Parliamentary Committees



Health and Other Legislation Amendment Bill 2021

Report No. 17, 57th Parliament
State Development and Regional Industries Committee
February 2022

State Development and Regional Industries Committee

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Acknowledgements

The committee acknowledges the assistance provided by officials from Queensland Health; Department of State Development, Infrastructure, Local Government and Planning; and Department of Environment and Science.

All web address references are current at the time of publishing.

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Chair's foreword

This report presents a summary of the State Development and Regional Industries Committee's examination of the Health and Other Legislation Amendment Bill 2021.

The committee's task was to consider the policy to be achieved by the legislation, the application of fundamental legislative principles, and its compatibility with human rights. Following its examination, the committee has recommended that the Bill be passed.

The Health and Other Legislation Amendment Bill 2021 amends various acts within the health portfolio and covers a diverse range of policy areas.

Issues addressed include the management of confidential information, access to The Viewer (which displays patient information for health practitioners), and the assistance provided by students for termination of pregnancy procedures. It also covers legislation relating to the use of human milk for sick infants, licensing arrangements for personal appearance services and proposes a series of more substantial amendments to improve the operation of the *Mental Health Act 2016* in Queensland.

Outside of the health portfolio, the Bill proposes amendments to the *Environmental Protection Act 1994* to ensure that ministerial infrastructure designations can be implemented effectively.

The committee was satisfied that all amendments proposed by the Bill were reasonable and fit for purpose.

That said, the committee was of the view that there was opportunity for the government to provide additional information on some of the amendments to ensure that they are well understood by the House, community and those potentially affected. The committee made several recommendations accordingly.

The committee also recommended that Queensland Health investigate enhancing the functionality of The Viewer, to provide patients with greater control over the type of information that can be seen by health providers; and ensure that any changes relating to The Viewer, be complemented by a comprehensive community engagement program.

On behalf of the committee, I thank those who participated in the inquiry for their valuable contributions. I also thank my committee colleagues for their collaborative approach, and parliamentary service staff for their assistance throughout the inquiry.

I commend this report to the House.

Chris Whiting MP

Chair

Recommendations

Recommendation 1 **4**

The committee recommends the Health and Other Legislation Amendment Bill 2021 be passed.

Recommendation 2 (Environmental Protection Act 1994) **9**

The committee recommends that the Minister, during the second reading debate, provide detail on how instances of environmental nuisance relating to a Ministerial infrastructure designation as exempted by the amendment, would be investigated and regulated.

Recommendation 3 (Hospital and Health Boards Act 2011) **14**

The committee recommends that Queensland Health examine enhancing the functionality of The Viewer, in consultation with key stakeholders, so that an individual may have greater control over who can access specific information or categories of information.

Recommendation 4 (Hospital and Health Boards Act 2011) **15**

The committee recommends that Queensland Health, in consultation with relevant providers, deliver a comprehensive and accessible engagement campaign to inform the community about what health information is available on The Viewer, who can access their health information, and what options they have to control it.

Recommendation 5 (Termination of Pregnancy Act 2018) **34**

The committee recommends that for the avoidance of any doubt, the Minister make clear in the second reading speech:

- that it will not be compulsory for students to assist with or observe terminations of pregnancy in order to complete their qualifications.
- information on alternative study options for students who express a conscientious objection to assist in a termination of pregnancy
- what measures will exist to ensure students feel supported in exercising a conscientious objection.

1 Introduction

1.1 Role of the committee

The State Development and Regional Industries Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- State Development, Infrastructure, Local Government and Planning
- Agricultural Industry Development, Fisheries and Rural Communities
- Regional Development, Manufacturing and Water.

The functions of a portfolio committee include the examination of bills in its portfolio area and as referred to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- matters arising under the *Human Rights Act 2019.*[2]

1.2 Inquiry process - Health and Other Legislation Amendment Bill 2021

The Health and Other Legislation Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly on 1 December 2021 by the Minister for Health and Ambulance Services.

The Bill was subsequently referred to the committee on 2 December 2021 by the Committee of the Legislative Assembly for examination and report by 11 February 2022.

On 6 December 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. Fourteen submissions were received. See **Appendix A**.

The committee conducted public briefings with officials from Queensland Health, Department of State Development, Infrastructure, Local Government and Planning (DSDILGP) and the Department of Environment and Science (DES) on 14 December 2021 and 27 January 2022. See **Appendix B** for a list of officials participating in the briefings.

The committee received written responses to issues raised in submissions from Queensland Health.

The committee held a public hearing on 27 January 2022 with representatives from the Office of the Information Commissioner, the Queensland Human Rights Commission and the Queensland Law Society. See **Appendix C** for a list of witnesses.

All inquiry documents, including submissions, correspondence, transcripts and questions on notice are available on the inquiry webpage.[3]

1.3 Policy objectives

The Bill amends various Acts within the health portfolio, as well as legislation within the environment portfolio which affects Ministerial Infrastructure Designations. The policy objectives of the amendments are summarised in the explanatory notes as follows:

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1 *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

2 *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

3 See: https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=172&id=4139

- ***Ambulance Service Act 1991*** – align requirements for managing confidential information with the *Hospital and Health Boards Act 2011*, and remove a requirement for the Queensland Ambulance Service Commissioner to be no older than 65 years of age.
- ***Environmental Protection Act 1994*** - provide that development or use of premises that causes environmental nuisance, is not an offence under the Environmental Protection Act if it has been assessed as and is regulated by a *requirement* of an infrastructure designation by the Planning Minister.
- ***Hospital and Health Boards Act 2011*** - enable more allied health professionals to access The Viewer (Queensland Health's patient information system) and allow certain designated persons and prescribed health professionals to disclose confidential information to a person performing functions under the *Mental Health Act 2016.*
- ***Mental Health Act 2016*** –
    - 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 process for approving electroconvulsive therapy (ECT) 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 practices
    - clarify the requirements for the interstate transfer of patients who have been placed under a forensic or treatment support order
    - promote a stronger rights-based approach for decisions about patient transfers
    - 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 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
    - make other minor amendments to improve the operation of the Mental Health Act.
- ***Public Health (Infection Control for Personal Appearance Services) Act 2003*** - improve the process for renewing licences for higher risk personal appearance services.
- ***Radiation Safety Act 1999*** - allow identity verification requirements for radiation related applications to be set out in departmental policies rather than in regulation.
- ***Termination of Pregnancy Act 2018*** and the ***Criminal Code Act 1899*** - enable students registered under the Health Practitioner Regulation National Law who are undertaking a clinical placement with a health service to assist in a termination of pregnancy.
- ***Transplantation and Anatomy Act 1979*** - 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.

- ***Corrective Services Act 2006 and Water Supply (Safety and Reliability) Act 2008*** - make consequential amendments to remove outdated references to repealed legislation.[4]

The proposed amendments to each Act are discussed in the following chapters.

1.4 Government consultation on the Bill

According to the explanatory notes, the Bill 'has been informed by consultation with stakeholders over a number of years, with the exception of the amendments to the Environmental Protection Act' which were added to the Bill more recently.[5]

The notes advise that targeted consultation (excluding amendments to the Environmental Protection Act) took place in 2021 with representatives from the medical, nursing, pharmaceutical, mental health and Aboriginal and Torres Strait Islander sectors. According to the explanatory notes, 'stakeholders were generally supportive of the proposed amendments'.[6]

This appears generally consistent with organisational submissions received to the inquiry.

Amendments to the Environmental Protection Act

Public consultation was not undertaken for amendments to the *Environmental Protection Act*, 'as it was not anticipated that every infrastructure designation made by the Planning Minister will include requirements that vary from default noise standards under the Environmental Protection Act'.[7]

The explanatory notes state that 'public consultation is required in the making or amending of each infrastructure designation, whereby submissions must be considered and addressed, including making any changes to the infrastructure designation proposal'.[8]

Consultation requirements for Ministerial infrastructure designations are discussed in Chapter 3.

Amendments to the Hospital and Health Boards Act – The Viewer

The notes advise that 'some stakeholders raised concerns about the privacy implications of expanding access to The Viewer to a broader range of allied health professionals which are not registered under National Law'.[9]

This is consistent with submissions received to the inquiry. This is discussed further in Chapter 4.

General feedback from inquiry stakeholders on consultation process

The Queensland Law Society commended Queensland Health and the government for the manner in which engagement and consultation took place in the formation of the Bill, submitting that this had led to a workable piece of legislation.[10]

1.4.1 Committee comment

The committee is satisfied that the government consultation process for the *Health and Other Legislation Amendment Bill 2021* was appropriate.

The committee is of the view that it would have been desirable for consultation to take place with key stakeholders affected by proposed amendments to the Environmental Protection Act. That said, the committee is comfortable that the infrastructure designation process provides opportunity for

4 Explanatory notes, pp 1-2.

5 Explanatory notes, p 29.

6 Explanatory notes, p 29.

7 Explanatory notes, p 30.

8 Explanatory notes, p 30.

9 Explanatory notes, p 29.

10 Queensland Law Society, Public hearing transcript, 27 January 2022, Brisbane, p 6.

stakeholders to have their say on relevant projects, including matters relating to the management of environmental nuisance.

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Health and Other Legislation Amendment Bill 2021 be passed.

2 Amendments to the *Ambulance Service Act 1991*

2.1 What does the Bill propose

The Bill amends the *Ambulance Service Act 1991* (Ambulance Service Act) to ensure the framework for the management of confidential information by the Queensland Ambulance Service (QAS) is robust and clear. The Bill also amends the Ambulance Service Act to remove the requirement for the QAS Commissioner to be no older than 65 years of age.

2.1.1 Aligning disclosure of confidential information requirements for QAS employees

The Queensland Ambulance Service (QAS) was established in 1991 under the Ambulance Service Act. In 2013, QAS was amalgamated with Queensland Health which had the effect of QAS employees being subject to information confidentiality provisions in both the Ambulance Service Act and the *Hospital and Health Boards Act 2016* (Hospital and Health Boards Act), administered by Queensland Health.[11]

There are several differences in the definitions between the two acts for the disclosure of confidential information. Queensland Health advised that this can 'create uncertainty for QAS officers about which act applies, whether they are authorised to disclose information in any presenting situation, and what information they can disclose. This raises a risk of officers unintentionally disclosing confidential information without proper authority'.[12]

To address this issue, the proposed amendments:

- clarify that all QAS staff are bound by the duty of confidentiality, regardless of whether they are employed under the Ambulance Service Act or the *Public Service Act 2008*
- make the duty of confidentiality provisions in the Ambulance Service Act consistent with the Hospital and Health Boards Act
- align reasons when confidential information may be disclosed under the Ambulance Service Act with the Hospital and Health Boards Act.[13]

The Bill also seeks to strengthen safeguards around the disclosure of information by:

- expanding the definition of confidential information to include information that *could* identify a person, even if the person is deceased
- providing that if an officer discloses confidential information, the person who receives the information will not be permitted to disclose it, unless required or permitted by a law
- increasing the maximum penalty for unauthorised disclosure to align with the maximum penalty in the Hospital and Health Boards Act (from 50 to 100 penalty units).[14]

2.1.2 Authorising a designated officer to disclose confidential information

Under the Ambulance Service Act, the Chief Executive (the Director-General of Queensland Health) has the power to authorise a designated officer (e.g. an ambulance officer) to disclose confidential information if it is: necessary to assist in adverting a serious risk to life, health or safety of a person; in the public interest; and made for the purpose of research which has the approval of an appropriate ethics committee.[15] However, under the Ambulance Service Act, this power cannot be delegated. This

[11] Explanatory notes, p 2.

[12] Queensland Health, Correspondence, 10 January 2022, Briefing, p 1.

[13] Explanatory notes, p 14.

[14] Explanatory notes, p 14. One penalty unit is equivalent to $135.85.

[15] Explanatory notes, pp 2-3.

means that the 'QAS Commissioner cannot authorise their own designated officers to disclose confidential information' in the same circumstances.[16]

The Bill amends the Ambulance Service Act to align the powers of the Queensland Ambulance Service Commissioner with the powers of the Director-General of Queensland under the Hospital and Health Boards Act.[17]

According to the explanatory notes, this amendment 'reflects that the Commissioner has oversight and direction of most of QAS's operations and aligns the provisions with the Hospital and Health Boards Act'. The explanatory notes also state that any 'disclosures made in the public interest will be required to be included in the Queensland Health annual report'.[18]

2.1.3 Removing age restriction on the appointment of the Commissioner

Currently, the Ambulance Service Act states that a person is disqualified from being appointed, or from continuing in the role as the Commissioner of QAS where the person is, or attains, the age of 65 years. The Bill removes this age restriction from the Act, 'as age is not considered relevant to the role of the Commissioner'.[19]

2.2 Stakeholder views

Inquiry stakeholders provided limited comment on this part of the Bill. One individual submitted that the increase in penalties for offences relating to unauthorised disclosure of confidential information seemed excessive.[20]

In response, Queensland Health confirmed that the 'increased penalties bring the Ambulance Service Act into line with equivalent penalties in the Hospital and Health Boards Act, which already apply to confidentiality of health information'. Queensland Health also advised 'that the unauthorised disclosure of confidential information is a serious offence and it is considered appropriate to ensure the penalties are consistent, regardless of which Act applies'.[21]

2.3 Committee comment

The committee is satisfied that proposed amendments to the *Ambulance Service Act 1991* are reasonable and fit for purpose.

