limitations on human rights are outweighed by the rights that will be enhanced by the amendment.

Conclusion

In my opinion, the Health and Other Legislation Amendment Bill 2021 is compatible with human rights under the Human Rights Act because it limits the identified human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

YVETTE D'ATH MP
MINISTER FOR HEALTH and AMBULANCE SERVICES
and LEADER OF THE HOUSE

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