16 Explanatory notes, p 3.

17 Explanatory notes, p 14.

18 Explanatory notes, p 14.

19 Explanatory notes, p 3.

20 Submission 6, p 1.

21 Queensland Health, Correspondence, 24 January 2022, Response to issues raised in submissions, p 2.

3 Amendments to the *Environmental Protection Act 1994*

3.1 What does the Bill propose

3.1.1 Background

Infrastructure designations can be made by the Planning Minister under the *Planning Act (2016)* and can be used to strategically identify and protect land for essential community infrastructure such as hospitals, schools and sewerage treatment plants. This provides an alternative process to lodging a development application with the relevant local government.[22]

The Planning Minister is responsible for making an infrastructure designation, while the Department coordinates the assessment process. This includes obtaining assessment advice from other state agencies, key stakeholders and technical experts.[23] In making a determination, the Planning Minister can set *requirements* on the Ministerial infrastructure designation about the works for the infrastructure and use of premises that act in a similar way to conditions under a development approval.[24]

The *Environmental Protection Act 1994* (Environmental Protection Act) regulates activities that cause environmental or material harm, including environmental nuisance. Departmental officials explained that *environmental nuisance* includes emissions like dust and noise. The Environmental Protection Act sets default noise standards, including for activities such as building works, but these can be varied by a local government under a local law.[25]

The Environmental Protection Act has an existing mechanism to prescribe matters that are not environmental nuisance because they are better managed in another way. This exemption mechanism (Schedule 1) means that activities exempted are not environmental nuisance for the purposes of the offence provisions for both environmental nuisance and breaching a noise standard. Other exemptions include where there is a development approval under the Planning Act or where the nuisance is regulated under the *Transport Infrastructure Act 1994*.[26]

3.1.2 Providing an exclusion to environmental nuisance limits for infrastructure designations

The Bill proposes to include an exemption to Schedule 1 of the Environmental Protection Act to provide an exclusion to environmental nuisance that applies to and is specifically regulated by a *requirement* of an infrastructure designation by the Planning Minister under the Planning Act (Ministerial infrastructure designations).[27] If passed, the proposed amendment will operate in a similar way to the other exemptions noted above.[28]

3.1.2.1 Infrastructure designation and consultation processes

The process for assessment of Ministerial infrastructure designations is set out in the statutory instrument known as the Minister's Rules and Guidelines.[29]

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22 Explanatory notes, p 3.

23 Queensland Government, Planning, Infrastructure Designations, Infrastructure designations | Planning (statedevelopment.qld.gov.au)

24 Queensland Health, Correspondence, 10 January 2022, Briefing, p 5.

25 Public briefing transcript, 14 December 2021, p 4.

26 Public briefing transcript, 14 December 2021, p 4.

27 Queensland Health, Correspondence, 10 January 2022, Briefing, p 5.

28 Dr Karen Hussey, Deputy Director-General, Department of Environment and Science, Public briefing transcript, 14 December 2021, p 4.

29 Queensland Health, Correspondence, 10 January 2022, Briefing, p 5.

Departmental officials confirmed that the proposed amendment will not change these obligations and that assessment of an infrastructure designation must have regard to all the matters a development application would be assessed against (for example, planning instruments, State Development Assessment Provisions, public consultation submissions).[30]

Talking specifically about the consultation process, Mr Kerry Doss, Department of State Development, Infrastructure, Local Government and Planning advised that applicants are required to carry 'out best practice consultation', prior to and during the application process.[31]

Mr Doss also advised that prior to lodging a proposal, applicants must consult with the community and this information will be provided in the application. Public notification is also required during the assessment process and members of the public may make a submission on the proposal. The Planning Minister is required to take into account matters raised when making a final decision on the designation. It was also confirmed that local government and the landholder are the highest level consultees.[32]

Mr Doss explained that where an applicant sought to have *requirements* which sat outside the Environmental Protection Act (i.e. certain environmental nuisance) the applicant would be required to provide justification as to why that should occur.[33] Mr Doss confirmed that this situation would be by exception that such alternative arrangements would be sought and that it would be emphasised as part of the material that was available for public consultation.[34]

3.1.3 When would an exemption be applied

The committee sought further detail on the circumstances in which such an exemption might be used. Mr Doss, Department of State Development, Infrastructure, Local Government and Planning provided the following example:

> … It makes sense that in certain cases you would be able to step outside the standard requirements of the Environmental Protection Act. As an example, we had a case recently at a hospital in Logan, which is approved under a ministerial infrastructure designation. They needed to carry out works on that site. The only way they could carry them out was to do so overnight, but that meant there would be audible noise outside that 6.30 am to 6.30 pm proposal. In a case such as this, the minister in considering those matters would be able to impose conditions with appropriate controls to allow that sort of activity to continue.[35]

The committee also inquired whether there was a specific project that prompted the proposed amendments. Mr Doss advised that a number of proponents had recently approached the department about noise requirements, particularly during the early stages of the COVID pandemic with changes around building works. Mr Doss advised that in the case of development applications there was a mechanism to deal with suitable requests, however when it came to Ministerial designations, options were limited.[36]

Inquiring about what measures had been used in the absence of the proposed amendment, the State Planner advised workarounds had been identified and in some cases a control called a temporary

30 Queensland Health, Correspondence, 10 January 2022, Briefing, p 5.

31 Mr Kerry Doss, Deputy Director-General, Department of State Development, infrastructure, Local Government and Planning, Public briefing transcript, Brisbane, 14 December 2021, pp 12-14.

32 Public briefing transcript, Brisbane, 14 December 2021, pp 12-14.

33 Public briefing transcript, Brisbane, 14 December 2021, pp 12-14.

34 Public briefing transcript, Brisbane, 14 December 2021, pp 12-14.

35 Public briefing transcript, Brisbane, 14 December 2021, pp 12-14.

36 Public briefing transcript, Brisbane, 14 December 2021, pp 12-14.

place licence had been used. The State Planner explained that the ability to make temporary place licences will cease in April 2022.[37]

3.2 Stakeholder views

The committee called for submissions from relevant stakeholders including from the local government sector and industry representatives. No submissions were received.

3.3 Committee comment

The committee is satisfied that the proposed amendments to the Environmental Protection Act are reasonable and fit for purpose.

In the interest of clarity, the committee recommends that the Minister, during the second reading debate, provide detail on how instances of environmental nuisance relating to a Ministerial infrastructure designation as exempted by the amendment, would be investigated and regulated.

Recommendation 2 (Environmental Protection Act 1994)

The committee recommends that the Minister, during the second reading debate, provide detail on how instances of environmental nuisance relating to a Ministerial infrastructure designation as exempted by the amendment, would be investigated and regulated.

[37] Public briefing transcript, Brisbane, 14 December 2021, pp 12-14.

4 Amendments to the *Hospital and Health Boards Act 2011*

4.1 What does Bill propose

4.1.1 Background

'The Viewer' is Queensland Health's read-only web-based application that displays a range of patients' clinical and demographic information from a variety of Queensland Health systems.[38] It includes, among other things: patient demographics; admission and discharge histories; pathology results and tests ordered; My Health Record; mental health data; operation notes and elective surgery waitlist information; oncology information and Advance Care Planning.[39]

Queensland Health advised that The Viewer enables continuity of care when transferring patients from acute care to community care settings. However, The Viewer is currently only accessible by health practitioners registered under the Health Practitioner Regulation National Law (the National Law), such as doctors, physiotherapists, psychologists, and optometrists. It cannot be accessed by allied health professionals who are not registered health practitioners.[40]

4.1.2 Extending access to The Viewer by allied health professionals

The Bill proposes to expand access to The Viewer to allied health professionals not registered under the National Law. The allied health professionals will be prescribed by regulation and are expected to include audiologists, social workers, dieticians, speech pathologists, orthotists (who specialise in clinical services for splints and braces), prosthetists (who specialise in clinical services for artificial limbs) and orthoptists (who specialise in eye disorders).[41]

These groups are not registered under the National Law but are regulated through other mechanisms. Queensland Health advised that these health professionals routinely work with Queensland Health during the transfer of patient care between the acute and community care settings. They provide community-based clinical services and primary health care, including domiciliary care provided by non-government organisations and private practitioners, and non-hospital rehabilitation provided in community care facilities or in private practices.[42]

Queensland Health advised that it is considered appropriate for allied health practitioners to have access to a patient's complete medical and health history from their public treatment. It is generally not possible to determine in advance which records an allied health professional may need as relevant records depend on the individual patient and their circumstances at the given time.

Allied health professionals provide essential healthcare and support as part of a multidisciplinary team to diverse patients across a multitude of settings. They will be guided by professional, legal and ethical obligations in accessing relevant records, as is the case for the existing cohort of professionals with access to The Viewer. If a patient has privacy concerns, they have the option to opt out as outlined above. [43]

38 Explanatory notes, p 4.

39 Office of the Information Commissioner, Submission 5, p 2.

40 Queensland Health, Correspondence, 10 January 2022, Briefing, p 2.

41 Queensland Health, Correspondence, 10 January 2022, Briefing, p 2.

42 Explanatory notes, p 15.

43 Queensland Health, Correspondence, 24 January 2022, Response to issues raised in submissions, p 2.

Queensland Health provided a number of case studies to demonstrate the benefits of broader access by health professionals:

Case study: Dietician

An elderly woman is admitted to a private palliative care facility following surgery, radiation and chemotherapy for stage four breast cancer. She is finding maintaining her oral food intake challenging and is becoming malnourished. She sees a dietician who works at the facility. The dietitian looks at The Viewer to check prescribed medications and results of pathology investigations to help determine the best way to manage the woman's nutritional requirements.

Case Study: Exercise physiologist

A man has an acquired brain injury associated with tumour removal, and moves into a private rehabilitation service after being discharged from hospital. Soon after, he suffers a fall, fractures his tibia and attends emergency and a fracture clinic. An exercise physiologist working for the rehabilitation service looks at The Viewer to clarify the recent encounters and x-ray results to ensure their interventions aimed at reconditioning are appropriate and safe.

Source: Queensland Health, Correspondence, 10 January 2022, Briefing, pp 2-3.

4.2 Stakeholder views

Several inquiry participants including the Office of the Information Commissioner, the Queensland Human Rights Society, and the Services for Australian Rural and Remote and Regional Health offered comment on this part of the Bill.

4.2.1 Support for amendment

Services for Australian Rural and Remote and Regional Health (SARRRH) was fully supportive of the amendment:

> SARRAH fully supports the intention of the amendments and believes they are consistent with other efforts to enable greater patient-centred health care and service delivery between health professionals, facilitate more integrated multidisciplinary care and improve transitions and continuity of care across and between the multiple settings individuals may receive care. The proposed amendments will remove an impediment to effective team based care and promote the broader objectives of the Bill.[44]

The Exercise & Sports Science Australia also submitted its support:

> ESSA supports the inclusion of a more complete range of health professions in the definition of a *prescribed health professional*. This will facilitate access to The Viewer for health professionals such as Accredited Exercise Physiologists who provide services for patients transferring from acute to community care settings.[45]

4.2.2 Right to privacy and greater control of information

4.2.2.1 Privacy

Queensland's Information Privacy Act recognises the importance of protecting the personal information of individuals. It creates a right for individuals to access and amend their own personal information and provides rules or 'privacy principles' that govern how Queensland government agencies collect, store, use and disclose personal information. The Office of the Information Commissioner (OIC) has regulatory oversight of Queensland Government agencies' compliance with requirements under the IP Act.[46]

[44] Services for Australian Rural and Remote and Regional Health, Submission 5, p 2.

[45] Exercise & Sports Science Australia, Submission 1, p 3.

[46] Office of the Information Commissioner, Submission 4, p 2.

OIC submitted that:

> *the broader sharing of a patient's health information with an expanded range of allied health professionals across the non-government and private sector, raises a number of privacy and data security risks and issues, including increased risk of misuse, loss and unauthorised access. Legislation authorising the use and disclosure of personal information should strike an appropriate balance to ensure any impacts on privacy are reasonable, necessary and proportionate having regard to the relevant policy objective.*[47]

While OIC submitted that it supports the policy intent underpinning the proposed amendments, it considered that the 'amendments represent a significant incursion into the individual's privacy and may not be reasonable, necessary and proportionate to achieving the stated policy objectives of improved health outcomes for patients transitioning from an acute care to the community'. [48]

4.2.3 Auditing, security and safeguards

The OIC submitted that there is a need for greater transparency of the audit process on access to and activity on The Viewer, and frequency and findings of audits. The OIC also submitted that expanded access to information leads to increased data vulnerability, and health services are particularly vulnerable to data breaches:

> *W*hile OIC notes user's access to and activity is recorded in audit files and subject to audits conducted by Queensland Health, it is unclear how the audit will be conducted and how privacy or other breaches, including breaches of professional and legal requirements for accessing The Viewer, will be detected. OIC suggests greater transparency around the frequency of audits and the findings of these audits are made publicly available.[49]

In response, Queensland Health advised that the Bill maintains several safeguards to protect the privacy of patients. 'All access to patient records is recorded. Patient searches can only be undertaken in The Viewer based on a set of unique patient identifiers, ensuring the patient is known to the health professional in a healthcare context, before their information can be accessed'.[50]

Queensland Health also confirmed that 'any unauthorised access or disclosure is an offence with a maximum penalty of 600 penalty units (currently $82,710). Allied health professionals are also subject to legal, professional and ethical obligations that cover confidentiality and privacy'.[51]

Queensland Health advised that the Department conducts monthly audits of access to The Viewer. Potentially inappropriate access is automatically flagged from a list of all access. Flagged users are then personally audited, and where access appears inappropriate, an inspector with powers under the Hospital and Health Boards Act commences an investigation. Consequences of inappropriate access include cautions, termination of access to The Viewer, referral to the Health Ombudsman, legal action and being found guilty of an offence. Audit findings are not published as they contain private and sensitive information of various individuals.[52]

Queensland Health also confirmed that while increased interaction with The Viewer increases susceptibility to data breaches, allied health professionals are not more susceptible than other professionals. All healthcare providers in Australia have professional and legal obligations to protect the security of patient information, under the *Privacy Act 1988* (Cwlth), and Australian Privacy Principles.[53]

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47 Office of the Information Commissioner, Submission 4, p 1.

48 Office of the Information Commissioner, Submission 4, p 6.

49 Office of the Information Commissioner, Submission 3, p 6.

50 Queensland Health, Correspondence, 10 January 2022, Briefing, p 2.

51 Queensland Health, Correspondence, 10 January 2022, Briefing, p 2.

52 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 3.

53 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 3.

4.2.3.1 Greater Patient Control

Several inquiry participants commented on the need for greater patient control of the information on The Viewer.

The OIC submitted that expanding the range of allied health professionals to provide access to more extensive patient information poses a number of implications for a person's privacy and may not accord with contemporary community expectations regarding privacy and the handling of their personal information.[54]

In support of this position the OIC reported findings of the *Australian Community Attitudes to Privacy Survey 2020* which indicated that 87 per cent of people want more control and choice over the collection and use of their personal information, while 84 per cent think it is a misuse of personal information when information is supplied for a specific purpose and used for another.[55]

The OIC submitted that not all health information is reasonable or necessary for certain professionals to view and submitted that an 'opt in' model was preferable over the current 'opt out' model and noted a general desire by consumers for privacy protections and controls:

> The existing process is for Queensland Health patients to 'opt-out' of having their public hospital healthcare information accessible through the Health Provider Portal. Opt-in is a stronger consent model than opt-out and assists in ensuring consent is informed, voluntary, current and specific and the individual has the capacity to give consent. An opt-in model is more likely to meet contemporary community expectations.[56]

The Privacy Commissioner, OIC talked further about this issue at the hearing:

> I understand that a patient can restrict access to certain categories of health professionals. However, the Viewer currently does not have the functionality to allow a patient to restrict access to specific health information or records. Many Queenslanders rely solely on the public health system to provide their health care. They do not have the ability to access private health care all the time. For that reason, all or most of their health records are likely to be held in Viewer. At times, while they want or need the services of allied health professionals to support their care, they may not want their healthcare providers to see all of their medical records, particularly if they are not relevant to the treatment they are receiving.[57]

In response, Queensland Health confirmed that if a patient would prefer that their treating health professional does not have access to their public healthcare information, they have the right to opt out and can do so by calling 13 HEALTH.[58]

Queensland Health also advised that the Viewer's opt out option has been established for several years. Patients can completely opt out of having their information on The Viewer accessible to health professionals outside of Queensland Health, or they can opt out of access by one or more categories of external health professionals.[59]

Any patient who has already opted out of any category of a professional having access will automatically be opted out for all new categories of professional that gain access to The Viewer.[60]

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54 Office of the Information Commissioner, Submission 4, p 3.

55 Office of the Information Commissioner, Submission 4, p 3.

56 Office of the Information Commissioner, Submission 4, p 7.

57 Mr Paxton Booth, Privacy Commissioner, Office of the Information Commissioner, Public hearing transcript, Brisbane, 27 January 2022, p 2.

58 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 2.

59 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 2.

60 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 2.

4.2.3.2 Committee comment

The committee acknowledges stakeholder views on a patients' right to privacy and an expectation to have greater control over their private information. The committee welcomes advice from Queensland Health around the tried and tested safeguards in place to protect a patients' privacy.

However, the committee is of the view that further functionality that would enable a patient to restrict access to certain information may be beneficial and in line with public expectations. The committee recommends that Queensland Health examine enhancing the functionality of The Viewer, in consultation with key stakeholders, so that an individual may have greater control over who can access specific information or categories of information.

Recommendation 3 (Hospital and Health Boards Act 2011)

The committee recommends that Queensland Health examine enhancing the functionality of The Viewer, in consultation with key stakeholders, so that an individual may have greater control over who can access specific information or categories of information.

4.2.4 Consumer and provider awareness

Several inquiry participants discussed the need for a consumer and provider awareness strategy.

The Privacy Commissioner, OIC recommended public awareness campaigns to ensure patients were aware of who may have access to their Queensland Health records:

> A comprehensive community engagement campaign to inform the community about what health information is available on the Viewer, who can access their health information, what options they have to control it and how to find out further information about the Viewer generally.[61]

The OIC also recommended that privacy and security training and resources be developed for health professionals, to ensure they are aware of their obligations:

> While OIC understands Health Practitioners are reminded of the Terms and Conditions of access at each log in, regular privacy and data security awareness training of health professionals obligations when accessing The Viewer minimises the risk of misuse, loss and unauthorised access.[62]

Similarly, the Queensland Human Rights Commission submitted that patients, as far as possible, should be aware of who may have access to their information in The Viewer and the extent to which they are able to control who can access that information.[63]

In response Queensland Health confirmed that should the Bill be passed, it will raise patient awareness about changes to access to The Viewer by developing consumer information resources. Hospital and Health Services will also update the privacy collection notices that are currently provided on forms that patients complete at points of care.[64]

Queensland Health also advised that it will work with Health Consumers Queensland during the implementation of these amendments to ensure consumers are aware of their choice to opt-out.[65] Furthermore, patients will be directed to these resources, if the Bill is passed, to support providers' use of The Viewer and their awareness of security, privacy and confidentiality obligations and that it

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61 Mr Paxton booth, Privacy Commissioner, Office of the Information Commissioner, Public hearing transcript, Brisbane, 27 January 2022, p 2.

62 Office of the Information Commissioner, Submission 4, p 7.

63 Queensland Human Rights Commission, Submission 3, p 7.

64 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 2.

65 Queensland Health, Briefing, p 2.

will put in place a number of training, fact sheets, resources and a regular requirement to agree to Terms and Access of Use.[66]

4.2.4.1 Committee comment

The committee agrees with advice from the Privacy Commissioner that a comprehensive community engagement campaign is important to informing the community about what health information is available on the Viewer, who can access their health information, what options they have to control it.

Recommendation 4 (Hospital and Health Boards Act 2011)

The committee recommends that Queensland Health, in consultation with relevant providers, deliver a comprehensive and accessible engagement campaign to inform the community about what health information is available on The Viewer, who can access their health information, and what options they have to control it.

4.2.5 Legislating privacy

The OIC noted privacy protections legislated in respect of the Australian Government's My Health Record are not all replicated for The Viewer. The QHRC submitted that professionals accessing The Viewer should be captured by definitions that ensure they are covered by the Australian Privacy Principles and the Health Ombudsman's authority.

In response, Queensland Health advised that Section 161C of the Hospital and Health Boards Act provides that a prescribed health practitioner must not access information contained in The Viewer unless the information is necessary for the prescribed health practitioner to facilitate the care or treatment of an individual. A maximum penalty of 600 penalty units applies to a breach of this section. If the Bill is passed, the restrictions will also apply to any allied health professionals prescribed by regulation.[67]

Queensland Health also advised that the Viewer and My Health Record are separate systems, and many practical privacy safeguards are already in place for The Viewer. The Viewer is only accessible after a health professional completes a stringent registration process. It is not possible for professionals to access information through The Viewer if a patient has opted out of The Viewer or nominated a particular profession as unable to access their records. Patient searches can only be undertaken using unique patient identifiers, meaning that professionals can only access patient information if they are clinically linked.[68]

In addition to current health professionals who have access to The Viewer, all allied health professionals who are proposed to be prescribed by regulation if the Bill is passed will be subject to the Australian Privacy Principles and the Health Ombudsman's authority, along with other oversight mechanisms.[69]

66 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 2.

67 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 3.

68 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 3.

69 Queensland Health, Correspondence, Response to issues raised in submissions, 24 January 2022, p 3.

5 Amendments to the *Mental Health Act 2016*

5.1 What does the Bill propose

5.1.1 Background

The *Mental Health Act 2016* (Mental Health Act) has three key objectives:

- to improve and maintain the health and wellbeing of persons who have a mental illness who do not have the capacity to consent to be treated
- to 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
- to protect the community if persons diverted from the criminal justice system may be at risk of harming others.[70]

The recently established Mental Health Select Committee is conducting an inquiry into mental health services to understand the needs and pressures on Queensland's mental health system. It is expected to report by 31 May 2022.[71]

In the interim, the Bill proposes a series of amendments to improve processes for patients and enhance the rights-based approaches to mental health care in Queensland.[72]

Key amendments relate to Mental Health Court matters; the process for approving electroconvulsive therapy (ECT); and the apprehension and transfer of patients. The Bill also proposes amendments which strengthen confidentiality provisions for employees, improves support for victims of unlawful acts, and makes other technical amendments 'to improve the operation of the Mental Health Act'.[73] These amendments are discussed in detail in the explanatory notes, and are summarised below.

5.1.2 General support for amendments

Several inquiry participants outlined their broad support for the amendments.

For example, Queensland Law Society stated:

> QLS commends Queensland Health and the Government for the manner in which they engaged and consulted with stakeholders in the formation of the Bill. This thoughtful process has led to a workable piece of legislation which, as far as is possible, appears to be free from unintended consequences and addresses the substantive policy intent of the desired reforms.[74]

The Royal Australia and New Zealand College of Psychiatrists (RANZCP) also outlined its broad support:

> Overall, the changes are positive, with the objective of achieving a greater balance between safeguarding patient rights and autonomy, employing least restrictive practices and the practical utilisation of the Act.[75]

The Queensland Human Rights Commission also supported the amendments.[76]

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70 https://www.health.qld.gov.au/clinical-practice/guidelines-procedures/clinical-staff/mental-health/act/about#reports

71 Mental Health Select Committee, See: https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=226&id=4143

72 Queensland Health, Public briefing transcript, 14 December 2021, p 3.

73 Queensland Health, Correspondence, 10 January 2022, p 4.

74 Queensland Law Society, Submission 12, p 1.

75 Royal Australian and New Zealand College of Psychiatrists, Submission 13, p 2.

76 Queensland Human Rights Commission, submission 3, p 3

These stakeholders also raised a number of issues relating to the overall mental health framework. While technically outside of the scope of this Bill, the committee has documented the issues, and offered some committee comment, later in this chapter.

5.1.3 Mental Health Court decisions regarding expert opinions and disputes of fact

The Mental Health Court (Court) is an inquisitorial court and does not test the facts of a matter. Its primary role is to make findings about whether a person was of unsound mind or of diminished responsibility when an offence was allegedly committed, make findings about current fitness for trial, and make orders for their treatment or care.[77]

Currently, the Court may determine unsoundness of mind or diminished responsibility even where the facts on which an expert witness, such as a psychiatrist, have based their opinion, are disputed.[78]

The Bill amends the Mental Health Act to prevent the Court from making a decision about whether a person was of unsound mind or of diminished responsibility where there is a substantial dispute about a fact that an expert has relied on in formulating their opinion. The Bill allows the Court to return a matter to the criminal courts if the person is fit for trial. If the matter is returned to the criminal courts, the disputed facts can be tested and determined. The amendment prevents unsafe findings and maintains the specialist court jurisdiction of the Mental Health Court.[79]

Queensland Health advised that the proposed amendments are similar to section 269 of the repealed *Mental Health Act 2000*.[80] The different wording is a drafting decision to align the amendment with provisions in the current Mental Health Act.[81]

The term 'substantial dispute' is not defined in the Bill. Queensland Health confirmed that it will be a matter for the court to provide the case law to guide what the 'substantial' meaning will be. The comparable section 269 provision referred to above may provide a useful reference to guide cases.[82]

5.1.3.1 Committee comment

The committee is satisfied that the amendments that relating to Mental Health Court decisions regarding expert opinions and disputes of fact are reasonable and fit for purpose.

5.1.4 Enhanced compliance of *Electro Convulsive Therapy* with the *Human Rights Act 2019*

Electroconvulsive therapy (ECT) is a regulated, evidence-based treatment that can be effective for some types of mental illness, including severe depressive illness. It involves the application of a minimal electric current to specific areas of a patient's head to produce changes in the brain's electrical activity.[83]

The majority of patients voluntarily consent to the use of ECT. However, some patients are unable to give informed consent such as those on a treatment authority.[84] In these cases, the Mental Health Review Tribunal (MHRT) must approve the use of ECT in accordance with the criteria under the Mental Health Act.[85] Queensland Health advised that this is a small cohort of individuals who are unable to

77 Queensland Health, Correspondence, 10 January 2022, Briefing Paper, p 3.

78 Queensland Health, Correspondence, 10 January 2022, Briefing Paper, p 3.

79 Queensland Health, Public briefing transcript, 14 December 2021, Brisbane, p 3.

80 Queensland Health, Correspondence, 10 January 2022, Briefing Paper, p 3.

81 Explanatory notes, p 5.

82 Queensland Health, Public briefing transcript, 14 December 2022, Brisbane, p 8.

83 Explanatory notes, p 5.

84 Queensland Health, Public briefing transcript, 14 December 2022, p 4.

85 Queensland Health, Correspondence, 10 January 2022, Briefing Paper, p 4.

give informed consent (estimated to be around 30 people over the last couple of years)[86] to which this amendment applies.[87]

Queensland Health advised that while the current process has been assessed as compatible with the *Human Rights Act 2019*, the Bill introduces additional safeguards to promote the rights of people with mental illness, and better supports decision makers to comply with human rights obligations. It does this by inserting new rights-based criteria, requiring specific consideration of whether adults are able to give informed consent and requiring that regard be had to the views, wishes and preferences of adults to the greatest extent practicable.[88]

The Bill also inserts new safeguards for people on treatment authorities, forensic orders or treatment support orders who are consenting to ECT by requiring the MHRT to be satisfied that the person has provided informed consent prior to the person accessing the treatment voluntarily. This is a new requirement and is considered an important independent safeguard for these patients by Queensland Health.[89] Further information on these safeguards is provided in Chapter 12, which discusses human rights matters.

The Bill replaces the 'best interests' test for adults under the current Mental Health Act with the more rights-based 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.[90]

5.1.4.1 'Best' interest' versus 'a rights-based' approach

The Bill replaces the 'best interests' test for adults under the current Act with the more rights-based 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.[91]

The committee canvassed the issue of 'best interests' for people with complex problems. Professor Allan, Queensland Health explained that this was an important issue as under the Human Rights Act practitioners are unable to act in a person's best interest:

> You have hit right at the heart of the debate. … One of things that is important to understand is that under the Human Rights Act we can no longer act in a person's best interest. That is considered to be too paternal. The Human Rights Act instructs us to take the person's interests, as stated there, into account. You can argue with that from a medical point of view, that doctors like that paternalism—and that is part of the argument… We also have to be consistent with the law, so we have had to change that.
>
> This argument has been raised by the AMA, by the college, by other psychiatrists, by people I have worked with. We have all sat around and talked about it. I would probably say that personally I would have thought that a few years ago too—that is, doctors know best, get on with it, let us get it done, the person wants the treatment so let us just do it. The issue that I have realised is that we do need to ensure we are quite meticulous about our attention to human rights, because if we say that it is okay for a doctor to make a decision at one point then we might lose some focus on human rights at another point. One of the main problems that I see in psychiatry is balancing the need for coercive treatment to help people versus the human rights to be free.[92]

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86 Out of a total of around 500 ECT decisions since the Act commenced.

87 Queensland Health, Public briefing transcript, 14 December 2022, p 4.

88 Queensland Health, Correspondence, 10 January 2022, Briefing Paper, p 4.

89 Queensland Health, Correspondence, 10 January 2022, Briefing Paper, p 4.

90 Explanatory notes, p 17.

91 Explanatory notes, p 17.

92 Public briefing transcript, p 6.

5.1.5 Stakeholder views

5.1.5.1 Support for amendment

Several inquiry stakeholders outlined their support for these amendments.

The Public Advocate outlined support for the changes, submitting:

> The MHA currently only requires the MHRT to take into consideration what has been expressed in an adult's advance health directive. The proposed changes recognise that, although an adult may lack the ability to provide informed consent when an application to approve ECT is being made, the adult's views, wishes and preferences should still be taken into consideration. This is in line with other legislation that pertains to people with impaired decision-making ability such as the *Guardianship and Administration Act 2000*, which recognises the right of everyone to express their position and encourages supported rather than substitute decision-making. [93]

The Public Advocate also stated that it was positive to see the concept of 'best interests' being removed from the MHRT's consideration set for ECT approvals:

> The replacement of the 'best interests' test with one that considers the views, wishes and preferences of the adult is illustrative of a more rights-based and individual-focused approach that is in line with a person's human rights.[94]

The Public Advocate welcomed the amendment requiring the MHRT to determine and approve an adult's ability to provide informed consent if they are subject to involuntary treatment:

> This requirement provides further safeguards for people under involuntary treatment orders, who may be in a position, either because of their illness or simply a misunderstanding, where they perceive that they must agree to any treatment proposed under the order.[95]

The RANZCP also outlined support for the broad intention of the amendments:

> The RANZCP Queensland Branch supports an objective consideration of the individual circumstances of each person and agrees that ECT therapy under the Act (that has clinical merit and is evidence based, and likewise is effective and appropriate for the person in the circumstances) must be balanced against respecting the dignity of people with mental illness who lack capacity to consent.[96]

However, the RANZCP submitted that while it recognises that the intention behind this provision is encouraging, it has some reasonable concerns with the proposal. This included: the proposal seeks to call into question the clinical judgement and capacity of authorised health practitioners, to obtain informed consent from patients; and a three tier approach to assessments and cross assessments threatens undue delay for evidence-based ECT treatment under the Act, which may be contrary to the person's best interests.[97]

The RANZCP Queensland Branch acknowledged that requests for voluntary ECT under the Act are rare and that it supports reasonable checks and balances, however 'cautioned that an arduous process of approvals for ECT treatment threatens to unnecessarily delay access to ECT therapy that has clinical merit and is evidence-based, and likewise is effective and appropriate for the person in the circumstances.'[98]

Another issue for the RANZCP Queensland Branch was the requirement for the Mental Health Review Tribunal to take into consideration the 'views, wishes and preferences of the person' prior to

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93 Public Advocate, Submission 2, p 1.

94 Public Advocate, Submission 2, p 1.

95 Public Advocate, Submission 2, p 1.

96 RANZCP, Submission 13, p 4.

97 RANZCP, Submission 13, p 9.

98 RANZCP, Submission 13, p 9.

approving ECT. The RANZCP submitted, some people may be deprived of the capacity to express their views, wishes and preferences, for example in cases of severe catatonia and profound thought disorder in psychosis. While the Mental Health Review Tribunal may be able to consider their historically expressed preferences, for many patients this option would be unavailable. It would be problematic if rigid interpretation of the expectation by the Mental Health Review Tribunal delayed commencement of appropriate treatment.[99]

The RANZCP also cautioned that 'forensic patients and patients on treatment support orders may be more susceptible to consenting to ECT under the mistaken belief that they are required to undergo the treatment as a condition of their order. The RANZCP Queensland Branch supports that the test for capacity in such cases should be the same as for adults who do not have capacity to provide informed consent, as is proposed by the amended Act'.[100]

5.1.5.2 Committee comment

On balance, the committee is satisfied that the amendment is reasonable and fit for purpose.

The committee has noted the issues raised by the Royal Australia and New Zealand College of Psychiatrists. This had not been received when the committee sought responses to issues in submissions from Queensland Health. For completeness the committee requests that Queensland Health provide a response to the issues raised in the RANZCP submission. The committee will publish this response on the committee's inquiry webpage to inform future debate on the Bill.

5.1.6 Improving practices for the apprehension and transfer of patients

The Bill makes a number of amendments relating to the apprehension and transfer of patients absent from a mental health service. Queensland Health advised that these seek to ensure that practices are effective and align with least restrictive practice.[101] The amendments are summarised from the explanatory notes below.

Apprehension of a person who is absent from an interstate mental health service

Currently, a person who is absent from an interstate mental health service can be apprehended in Queensland when a warrant has been issued under a corresponding law in the state in which the interstate service is located.[102] The explanatory notes state that this can be 'problematic as not all corresponding interstate laws require the making of a warrant to authorise the apprehension and transport of a person'. Instead, another relevant legal document may be issued.[103]

The proposed amendment expands the types of interstate legal documents made under corresponding interstate laws that can be relied on for the purposes of apprehending and returning an absent person to an interstate mental health service.[104]

Persons who can apprehend or transport a person who is absent from an interstate service

Currently, only police officers can apprehend or transport a person who is absent from an interstate mental health service while that person is in Queensland. The explanatory notes state that this 'results in instances where police must apprehend or transport a person even when their level of risk does not warrant police involvement'.[105]

99 RANZCP, Submission 13, p 9.

100 RANZCP, Submission 13, pp 8-10.

101 Queensland Health, Correspondence, 10 January 2022, Briefing Paper, p 3.

102 Explanatory notes, p 7.

103 Explanatory notes, p 7.

104 Explanatory notes, p 17.

105 Explanatory notes, p 17.

The Bill expands the categories of authorised persons who may apprehend and/or transport a person to include health practitioners or ambulance officers, which provides greater flexibility to determine which authorised person is the most appropriate to safely transport the person back to the interstate service.[106]

5.1.6.1 Stakeholder views

The RANZCP supported proposed amendments that would see health practitioners specifically named in the amended act as an Authorised Officer:

> Overall however, the RANZCP Queensland Branch supports the proposed amendment as it reflects a step towards less restrictive treatment. Police based transport can be stigmatising and distressing for consumers, and when this mode of transport can be avoided, it should be.[107]

However, the organisation expressed some concern around the expectation that authorised practitioners both 'apprehend' and 'transport' absent persons. The RANZCP advised that any person needing to be an apprehended and/or who does not assent to the transfer is unlikely to be an appropriate person to transport by a health practitioner.[108]

The RANZCP acknowledged that while it does not appear to be the intention of the proposed amendment to inappropriately transfer high-risk transfers, the change may 'create a grey area that will impose a burden on Queensland Health and give rise to potential conflicts with the Queensland Police Service'.[109]

The RACNZP also suggested that the amendment may raise some practice issues including that the Queensland Police Service will more regularly push back on requests to assist with transfer, resulting in administrative burden and escalation within Queensland Health.[110]

Interstate authorised officers seeking to return an absent person from Queensland

Currently, the Mental Health Act does not permit an interstate officer to exercise their powers in Queensland to manage the return of an absent person to an interstate mental health service. As a result, interstate officers who may be best placed to transport the person interstate are unable to.[111]

The Bill amends the Mental Health Act to recognise the powers and functions of interstate officers under corresponding interstate laws.[112]

Interstate transfers of persons subject to forensic orders and treatment support orders

Currently, an application for approval of the transfer by the MHRT of a person subject to a forensic order, treatment support order or its interstate equivalent, can only be made if supported by a written statement from the relevant person confirming that interstate transfer requirements may be satisfied.[113] An application for transfer cannot be made if the other state does not have legislation recognised by Queensland as a corresponding law for the purposes of interstate transfer requirements. This is currently the case for South Australia and Western Australia.[114]

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106 Explanatory notes, pp 17-18.

107 RANZCP, Submission 13, p 6.

108 RANZCP, Submission 13, p 6.

109 RANZCP, Submission 13, p 6.

110 RANZCP, Submission 13, p 6.

111 Explanatory notes, p 8.

112 Explanatory notes, p 18.

113 A relevant person is either the Chief Psychiatrist or Director of Forensic Disability.

114 Explanatory notes, p 8.

To address this issue, the bill amends the Mental Health Act to allow a person to apply for approval by the MHRT of an interstate transfer if appropriate safeguards have been met.[115]

Rights based approach for patient transfers

The Mental Health Act allows for the transfer of particular patients between authorised mental health services in Queensland, the Forensic Disability Service, and interstate authorised mental health services. The MHRT can also review or make transfer decisions in certain circumstances, for example, for an interstate transfer as explained above.[116]

The Mental Health Act requires a decision-maker for any transfer of a person to consider whether the transfer is in the 'best interests' of the person. As discussed earlier in this chapter, the application of a 'best interests' test is a less rights-based approach than other available approaches and may not promote a person's participation in decision-making about their treatment. The Bill proposes to replace the 'best interests' consideration for patient transfers with an approach that better supports the rights of individuals by requiring consideration of whether the transfer is appropriate in a person's circumstances and the person's views, wishes and preferences regarding transfer.[117]

International patient transfer

Currently, people who are subject to a forensic order or treatment support order can apply to the MHRT for approval to transfer to another state or territory in Australia. While such requests are very rare, there is no equivalent provision allowing the MHRT to approve an international transfer.[118] The explanatory notes state that this 'can prohibit a person accessing supports which may be vital to the person's recovery from mental illness or their continued care in relation to an intellectual disability'.[119]

The Bill provides the MHRT with the ability to approve the international transfer of people subject to forensic or treatment support orders, subject to appropriate assurances from the Chief Psychiatrist or Director of Forensic Disability.[120]

5.1.7 Aligning confidentiality provisions in the Mental Health and Hospital and Health Boards Acts

The confidentiality framework established by the Mental Health Act does not provide a consistent approach with the Hospital and Health Boards Act in relation to protecting confidential information and governing when it can be used or disclosed.[121] The explanatory notes state that this 'can cause confusion for persons performing functions under, or administering, the Mental Health Act, particularly Queensland Health employees, who may be subject to both acts'.[122]

The Bill seeks to strengthen and clarify the confidentiality provisions in the Mental Health Act by aligning the confidentiality obligations for all people performing functions under the Act and improves consistency with the Hospital and Health Boards Act. The Bill clarifies that the offence of inappropriately accessing, using or disclosing confidential information acquired under the Act applies to all persons captured by confidentiality provisions in the Mental Health Act.[123]

The Bill also extends the confidentiality obligations to the Director of Forensic Disability and examining practitioners engaged by the Mental Health Court or MHRT. The maximum penalty for breaching the

115 Explanatory notes, p 8.

116 Explanatory notes, p 8.

117 Explanatory notes, p 8.

118 Explanatory notes, p 9.

119 Explanatory notes, p 9.

120 Explanatory notes, p 9.

121 Explanatory notes, p 9.

122 Explanatory notes, p 9.

123 Explanatory notes, p 19.

provision is 100 penalty units, which is consistent with the existing penalty under the Mental Health Act and Hospital and Health Boards Act.[124]

5.1.8 Information and support for victims of unlawful acts

Under the Mental Health Act, a victim of an unlawful act may apply for an information notice about the person who has committed an unlawful act and is subject to a forensic or treatment support order. The provisions relating to these notices require the Chief Psychiatrist to communicate critical information regarding proceedings and decisions about a person's order to victims.[125]

Under the Act, an information notice must be revoked by the Chief Psychiatrist if a patient's order has been revoked and the information notice holder must be advised of appeal rights in relation to the revocation. According to the explanatory notes, this 'results in situations where information notice holders are provided with advice about their appeal options, even when there is no prospect of a successful appeal because a patient's order has been revoked'.[126]

The Bill seeks to provide greater clarity to victims of unlawful acts, and makes amendments to 'reframe the mandatory revocation requirements for information notices to ensure information notice holders are provided with clearer and more transparent information about why a notice has ended'.[127]

5.1.9 Use and disclosure of personal information for the provision of ongoing support to victims

Under the Mental Health Act, a government entity may use or disclose personal information to assist in the initial identification of a person who is, or may be, a victim for the purpose of providing support services. However, this section does not recognise that the use or disclosure of personal information may also be needed to *continue* to ensure that ongoing support can be provided to a victim. (For example, to assist in preparing a victim impact statement, to help prepare for a Mental Health Court hearing, or provide specialised counselling).[128]

The amendment clarifies that employees of the department, a Hospital and Health Service or another government entity may use and disclose personal information for both the initial identification of victims and on an ongoing basis where it is necessary to provide them with ongoing support services.[129]

5.1.10 Changes to annual reporting on information notices given by mental health services

Currently, the Mental Health Act provides that the Chief Psychiatrist's annual report must include statistical data about the number of information notices given by each authorised mental health service in Queensland. However, the making and administration of information notices is exclusively a function of the Chief Psychiatrist, rather than of administrators of authorised mental health services.[130]

The Bill removes the requirement for the Chief Psychiatrist to report on the number of information notices for each authorised mental health service and replaces it with a requirement for the report to include state-wide data about the number of information notices made and administered by the Chief Psychiatrist. [131]

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124 Explanatory notes, p 19.

125 Explanatory notes, p 9.

126 Explanatory notes, p 9.

127 Explanatory notes, p 10.

128 Explanatory notes, p 10.

129 Explanatory notes, p 20.

130 Explanatory notes, p 10.

131 Explanatory notes, p 20.

5.1.11 Protection from civil liability for the Chief Psychiatrist and the Director of Forensic Disability

Currently, the Mental Health Act protects certain officials from civil liability when performing a function under the Act. The Chief Psychiatrist and the Director of Forensic Disability are not included in the list of officials, which means they are required to apply for indemnity on a case-by-case basis in relation to functions performed as part of their roles.

The Bill proposes to extend the protection from civil liability to the Chief Psychiatrist and the Director of Forensic Disability while they are carrying out their duties and functions under the Mental Health Act to ensure they are appropriately protected. The amendment aligns with the *Queensland Government Indemnity Guideline*.[132]

5.1.12 Use of expert reports and reports by the Magistrates Court

Currently, an *expert report* received in evidence by the Mental Health Court, is admissible in a person's criminal trial. The use of such reports is limited in criminal proceedings to issues of unsoundness of mind or fitness for trial under the Criminal Code and sentencing proceedings.

Persons charged with serious offences may elect to have them dealt with summarily in the Magistrates Court and may wish to use evidence that was before the Mental Health Court in those proceedings. However, the Act may not allow the Magistrates Court to use an expert report received in evidence by the Mental Health Court.

The Bill makes it clear, that an expert report received in evidence by the Mental Health Court is admissible and can be used by the Magistrates Court for the purpose of making a decision about whether a person was of unsound mind when they committed an offence, or is unfit for trial.[133]

The same issue applies to *reports* prepared about a person for the purposes of a Magistrates Court. The intention of the provision is to prevent statements made by a person during an assessment related to their mental health or mental capacity from being used against them in subsequent criminal or civil proceedings.[134] However, the explanatory notes state that 'as a result, the Mental Health Court may be unable to inform itself with all relevant available evidence'. It is therefore proposed to amend the Mental Health Act to clarify that statements made by a person to a health practitioner preparing a report to assist a Magistrate Court are also admissible in Mental Health Court proceedings.[135]

5.1.13 Ending an existing treatment authority when a treatment support order is made

Under the Mental Health Act, when a forensic order (mental health) is made, any treatment authority or treatment support order a person is subject to automatically ends. By contrast, the Mental Health Act does not provide a mechanism to end a treatment authority when the Mental Health Court makes a treatment support order for a person. This means a person can be subject to two orders that both provide for involuntary mental health treatment. [136]

The Bill aims to provide clarity in these situations by providing that a treatment authority ends when a treatment support order is made, preventing a person from being unnecessarily subject to two orders that provide for involuntary treatment.[137]

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132 Explanatory notes, p 21.

133 Explanatory notes, p 21.

134 Explanatory notes, p 21.

135 Explanatory notes, p 11.

136 Explanatory notes, p 11.

137 Explanatory notes, p 11.

5.1.14 Increased flexibility for Mental Health Court to amend forensic or treatment support orders

Under the Mental Health Act, the Mental Health Court can amend or revoke an existing forensic order or existing treatment support order when making a new order of the same nature.[138]

When the Mental Health Court makes an order for a person that is of a different type (for example, the Court makes a forensic order for a person on a treatment support order or vice versa), the current provisions in the Act mean that the first order ends and a whole new order needs to be made. According to the explanatory notes 'this can result in the unintended situation where a patient's forensic history from a pre-existing order is not reflected in the new order and, as a consequence, is not necessarily considered in decisions regarding a patient's treatment and care'.[139] It can also result in victim information notice entitlements attached to the pre-existing order being discontinued.[140]

The Bill seeks to provide the Mental Health Court with flexibility to amend an existing order and change the order type (for example, from forensic order to treatment support order or vice versa) when making a new order of a different type for a person who has a pre-existing order in place. The explanatory notes state that 'this provides a mechanism to ensure that relevant unlawful acts are reflected in the person's most recent order, even when the new order is of a different type to the pre-existing order'.[141] It also recognises that a person's treatment and risk management may change over time. Additionally, where appropriate, 'the rights of victims of unlawful acts to receive information will be able to continue'.[142]

5.2 Committee comment

The committee agrees that responsive and robust mental health services are essential. The committee is satisfied that the proposed amendments to the Mental Health Act are reasonable and appropriate.

5.3 Other suggested proposals for reform

The QHRC and QLS submissions, while supporting amendments to the Mental Health Act proposed by the Bill, suggested a number of additional legislative and operational reforms.

Queensland Health advised that these proposals are outside of the scope of the Bill.[143]

Given that a parliamentary inquiry into Mental Health services in Queensland is on foot, the committee documents and provides brief comment on these matters, and intends to write to the Mental Health Committee so that they may be considered further.

5.3.1 Framework for persons who have been found unfit for trial by the Mental Health Court

While the Queensland Human Rights Commission outlined support for amendments proposed by the Bill, it raised 'concerns as to the overall framework where a person is found to be unfit for trial, particularly where there is a substantial dispute about whether the person has committed the offence'.[144]

The Queensland Human Rights Commission explained that if a person is found permanently unfit for trial, criminal proceedings are discontinued. That person ***may*** be placed on a forensic order or treatment support order, if the order is necessary to protect the safety of the community. However, if a person is found temporarily unfit for trial, the proceedings are stayed and that person ***must*** be

138 Explanatory notes, p 11.

139 Explanatory notes, p 11.

140 Explanatory notes, p 11.

141 Explanatory notes, p 12.

142 Explanatory notes, p 12.

143 Queensland Health, Correspondence, 24 January 2022, Response to issues raised in submissions, p 4.

144 Queensland Human Rights Commission, Submission 3, p 4.

placed on a forensic order or treatment support order, unless and until the Mental Health Review Tribunal determines the person is fit for trial or a prescribed period has passed.[145]

This means that a person for whom there is reasonable doubt about whether they committed the offence may find themselves on an order. If the person is found temporarily unfit for trial, they must be placed on an order, whether or not it is necessary to protect the safety of the community.'[146]

The Commission noted that a forensic or treatment support order can present significant limitations to various human rights. Where a person has been found of unsound mind or fit for trial, this may be justified. However, where there is a dispute about whether the person has in fact committed the offence, that justification is eroded. [147]

A person deemed unfit for trial is unable to challenge the evidence and is not offered the opportunity to be found not guilty, unless they become fit for trial, thereby limiting their right to equal protection before the law, the presumption of innocence and the right to a fair hearing. It was submitted that other Australian jurisdictions offer an opportunity to test evidence through special hearings, notwithstanding a finding of unfitness.[148]

The Commission also submitted that where there is a finding of temporary unfitness, an involuntary order must be made, and cannot be revoked. Although it may be argued that such care is necessary and the best opportunity for the person to regain capacity, the situation can continue for up to three years, at which point the criminal proceedings will discontinue but the order will remain. This means that a person can therefore be subject to an involuntary order for an extended period of time, in circumstances where the order was not necessary to protect the community.[149]

In response, Queensland Health advised that it regularly reviews its legislation and considers how the legislation it administers may be improved. 'The issue of special hearings for persons who are unfit for trial is a significant and complex reform and would need to be considered separately and in careful consultation with stakeholders. A framework of this type would also need to consider the implications for Queensland's broader criminal justice system.'[150]

5.3.1.1 Committee comment

The committee acknowledges the issues raised by the Queensland Human Rights Commission and encourages Queensland Health to consider these issues as part of a future review of the legislation.

The committee will also provide the current Mental Health Select Committee with a copy of this report, and evidence relating to these issues so that it may consider the information as part of its inquiry into the opportunities to improve mental health outcomes in Queensland.

5.3.2 Electronic recording of hearings in the Mental Health Review Tribunal

Queensland Law Society strongly recommended the introduction of a system of electronically recording hearings of the Mental Health Tribunal.[151]

In response, Queensland Health acknowledged the potential benefits of electronic recording of Mental Health Review Tribunal hearings and advised that it is actively considering this issue. In the interim however, Queensland Health is satisfied that the current practice of the Tribunal meets the

[145] Queensland Human Rights Commission, Submission 3, p 4.

[146] Queensland Human Rights Commission, Submission 3, p 4.

[147] Queensland Human Rights Commission, Submission 3, p 4.

[148] Queensland Human Rights Commission, Submission 3, p 5.

[149] Queensland Human Rights Commission, Submission 3, p 5.

[150] Queensland Health, Correspondence, 24 January 2022, Response to issues raised in submissions, p 4.

[151] Queensland Law Society, Submission 12, pp 2-3.

requirements of the *Recording of Evidence Act 1962* (Recording of Evidence Act), which requires relevant matters to be recorded, without prescribing the particular method that must be used.[152]

Queensland Health provided a further update at a public hearing in January 2022 advising that the Tribunal wish to make a submission for funding for electronic recording, and are currently considering issues around cost, technology and suitability for the nature of matters heard by the MHC. It is intended to bring the proposal to the Queensland Health legislative working group as a first step when it next meets in March 2022. One of the issues that will have to be considered by the legislative working group relates to responsibilities between government agencies and how any amendments may have wider implications for the Mental Health Court or other tribunals set up under the Recording of Evidence Act.[153]

5.3.2.1 Committee comment

The committee acknowledges the potential benefits of electronic recording of Mental Health Review Tribunal hearings. The committee welcomes advice that a proposal is being actively considered and encourages Queensland Health to progress the proposal through appropriate channels as soon as practicably possible.

The committee will also provide the current Mental Health Select Committee with a copy of this report and evidence relating to this issue so that it can consider the information as part of its inquiry into the opportunities to improve mental health outcomes in Queensland.

5.3.3 Publication and disclosure of Mental Health Court and Review Tribunal Decisions

The Queensland Human Rights Commission and the Queensland Law Society also submitted that current requirements and practices around the publication and disclosure of Mental Health Court and Mental Health Review Tribunals resulted in a number of challenges.

The Commission advised the committee that provisions of the Mental Health Act prohibit the publication of statements of reasons of the Mental Health Review Tribunal, appeals of those decisions to the Mental Health Court and any information that identifies a party to those proceedings unless permission has been given by the court or tribunal.[154]

The Deputy Human Rights Commissioner advised the committee that while the Commission respects the need for confidentiality of court records and the right to privacy for both the patient and any victims, balance against the right to a fair hearing which includes the right for all judgements or decisions made by a court or tribunal in a proceeding to be made publicly available was required. The Deputy Commissioner stated that 'this is an important component of open justice and allows for public scrutiny and awareness raising of the court process'.[155]

Similarly, the Queensland Law Society called for 'decisions to be published as a matter of course so that persons appearing before the tribunal, their treating team, support person or legal representative can fully understand the legal implications of the process which will affect their future treatment and possibly facilitate their release from an order'.[156]

In response Queensland Health advised that the publication of decisions is an operational matter for the Mental Health Court and the Mental Health Review Tribunal. Queensland Health further noted

[152] Queensland Health Correspondence, 24 January 2022, Response to issues raised in submissions, p 4.

[153] Queensland Health, Public briefing transcript, 27 January 2022, p 7.

[154] Deputy Commissioner, Public hearing transcript, Brisbane, 27 January 2022, p 6.

[155] Deputy Commissioner, Public hearing transcript, Brisbane, 27 January 2022, p 6.

[156] Dr Thompson, Queensland Law Society, Public hearing transcript, Brisbane, 27 January 2022, p 6.

that as the QHRC submission notes, the provisions of the Mental Health Act do not limit an individual from disclosing their information in a private capacity about proceedings they have been a party to.[157]

5.3.4 Appeal rights for lawyers who are acting for clients in a best interests capacity

The Queensland Law Society raised the issue of appeals to the Mental Health Court. Specifically, if the client lacks capacity to instruct and their lawyer is acting in a best interests capacity, neither the client nor the lawyer has standing to appeal a decision of the MHRT to the Mental Health Court (unless there is a legal guardian who is seeking to appeal, or a litigation guardian is appointed).[158]

Under the Mental Health Act, certain persons (e.g. the person subject to the order, an interested person acting on behalf of the person, the Chief Psychiatrist) may appeal to the Mental Health Court against a decision of the Tribunal. Legal representatives are not one of these persons under the Act. Queensland Law Society submitted that:

> While a lawyer can be appointed once an appeal is on foot, the difficulty lies in initiating the appeal. This limits the scope to challenge incorrect decisions where a person does not have the capacity to instruct a lawyer. … A useful comparison can be made with child protection matters. …
>
> Accordingly, QLS recommends that schedule 2, column 2 of the MHA be amended to include legal practitioners acting in a best interests capacity.[159]

In response, Queensland Health advised that if a person lacks capacity to instruct their lawyer to appeal to the Mental Health Court, there is existing mechanisms for appointment of independent substitute decision makers to provide instructions on the person's behalf, for example under the *Guardianship and Administration Act 2000.*[160]

5.3.4.1 Committee comment

The committee acknowledges the issue raised by the Queensland Law Society around appeal rights for lawyers who are acting for clients in a best interests capacity.

The committee will provide the current Mental Health Select Committee with evidence relating to this issues so that it can consider the information as part of its inquiry into the opportunities to improve mental health outcomes in Queensland.

[157] Queensland Health, Correspondence, 24 January 2022, Response to issues raised in submissions, p 4.

[158] Queensland Law Society, Submission 12, p 2.

[159] Queensland Law Society, Submission 12, p 2.

[160] Queensland Health, Correspondence, 24 January 2022, Response to issues raised in submissions, p 4.

6 Amendments to the Public Health (Infection Control for Personal *Appearance Services) Act 2003*

6.1 What does the Bill propose

6.1.1 Background

The *Public Health (Infection Control for Personal Appearance Services) Act 2003* regulates personal appearance services industries in Queensland to minimise the risk of infection that may result from the provision of hairdressing, beauty therapy and skin penetration services (collectively referred to as personal appearance services).

The Act sets out a two-tier licensing scheme which is administered and enforced by local government. Businesses providing higher risk services (such as body piercing and tattoo services) require a licence to operate, while non-higher risk businesses (such as hairdressing and waxing) do not.[161]

6.1.2 Providing greater flexibility in the licensing arrangements

The Bill seeks to provide greater flexibility in the licensing arrangements of higher-risk personal appearance services by:

- extending the timeframe within which local governments can receive applications from service providers for the renewal of a licence from one month to 60 days
- allowing a person to apply for the restoration of a licence within 30 days after the date that their existing licence expired
- enabling a licence to continue while an application for restoration of a licence is being considered by the relevant local government.[162]

According to the notes, the 'amendments will reduce the financial and administrative burden on both businesses and local governments and ensure that businesses are not adversely impacted because of delays in the licensing process'.[163]

Queensland Health also confirmed that the infection control requirements for relevant businesses are not changing, and that they will still be required to comply with the same standards.[164]

6.2 Stakeholder views

The committee invited submissions from a number of Local Government and industry representatives. No submissions were received.

6.3 Committee comment

The committee is satisfied that the proposed amendments to the *Public Health (Infection Control for Personal Appearance Services) Act 2003* are reasonable and fit for purpose.

161 Explanatory notes, p 12.

162 Explanatory notes, p 22.

163 Explanatory notes, p 22.

164 Queensland Health, Correspondence, 10 January 2022, Briefing, p 4.

7 Amendments to the *Radiation Safety Act 1999*

7.1 What does Bill propose

7.1.1 Background

Under the *Radiation Safety Act 1999*, a person or corporation which applies for an Act instrument (such as a radiation possession licence) must provide evidence of their identity or, for certain applications where the applicant is a corporation, a nominated person's identity. Currently, the Radiation Safety Regulation 2021 must prescribe the types of identity documents that are accepted as evidence of an applicant's identity.[165]

The Chief Executive must consider the application and either grant or refuse the application.[166]

According to the explanatory notes, this 'creates an administrative and procedural burden because the regulation must be updated every time the department wishes to rely on new and improved forms of identification'.[167]

7.1.2 Removes the requirement for identity documents to be prescribed by the Radiation Safety Regulation

The Bill removes the requirement for proof of identity documents to be prescribed in regulation. Instead, an applicant will be required to prove their, or their nominated person's, identity to the satisfaction of the chief executive. [168]

Queensland Health advised that if the amendments in the Bill are passed and enacted, high standards of identity assessment will remain. An applicant will still be required to prove their identity when they apply. [169]

Instead, it is proposed that the chief executive will publish guidance on the Queensland Health website to advise applicants which documents may be accepted to prove their identity or the identity of a nominated person. This will be informed by the National Identity Proofing Guidelines (NIPGs), which are published by the Australian Government Department of Home Affairs. [170]

The NIPGs set out the minimum identity proofing requirements based on a risk-based approach to identity proofing commensurate to the level of risk associated with the licensed activity.[171] The NIPGs are used by other Queensland agencies as part of their application processes for various licences schemes.[172]

> This amendment aligns with requirements under other licensing schemes in Queensland, such as weapons licensing under the *Weapons Act 1990* and driver licences under the *Transport Operations (Road Use Management – Driver* Licensing*) Regulation 2021* (Driver Licensing Regulation).[173]

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165 Explanatory notes, p 12.

166 Queensland Health, Correspondence, 10 January 2022, Briefing, p 4.

167 Explanatory notes, p 12.

168 Queensland Health, Correspondence, 10 January 2022, Briefing, p 4.

169 Queensland Health, Correspondence, 10 January 2022, Briefing, p 4.

170 Queensland Health, Correspondence, 10 January 2022,Briefing, p 4.

171 Explanatory notes, p 22.

172 Explanatory notes, p 22.

173 Queensland Health, Question on Notice, p 2.

The explanatory notes state that the amendments will 'provide greater flexibility by enabling new forms of identity documents to be relied on to prove a person's identity, without an amendment having to be made to the regulation'.[174]

7.2 Stakeholder views

The committee did not receive any specific comment on this aspect of the Bill.

7.3 Committee comment

The committee is satisfied that proposed amendments to the *Radiation Safety Act 1999* are relevant and appropriate.

[174] Explanatory notes, p 22.

8 Amendments to the *Termination of Pregnancy Act 2018* and the *Criminal Code of Conduct Act 1899*

8.1 What does the Bill propose

8.1.1 Background

The *Termination of Pregnancy Act 2018* (Termination of Pregnancy Act) regulates the termination of pregnancy in Queensland.

The Act prescribes who may perform a termination and who may assist.[175] Registered health practitioners who may assist include: a medical practitioner, a nurse, midwife, pharmacist, Aboriginal and Torres Strait Islander health practitioner or other registered health practitioner prescribed by regulation.[176]

Currently, students are not permitted to assist in the performance of terminations. According to the explanatory notes, this has led to 'implementation challenges for hospitals as students on clinical placements must be excluded from any activities relating to terminations. This in turn limits the ability for students to learn and gain experience in performing terminations'.[177]

8.1.2 Permitting students on a clinical placement to assist in a termination

The Bill proposes to amend the Termination of Pregnancy Act to 'allow students to assist in a termination of pregnancy' when undertaking a clinical placement with a health service.[178]

The Bill provides that in order to lawfully assist with a termination, a student must:

- be registered under the Health Practitioner Regulation National Law
- be under the supervision of a medical practitioner, another prescribed practitioner assisting lawfully, or the student's primary clinical supervisor
- assist only to the extent necessary to complete their program of study for, or clinical training in, the student's health profession.[179]

Queensland Health advised that the amendments will support training and capacity building for students:

> The amendments will ensure students have lawful opportunities to gain knowledge and training in terminations in preparation for their entry to the professional workforce. The Bill will support capacity building and safe access to terminations in regional and rural areas.[180]

8.1.2.1 Nature of assistance to be provided by students

The committee sought advice on nature of assistance expected to be provided by students.

Queensland Health confirmed that 'in practice, a student would observe the process for a termination and would not physically assist in the procedure'.[181]

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175 Explanatory notes, p 13.

176 Section 7, Termination of Pregnancy Act 2018.

177 Explanatory notes, p 13.

178 Explanatory notes, p 2.

179 Explanatory notes, p 13.

180 Queensland Health, Correspondence, 10 January 2022, Briefing, p 4.

181 Queensland Health, Correspondence, 10 January 2022, Briefing, p 4.

Typically there is a 'provider' (the medical physician) and an 'assistant' (scrub nurse/nurse) involved in a surgical termination. A student would be in the theatre observing'.[182]

The Statement of Compatibility provides some further guidance:

> 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**.[183]

8.1.3 Conscientious objections and compulsory participation

Queensland Health advised that 'as is already the case for practitioners authorised to assist with terminations, no student will be required to assist if they have a conscientious objection to doing so. In other words, it will not be compulsory for students to assist with or observe terminations to complete their qualifications.[184]

The explanatory notes state that 'this will give a supervising practitioner the opportunity, in these circumstances, to request assistance from another registered student or other health practitioner'.[185]

Queensland Health advised that it maintains 'comprehensive' resources on termination of pregnancy for health practitioners and health services. Available materials include clinical guidelines, documents in support of the guidelines, information about legal obligations and educational tools.[186]

Queensland Health also advised that further engagement with stakeholders will take place if the Bill passes, and updates will be made to Queensland Health resources on student involvement and their right to conscientiously object.[187]

8.1.3.1 Human rights discussion

The issue of the conscientious objection was raised during the committee's consideration of this part of the Bill. In particular, issues around the level of detail on what might be expected of students, hypothetical coercion to participate, and access to alternative means of study were canvassed.

This is discussed in further detail in Chapter 12 which considers human rights issues.

In Chapter 12 it states that the committee is of the view that the statement of compatibility may have benefited from additional information on possible alternative forms of study for students who choose to express their contentious objection to participating in a termination of pregnancy. The committee also considered that further information on measures that will be in place to ensure students feel supported in their decision to conscientiously object is required.

8.1.4 Consequential amendments to the Criminal Code

Under the Criminal Code it is an offence for an unqualified person to perform a termination of pregnancy, or to assist in a termination. The Bill proposes consequential amendments to the Criminal Code to ensure authorised students are not captured by the Criminal Code offence.[188]

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182 Queensland Health, Answer to question on notice, p 1.

183 Statement of compatibility, p 7.

184 Queensland Health, Briefing, p 4.

185 Explanatory notes, p 13.

186 Queensland Health, Correspondence, 10 January 2022, Briefing, p 4.

187 Queensland Health, Correspondence, 10 January 2022, Briefing, p 5.

188 Explanatory notes, p 23.

8.2 Stakeholder views

The committee invited submissions from stakeholders from the health and other sectors. No submissions were received. A number of individual submitters stated that they did not support any aspect of the Bill, as they had not had sufficient time to consider what it might mean for their local area.[189]

8.3 Committee comment

The committee is satisfied that amendments to the Termination of Pregnancy Act are relevant and fit for purpose.

The committee is however of the view that the level of detail in the explanatory notes and Statement of Compatibility about this part of the Bill could lead one to question the nature of 'assistance' expected of students; and acknowledging that a mechanism for a contentious objection is in place, what might be required in order to complete certain compulsory clinical placements.

The committee was assured by advice from Queensland Health, which confirmed that assistance would be of an 'observatory capacity' and that it will not be compulsory for students to assist with or observe terminations to complete their qualifications. That said, in the interest of clarity and for the avoidance of any doubt, the committee recommends that the Minister make this clear in the second reading speech.

Recommendation 5 (Termination of Pregnancy Act 2018)

The committee recommends that for the avoidance of any doubt, the Minister make clear in the second reading speech:

- that it will not be compulsory for students to assist with or observe terminations of pregnancy in order to complete their qualifications.
- information on alternative study options for students who express a conscientious objection to assist in a termination of pregnancy
- what measures will exist to ensure students feel supported in exercising a conscientious objection.

9 Amendments to the *Transplantation and Anatomy Act 1979*

9.1 What does the Bill propose

9.1.1 Background

The *Transplantation and Anatomy Act 1979* (Transplantation and Anatomy Act) prohibits trading in human tissue to prevent trafficking in human organs and tissue for transplantation.

The current definition of tissue in the Transplantation and Anatomy Act does not clearly exclude human milk. According to the explanatory notes, this has 'led to uncertainty about the application of the Act to the legitimate use of human milk'.[190]

9.1.2 Excluding human milk from the definition of tissue

The Bill excludes human milk from the definition of tissue under the Transplantation and Anatomy Act to clarify that hospitals can use human milk to treat vulnerable infants.

[189] For example, submission nos. 7, 8, 9 and 10.

[190] Explanatory notes, p 13.

Human milk is a recognised treatment for sick and preterm infants in hospital who are provided donated human milk to prevent or treat serious health conditions. Any delay or hesitancy on the part of hospitals in purchasing human milk could have serious health implications for these infants.[191]

Queensland Health explained that the 'change removes any doubt that donated milk can continue to be used as a therapeutic treatment for infants in need without triggering requirements for permits or other restrictions that would occur if the amendment remains in force'.[192]

Queensland Health advised that donated milk does not need to be regulated by the Transplantation and Anatomy Act as it is regulated by the *Food Act 2006* (Food Act).[193]

There are currently two private human milk donor banks operating in Queensland which are subject to licensing provisions under the Food Act. The explanatory notes state that the two milk banks will not be impacted by the amendment.[194]

9.2 Stakeholder views

The committee called for submissions from stakeholders from the health sector, as well as the operating milk banks. The committee did not receive any specific comments on this part of the Bill.

9.3 Committee comment

The committee is satisfied that the proposed amendments to the Transplantation and Anatomy Act are reasonable and fit for purpose.

10 Amendments to the *Corrective Services Act 2006* and *Water Supply (Safety and Reliability) Act 2008*

10.1 What does Bill propose

10.1.1 Consequential amendments to remove references to repealed legislation

The Bill makes consequential amendments to the *Corrective Services Act 2006* and the *Water Supply (Safety and Reliability) Act 2008* to remove any references to the *Health Act 1937* and the *Pest Management Act 2001*, which were repealed when the *Medicines and Poisons Act* commenced in 2021.[195]

10.2 Stakeholder views

Inquiry participants did not offer any views on these amendments.

10.3 Committee comment

The committee is satisfied that the proposed amendments are reasonable and appropriate.

191 Explanatory notes, p 13.

192 Public briefing transcript, Brisbane, 14 December 2021, p 3.

193 Explanatory notes, p 23.

194 Explanatory notes, p 23.

195 Clause 1 of Bill.

11 Compliance with the *Legislative Standards Act 1992*

11.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' 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
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

11.2 Rights and liberties of individuals

11.2.1 Privacy

The right to privacy and the confidentiality of personal information are relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.[196] Amendments to the *Ambulance Service Act 1991 (Ambulance Service Act)* the *Hospital and Health Boards Act 2011 (Hospital and Health Boards Act)* enliven consideration of this right.

Ambulance Service Act

Clauses 16 to 28 of the Bill broaden the circumstances in which Queensland Ambulance Service officers are permitted to disclose confidential information. Clause 31 of the Bill also expands the definition of confidential information to include information with 'the potential to identify a person' in place of the existing definition that refers to information 'that identifies a person'.[197]

The explanatory notes state:

> Any potential breach of fundamental legislative principles is justified because the amendments aim to provide consistency and clarity for individuals employed by the QAS about their obligations. This will help to ensure confidential information is appropriately managed. Achieving this objective, along with expanding the safeguards around confidential information in the Ambulance Service Act, will improve the security of personal information by minimising the potential for inappropriate disclosures.[198]

11.2.1.1 Committee comment

The committee is satisfied that the Bill has sufficient regard to an individual's right to privacy in this respect, given the need for consistency and clarity for QAS employees and the presence of safeguards around the use of confidential information.

Hospital and Health Boards Act

Clauses 48 and 49 of the Bill extend access to 'The Viewer' to 'prescribed health professionals', with the aim of enabling allied health professionals who are not registered health practitioners under the Health Practitioner Regulation National Law (the National Law) to access The Viewer and view patient healthcare information.[199]

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196 Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: The OQPC Notebook*, pp 95, 113-115 available at: https://www.oqpc.qld.gov.au/file/Leg_Info_publications_FLPNotebook.pdf. See also *Legislative Standards Act 1992* (LSA), s 4(2)(a).

197 Explanatory notes, p 24.

198 Explanatory notes, p 24.

199 Explanatory notes, p 4.

The explanatory notes justify this expansion of access to The Viewer and therefore the breach of fundamental legislative principle, stating:

> Providing health professionals in the community care setting with access to The Viewer would provide these health professionals with a greater ability to understand the care that has been provided to a patient and assess their future care requirements, which will improve the health outcomes for patients.[200]

The explanatory notes state 'there are legislative and operational safeguards in place that protect personal information from being inappropriately accessed.'[201] The legislative safeguards are contained within clauses 48 and 49 of the Bill, and take the form of the extension of the application of existing provisions concerning proof of identity and recording of usage to health professionals who are not registered under the National Law.[202]

It is currently an offence for a practitioner to inappropriately access information in The Viewer that is not directly related to the provision of care or treatment to the person, with the maximum penalty for doing so being 600 penalty units.[203] Clauses 34 to 47 of the Bill extend existing provisions concerning the situations in which confidential patient information can be disclosed to health professionals who are not registered under the National Law.

With regards to operational safeguards, the explanatory notes state:

> Queensland Health conducts audits to ensure patient information is being used appropriately and investigates and acts on any inappropriate use of information. Any privacy breaches would also be dealt with under the *Information Privacy Act 2009*.[204]

11.2.1.2 Committee comment

The committee is satisfied that the breach of the right to privacy is justified on account of the safeguards to protect a person's private information and the purpose of the amendment.

11.2.2 Penalties

The proportionality and relevance of penalties is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual. A penalty should be proportionate to the offence:

> In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy. … Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.[205]

Proposed amendments to the Ambulance Service Act and the Mental Health Act enliven consideration of this right.

Ambulance Service Act 1991

Clauses 16 to 19 of the Bill increase the penalties for existing offences relating to unlawful disclosure of information by designated officers from 50 penalty units to 100 penalty units. Clause 13 of the Bill also creates an offence relating to unlawful disclosure of confidential information by informed persons (a person to whom a designated officer has directly or indirectly disclosed confidential information),

200 Explanatory notes, p 25.

201 Explanatory notes, p 26.

202 Explanatory notes, p 26.

203 Hospital and Health Boards Act, s 161C.

204 Explanatory notes, p 26.

205 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

for which the maximum penalty is 50 penalty units. These penalties are in line with the penalties for the same offences under the Hospital and Health Boards Act.[206]

It should be noted that the explanatory notes are silent as to the proportionality and relevance of the above penalties. However, the explanatory notes do state:

> The increase in penalty is justified because unauthorised disclosure of confidential information is equally serious regardless of which Act applies and should therefore be subject to the same maximum penalty.[207]

11.2.2.1Committee comment

The committee is satisfied that the offences and penalties in the Bill are appropriate, proportionate and justified in the circumstances.

Mental Health Act 2016

Clauses 99 and 100 of the Bill extend the application of the offence of unauthorised disclosure of confidential information to the Director of Forensic Disability and examining practitioners for the Mental Health Court and the Mental Health Review Tribunal (MHRT).

The explanatory notes state:

> The extension of the offence is necessary and justified to protect the confidentiality of patient information and to improve the consistency of obligations on all persons providing functions under the Act.[208]

The maximum penalty for unauthorised disclosure is 100 penalty units. This penalty is consistent with similar provisions in the Ambulance Service Act and the Hospital and Health Boards Act.

11.2.2.2Committee comment

The committee is satisfied that the extension of the application of the offence is appropriate in the circumstances.

11.2.3 Delegation of administrative power

Legislation should only allow the delegation of administrative power in appropriate cases and to appropriate persons.[209]

Ambulance Service Act 1991

Clause 27 of the Bill enables the chief executive to delegate, to the Queensland Ambulance Service Commissioner, their authority to allow disclosures of confidential information.

The explanatory notes state:

> Allowing these powers to be delegated to the Queensland Ambulance Service Commissioner is considered justified as it will allow the Commissioner to more effectively perform their role and support confidential information, subject to the requirements of the Ambulance Service Act, to be disclosed by QAS officers in important situations.[210]

11.2.3.1Committee Comment

The committee is satisfied that the delegation of administrative power is appropriate, and that the breach of fundamental legislative principle is justified.

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206 Hospital and Health Boards Act, ss 105-114.

207 Explanatory notes, p 25.

208 Explanatory notes, p 28.

209 LSA, s 4(3)(c). (At page 24, the explanatory notes erroneously classify this delegation as a delegation of legislative power.)

210 Explanatory notes, p 25.

11.2.4 Sufficient definition of administrative power

Whether the legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation makes rights and liberties dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.[211]

Mental Health Act 2016

Clauses 63 and 84 of the Bill set out new requirements for when a doctor must seek the approval of the MHRT to perform electroconvulsive therapy (ECT) on a patient. Those clauses also revise the matters that the MHRT must take into account when considering a doctor's application to approve the performance of ECT on a patient.

As the MHRT acts in an administrative capacity when it decides applications for approval to perform ECT, and given the decisions of the MHRT have the potential to affect a person's rights and liberties, a breach of fundamental legislative principle could arise in this instance.

The explanatory notes refer to safeguards in the Bill:

> The Bill contains safeguards by clearly defining the MHRT's power to approve the performance of ECT and setting out the matters the MHRT must consider and be satisfied of before approving the treatment. These safeguards in the Bill strengthen the current Act as they reflect a more rights-based approach and will comply more closely with the Human Rights Act. They ensure that:
>
> - the voice of the person subject to the application is heard in the proceeding;
> - persons who have capacity to consent and decline the treatment will not be subject to the treatment; and
> - ECT is only approved for people who lack capacity to provide consent, or for people subject to a treatment authority, forensic order or treatment support order who have provided informed consent, where:
>   - *the treatment has clinical merit;*
>   - *evidence supports the effectiveness of the therapy for the person's particular mental illness;*
>   - *evidence of effectiveness in any past application of the therapy is considered; and*
>   - *the therapy is appropriate for the person in the circumstances.*[212]

The explanatory notes then refer to the power for decisions to approve ECT to be appealed, and conclude:

> Decisions to approve ECT can be appealed under the Mental Health Act and subject to appropriate review by the Mental Health Court. The amendments are therefore considered to have sufficient regard to the rights and liberties of individuals.[213]

11.2.4.1 Committee comment

The committee is satisfied that the administrative powers of the MHRT as revised by the Bill are sufficiently defined and subject to appropriate review.

11.2.5 Immunity from proceeding or prosecution

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.[214]

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211 LSA, s 4(3)(a).

212 Explanatory notes, p 27.

213 Explanatory notes, p 27.

214 LSA, s 4(3)(h).

> A person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence … and if liability is removed it is usually shifted to the State.[215]

One of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that, the conferral of immunity is appropriate in certain situations.[216]

Mental Health Act 2016

Clause 102 of the Bill provides the Chief Psychiatrist and the Director of Forensic Disability with protection from civil liability. As observed in the explanatory notes:

> … this protection only extends to 'acts done, or omissions made, honestly and without negligence under the Act. In addition, if immunity is granted, the liability attaches instead to the State so a person's right to take action are not extinguished by the conferral of immunity from proceedings.'[217]

The explanatory notes also note this protection is similar to that provided to the Director of Forensic Disability under provisions such as clause 102 are quite common in legislation. They generally serve to allow public servants, officials, statutory officers and the like, to make decisions and exercise powers and functions without being unduly concerned that they may be held personally liable for acts done or omissions made in the course of carrying out their duties, providing that those actions or omissions are made honestly and without negligence or malice.

Where such clauses shift liability to the State for actions or omissions of officials, aggrieved persons are able to make a claim for loss or damage suffered as a result of actions taken by officials.

11.2.5.1Committee comment

The committee is satisfied that the immunity conferred on the Chief Psychiatrist and the Director of Forensic Disability is adequately justified.

11.3 Institution of Parliament

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

11.3.1 Delegation of legislative power

Whether a Bill has sufficient regard to the institution of Parliament depends on whether the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.[218]

The appropriateness of delegation of additional powers under regulation depends on the subject matter of the legislation.[219]

Amendments to the Hospital and Health Boards Act 2011

Clauses 48 and 49 of the Bill enable allied health professionals, who are not registered health practitioners under the Health Practitioner Regulation National Law, to be prescribed by regulation so they can access The Viewer and view patient healthcare information. As the exact groups of health professionals allowed to access the Viewer will be prescribed by regulation rather than in the Act, this

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215 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.

216 OQPC, *Fundamental Legislative Principles*: *The OQPC Notebook*, p 64; Scrutiny of Legislation Committee, *Alert Digest 1 of 1998*, p 5, para 1.25.

217 Explanatory notes, p 28. See also section 797 of the Mental Health Act.

218 LSA, s 4(4)(a).

219 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 153.

constitutes a delegation of legislative power, and raises the issue of fundamental legislative principle that legislation should have sufficient regard to the institution of Parliament.

The explanatory notes state:

> The departure is considered justified as…it aligns with the existing approach under the Act and the Hospital and Health Boards Regulation 2012 for prescribed health practitioners. Qualification requirements will need to be outlined for the relevant allied health professionals, and it is considered these are more appropriately contained within subordinate legislation than in the Act.[220]

11.3.1.1Conclusion

The committee is satisfied that this delegation of legislative power is justified in the circumstances, given the nature of the legislation and the detailed information that is expected to be addressed in the subordinate legislation.

Radiation Safety Act 1999 (Radiation Safety Act)

Clause 114 removes the requirement for the proof of identity documents required for the purposes of applying for an instrument under the Radiation Safety Act, such as a radiation possession licence, to be prescribed by the Radiation Safety Regulation 2021.

Clause 114 also provides that applicants are to provide proof of identity documents to the chief executive, who then decides whether they can be satisfied that the documents prove the applicants' identities. This change constitutes a potential breach of fundamental legislative principle.

The explanatory notes provide this rationale for the change:

> The requirement to prescribe the relevant identity documents by regulation creates an administrative and procedural burden because the regulation must be updated every time the department wishes to rely on new and improved forms of identification. …
>
> … when new identity verification documents are created, such as a new form of identity issued by the Queensland Government, Commonwealth Government or another interstate jurisdiction, they can be adopted without a requirement to amend the legislative framework. …
>
> The prescription of a list of identity documents by regulation does not impact on a person's suitability to hold an Act instrument as this remains solely at the discretion of the chief executive.[221]

The explanatory notes also state:

> … the amendments to the Radiation Safety Act are considered appropriately justified as they do not impact on the standard of proof required for a person to prove their identity. In practice, the chief executive will continue to manage the application process for Act instruments under the Radiation Safety Act in accordance with their existing delegated authority under the Act.[222]

11.3.1.2Committee comment

The committee is satisfied that this change has sufficient regard to the institution of Parliament, and therefore that any breach of fundamental legislative principle is sufficiently justified, noting the need for efficiency and the fact that the chief executive also managed the application process for instruments under the Radiation Safety Act prior to the introduction of the Bill.

11.3.2 Explanatory notes

Part 4 of the *LSA* 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.

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220 Explanatory notes, p 26.

221 Explanatory notes, pp 28-29.

222 Explanatory notes, p 29.

11.3.2.1Committee comment

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 LSA. The notes provide an adequate level of background information and commentary to facilitate understanding of the Bill's aims and origins.

In the interest of improving understanding of the proposed legislation for Parliament, committees and the public, the committee offers the following feedback. In discussing issues of fundamental legislative principle, the explanatory notes do not discuss the proportionality and relevance of penalties. Furthermore, it may aid in understanding of fundamental legislative principle issues, if the explanatory notes refer to the specific clause numbers relating to each issue.

12 Compliance with the *Human Rights Act 2019*

12.1 Background

A portfolio committee must consider and report to the Legislative Assembly about whether a Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[223]

A Bill is compatible with human rights if it:

(a) does not limit a human right, or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.[224]

The HRA protects fundamental human rights drawn from international human rights law. Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

12.2 Human rights compatibility

The committee has examined the Bill for human rights compatibility. There are a number of amendments in the Bill which are rights-protective (i.e. they protect or enhance human rights). There are also a number of clauses which impose restrictions on human rights but which are justified and aptly dealt with in the statement of compatibility. The committee does not focus on these amendments in this chapter.

The committee brings to the attention of the Legislative Assembly three amendments that could result in restrictions of human rights and which arguably require further information than that set out in the statement of compatibility.

12.2.1 Freedom of thought, conscience, religion and belief - Section 20, HRA

Proposed amendments to the Termination of Pregnancy Act which enable students to assist with a termination of pregnancy enliven the need to consider rights relating to the freedom of thought, conscience, religion and belief, as required by section 20 of the HRA.

Nature of the human right

The UN Human Rights Committee (the UNHRC) has described the right to freedom of thought, conscience and religion as 'far-reaching and profound'.[225] However, this right can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Nature of the purpose of the limitation

The purpose of the amendment is to allow students to obtain practice at undertaking terminations and to ensure that in the future medical professionals have that skill. The amendment therefore furthers the right to education and the right to a health service.

223 HRA, s 39.

224 HRA, s 8.

225 UNHRC, General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) Adopted at the Forty-eighth Session of the UNHRC, on 30 July 1993 CCPR/C/21/Rev.1/Add.4, p 1.

The statement of compatibility acknowledges that clinical placement is a compulsory part of programs for study, and that the Bill enables students to be involved in the performance of a termination:

> **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**.[226] …
>
> 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.[227] **[Emphasis added]**

This is important point to bear in mind when considering the implications of the amendment for the right of students to freely exercise their freedom of conscience, religion or belief.

As discussed in Chapter 8, the committee sought further information on the nature of assistance that a student might be required to undertake and whether a student could ever find themselves compelled to participate in a termination. Advice received from Queensland Health confirmed that a student may be required to 'observe' the procedure and 'as is already the case for practitioners authorised to assist with terminations, no student will be required to assist if they have a conscientious objection to doing so. In other words, it will not be compulsory for students to assist with or observe terminations to complete their qualifications'.[228]

The relationship between the limitation and its purpose

By permitting students to obtain practice in undertaking terminations, a broader range of future medical professionals will have skills in undertaking this health service. This will improve the level of care that is able to be provided to persons seeking a termination.

However, this may limit the ability of some students to exercise their right to freedom of thought, conscience and/or religion. Provision for the exercise of this right is made in clause 12 of the Bill, inserting new section 8A.

Section 8A requires a student who has a conscientious objection to assisting in the termination of a pregnancy to disclose their objection to a relevant person (a medical practitioner performing a termination of a pregnancy, a prescribed practitioner lawfully assisting in the performance of the termination, or the student's primary clinical supervisor) who requests their assistance.

In practice, this section will provide for a student to notify the relevant person that they have a conscientious objection to assisting so that steps can be taken to address the objection and ensure appropriate assistance is available to the relevant person performing the termination of pregnancy.[229]

Proposed Section 8A is an important provision but it could be argued that it does not fully deal with the implications of the limitation on the right as it could be questioned whether a student will feel under coercion to act against their conscience and agree to participate in a termination where they may be required to undertake that as part of a compulsory clinical placement/education.

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226 Statement of compatibility, p 7.

227 Statement of compatibility, p 8.

228 Queensland Health, Briefing, p 4.

229 Explanatory notes, p 35.

There is also no mention of whether alternative means will be made available for students to achieve the relevant skills to replace a practical component of medical training if they choose to exercise a conscientious objection. If there is no alternative means, this could arguably be discriminatory.

The UNHRC has emphasised in a number of cases involving conscientious objection to military service that the right to exercise a conscientious objection must not be impaired by coercion. It has also emphasised the need for states to provide alternative means of undertaking the compulsory military service.[230] In particular, the UNHRC has cautioned against unfair disparities between those engaged in compulsory military service and those undertaking alternative service (such as community service). The UNHRC has opined that States need to ensure accessibility and non-discrimination when providing any alternative to military service.[231]

Although the present situation is different from compulsory military service, the principles espoused by the UNHRC are still relevant to the need for alternatives to participation in a termination.

Whether there are less restrictive and reasonably available ways to achieve the purpose

The purpose cannot feasibly be achieved by less restrictive means. However, it could be reasonable and in line with international guidance for there to be a procedure for objecting students to be able to complete the practical component via another means (for example, by a simulation or participation in another surgical or medical procedure of similar complexity so that the student can be tested and verified to have developed the relevant core clinical skills).

The importance of the purpose of the limitation

The importance of preserving the human right

The balance between the importance of the purpose of the limitation and the importance of preserving the human right

It could be argued that the importance of ensuring that medical students (and therefore ultimately doctors) have experience in undertaking terminations is of vital importance to the right to health services. It is also important, on the other hand, that the religious beliefs and conscience of those students are respected. The Bill achieves a balance between these two rights by permitting students to express a conscientious objection to assisting a termination.

It could be argued that the Bill does not, however, fully cover the issues which have been flagged as important in UNHRC jurisprudence and other guidance – that is, the need to prevent coercion in this context, and the availability of alternative means of undertaking the clinical experience. To be fully compliant with s 20 of the HRA, it could be argued that the provision of alternatives should be made more explicit.

12.2.2 Committee comment

As discussed in Chapter 8, it is the view of the committee that further information on this aspect of the Bill is required in the interest of clarity. The committee reiterates its recommendation, that the Minister make clear in the second reading speech, that assistance in terminations of pregnancy will not be compulsory for students in order to complete their studies.

The committee is also of the view that the statement of compatibility may have benefited from additional information on possible alternatives for students undertaking that particular component of

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230 See eg UNHRC, *Jeong et al. v. Korea*, CCPR/C/101/D/1642–1741/2007, 24 March 2011, para 7.3, *Jong-nam Kim et al. v. Republic of Korea, Communication No. 1786/2008,* Views adopted on 25 October 2012, para 7.3-7.4; UNHRC, Concluding observations on the second periodic report of Turkmenistan, CCPR/C/TKM/CO/2, 20 April 2017, para 40-41.

231 See eg Concluding observations of the UNHRC, Mongolia, CCPR/C/MNG/CO/5, 2 May 2011, para. 23: 'The State party should put in place an alternative to military service, which is accessible to all conscientious objectors and neither punitive nor discriminatory in nature, cost and/or duration'.

their clinical placement. The committee also considers that further information on measures that will be in place to ensure students feel supported in their decision to conscientiously object is required.

The committee also recommends that the Minister address these issues by providing that information in the second reading speech, as discussed in Chapter 8.

12.2.3 Right to privacy and reputation – Section 25, HRA

Amendments to the Hospital and Health Boards Act enliven considerations of the right to privacy and reputation.

Nature of the right

A person has the right not to have their privacy, family, home and correspondence unlawfully or arbitrarily interfered with. The right to privacy includes respect for private and confidential information. This is designed to particularly protect the storage, use and sharing of such information.[232]

The UNHRC has indicated (in its *General Comment on the Right to Privacy*) that a law which authorises interference with privacy must be precise and circumscribed.[233]

The amendments impact 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.

Nature of the purpose of the limitation

As discussed in Chapter 5, it is intended to prescribe by regulation certain allied *relevant health professionals* who may access The Viewer. The purpose of expanding access to the Viewer is to enable health professionals to make decisions based on full patient information. It therefore enhances the right to health services (section 37 HRA) and is consistent with a free and democratic society based on human dignity, equality and freedom.

The relationship between the limitation and its purpose

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.

Whether there are less restrictive and reasonably available ways to achieve the purpose

The Statement of Compatibility states that there are no less restrictive or reasonably available ways to achieve the purpose of the amendment.

The importance of the purpose of the limitation

The importance of preserving the human right

The balance between the importance of the purpose of the limitation and the importance of preserving the human right

The purpose of the limitation enhances individual patient's right to health services.

The right to privacy is also clearly important. However, it is a derogable right and can be limited where necessary and reasonable.[234] It is noted that precedents from other jurisdictions highlight the

[232] UNHRC, General Comment No. 16: Article 17 (1988) para 10 notes that 'Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been process contrary to legal provisions, every person should be able to request rectification or elimination'. See also, General Comment No. 34 (Freedom of opinion and expression) (2011), para 18.

[233] Office of the High Commissioner for Human Rights, General Comment 16, 8 April 1988, para 4.

[234] Define.

importance of the right to privacy, but also that limitations on that right which are specified and proportionate are permitted.[235]

As stated in the explanatory notes, there are legislative and operational safeguards in place that protect personal information from being inappropriately accessed:

> For example, each person is required to prove their identity to obtain system access to The Viewer and a person must provide their credentials on each log in to The Viewer. Every user's access to and activity on The Viewer is recorded in audit files, allowing for regular usage checks by Queensland Health. Currently, health practitioners can only access The Viewer through a read-only secure access portal known as the Health Provider Portal. Health practitioners must go through a stringent registration process to register for the Health Provider Portal. This process will be maintained for the additional allied health professionals under the Bill. This will include confirmation of personal identity information, qualifications, and professional registrations. Patient searches can only be undertaken in The Viewer based on a set of unique patient identifiers, ensuring the patient is known to the health practitioner in a healthcare context, before their information can be accessed.[236]

12.2.3.1Committee comment

The committee is satisfied that amendments to the *Hospital and Health Boards Act 2011* impacting on a person's right to privacy are only to the extent that are reasonable and demonstrably justifiable in accordance with section 13 of the HRA.

12.2.4 Medical treatment without consent – HRA section 17

Clauses 83 and 84 of the Bill which relate to amendments to the Mental Health Act require discussion around the rights relating to medical treatment.

Section 17 of the HRA states a person must not be (a) subjected to torture; or (b) treated or punished in a cruel, inhuman or degrading way; or (c) subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.

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.

Nature of the limitation

The statement of compatibility considers amendments to the Mental Health Act in some detail. That said, and as acknowledged in the statement of compatibility, it prudent to consider any human rights impacts in relation to ECT because it is considered an intrusive process.

The UNHRC has also set out helpful guidance on this issue. It has considered whether the treatment is for a justified medical purpose and with independent review:

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235 For instance, there are a number of cases where the ACT Supreme Court has considered the right to privacy. These include: R v Wayne Michael Connors [2012] ACTSC 80 (28 May 2012) where Mr Connors alleged that the requirement to submit to urinalysis was a breach of his right to privacy under section 12 of the Human Rights Act 2004 (ACT). Here the ACT Supreme Court held that the limitation that the condition imposes on the right to privacy under the Human Rights Act 2004 (ACT) is reasonable given its purpose. Specifically, the bail condition mandating urinalysis was considered reasonable given its purpose was to facilitate compliance with the law and with the primary condition of bail (abstinence from the consumption of illicit drugs). The primary condition was clearly related to criminogenic risk, and thus reasonable to impose in a free and democratic society. The question was whether the requirement to submit to urinalysis was justified in order to give effect to the primary condition. However, here the court did order that, to avoid abuse, the condition should be amended to include "if so directed in the course of supervision by an officer so authorized by the Director-General."

236 Explanatory notes, p 26.

- The UNHRC has stated that, under article 3 of the ICCPR, the administration of anti-psychotic medication to a person without their consent is not inhuman or degrading treatment if done for a justified medical purpose.[237]
- The UNHRC has held that non-consensual psychiatric treatment may only be applied, if at all, in exceptional cases as a measure of last resort where absolutely necessary for the benefit of the person concerned, provided that he or she is unable to give consent, and for the shortest possible time without any long-term impact and under independent review.[238]

The same right as set out in Section 17 HRA is protected in the Victorian *Charter of Rights and Responsibilities Act 2006* (the Charter). In the Victorian Civil and Administrative Appeal's Tribunal decision in *Kracke*, the following remarks were made about the general nature of this right:

> It is an obvious interference with a person's dignity and integrity to give them medical treatment without their consent.[239] …
>
> Forcing a person of full mental capacity to have unwanted medical treatment is a serious affront to their personal dignity and autonomy in itself. The fact the treatment may be medically warranted is not at this stage the point. Remember, we are dealing here with people who, though mentally ill, still have full legal capacity or are presumed to have that capacity. The right to refuse unwanted treatment respects the person's freedom to choose what should happen to them, which is an aspect of their individual personality, dignity and autonomy.[240]…
>
> The purpose of this right is to protect people from medical or scientific experimentation or treatment without their full, free and informed consent. It is directed at such experimentation or treatment of any kind, even that which is beneficial to the individual. The right expresses the fundamental value of the personal dignity and integrity of the individual and the physical and psychological inviolability of their person in this specific context. It also expresses the fundamental value of the autonomy of the individual, the authority of people to make decisions in matters that affect themselves and the importance of such decisions being full, free and informed.[241]

Ultimately, Bell J held that the limitations on Mr Kracke's human rights imposed by the operation of the provisions of the Mental Health Act for making, maintaining and reviewing involuntary and community treatment orders were made under law and reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Therefore the provisions satisfied the general limitations provision in s 7(2) of the Charter. Although Bell J found there was no breach in relation to the consent issue as such, his comments can provide a useful context in considering this right under the HRA.[242]

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237 *Brough v Australia*, Communication no 1184/2003, CCPR, 86th session, UN Doc CCPR/C/86/D/1184/2003 (2006).

238 UNHRC, Concluding observations on the fourth periodic report of the United States of America, USA CCPR/C/USA/CO/4 (2014) para 18. See also UNHRC, Concluding observations on the seventh periodic report of Norway, CCPR/C/NOR/CO/7, para 23.

239 *Kracke v Mental Health Review Board* [2009] VCAT 646 (21 May 2009) [548] (Bell J).

240 *Kracke v Mental Health Review Board* [2009] VCAT 646 (21 May 2009) [569] (Bell J).

241 *Kracke v Mental Health Review Board* [2009] VCAT 646 (21 May 2009) [576] –[577].

242 Justice Bell held that the Board had breached Mr Kracke's human right to a fair hearing. The Mental Health Act (Vic) establishes a regime for 'involuntary treatment orders' ('ITOs') and 'community treatment orders' ('CTOs'), and prescribes time limits within which such orders (which are made by an authorised psychiatrist) 'must' be reviewed by the Board. ITOs must be reviewed within 12 months. CTOs must be reviewed within 8 weeks. In Mr Kracke's case, the ITO was not reviewed for over two years and the CTO was not reviewed for over one year. Bell J held that the Board had breached the right to a fair hearing by failing to conduct the reviews of his involuntary and community treatment orders within a reasonable time.

Nature of the purpose of the limitation

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 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.

The relationship between the limitation and its purpose

Clause 84 of the Bill provides that, 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 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.

Whether there are less restrictive and reasonably available ways to achieve the purpose

One could argue that a less restrictive way to achieve the health protective purpose of the amendment would be to simply prohibit the use of ECT. The statement of compatibility states that it is not a reasonable alternative to remove the entire regulatory framework for ECT from the Mental Health Act on the basis that 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.

The importance of the purpose of the limitation

The importance of preserving the human right

The balance between the importance of the purpose of the limitation and the importance of preserving the human right

Where the performance of ECT is approved for a person with mental illness on the basis that it has clinical merit, is appropriate in the circumstances and evidence supports its effectiveness, it enhances the right to health services.

12.2.4.1 Committee comment

On balance, it is the view of the committee that the purpose of the amendments outweighs any potential limitation that may occur relating to the right to humane treatment and/or consensual medical treatment. There are significant protections and review mechanisms provided such that, overall, any limitations are reasonable and demonstrably justifiable under section 13 of the HRA.

12.3 *Statement of Compatibility*

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights. A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA.

12.3.1.1 Committee comment

It is the view of the committee that the statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights for all clauses apart from that relating to amendments to the Termination of Pregnancy Act.

However, it is the view of the committee that further detail on amendments relating to the Termination of Pregnancy Act would have benefited from more information, in the interest of clarity. The committee has recommended that the Minister provide this detail in the second reading speech.

Appendix A – Submitters

Sub #	Submitter
001	Exercise & Sports Science Australia
002	Public Advocate
003	Queensland Human Rights Commission
004	Office of the Information Commissioner
005	Services for Australian Rural and Remote Allied Health
006	Shona Kenrick
007	Confidential
008	Confidential
009	Confidential
010	Confidential
011	Marsha McGuire
012	Queensland Law Society
013	The Royal Australian & New Zealand College of Psychiatrists

Appendix B – Officials at public departmental briefing

14 December 2021

Queensland Health

- Associate Professor John Allan, Executive Director, Mental Health, Alcohol and Other Drugs Branch
- Ms Bobbie Clugston, Legislative Projects, Mental Health Alcohol and Other Drugs Branch
- Mr David Harmer, Senior Director, Social Policy and Legislation Branch
- Mr James Liddy, Director, Legislative Policy Unit

Department of Environment and Science

- Dr Karen Hussey, Deputy Director-General, Environmental Policy and Programs
- Ms Kate Watkins, Manager, Environmental Policy and Planning Branch, Environmental Policy and Programs

State Development, Infrastructure, Local Government and Planning

- Mr Jesse Chadwick, Director, Policy and Statutory Planning, Department of State Development, Infrastructure, Local Government and Planning
- Mr Kerry Doss, Deputy Director-General

27 January 2022

Queensland Health

- Associate Professor John Allan, Executive Director, Mental Health, Alcohol and Other Drugs Branch
- Ms Bobbie Clugston, Legislative Projects, Mental Health Alcohol and Other Drugs Branch
- Ms Liza-Jane McBride, Chief Allied Health Officer, Allied Health Professions Office of Queensland
- Mr James Liddy, Director, Legislative Policy Unit, Social Policy and Legislation Branch

Appendix C – Witnesses at public hearing

Office of the Information Commissioner (via teleconference)

- Mr Paxton Booth, Privacy Commissioner

Queensland Law Society

- Dr Emma Phillips, Deputy Chair, Human Rights and Public Law Committee
- Dr Brooke Thompson, Policy Solicitor
- Ms Karen Williams, Deputy Chair, Health and Disability Law Committee

Human Rights Commission (via teleconference)

- Ms Neroli Holmes, Deputy Commissioner
- Ms Rebekah Leong, Principal Lawyer