

Health and Other Legislation Amendment Bill (No. 2) 2023

Statement of Compatibility

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

In accordance with section 38 of the *Human Rights Act 2019*, I, Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women make this statement of compatibility with respect to the Health and Other Legislation Amendment Bill (No. 2) 2023.

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

Overview of the Bill

The Health and Other Legislation Amendment Bill (No. 2) 2023 (Bill) will make amendments that support access to healthcare and improve patient safety and quality improvement in public sector health services. The amendments will also enhance the operation of health legislation and enable policies and practices that advance the health of Queenslanders.

The Bill amends:

- the *Hospital and Health Boards Act 2011* to:
 - clarify that, for the purposes of nurse- and midwife-to-patient ratios, a newborn baby should be counted as a patient when they are staying in a room on a maternity ward with their birthing parent;
 - require a Quality Assurance Committee (QAC) to disclose information about a health professional to their chief executive where the QAC reasonably believes the health professional's health, conduct or performance poses a serious risk of harm to a person;
 - clarify that the chief executive of Queensland Health may, after considering a report from a clinical review or health service investigation conducted in a Hospital and Health Service (HHS), take the action the chief executive considers appropriate in relation to the matters identified in the report;
 - ensure key findings, recommendations and lessons learnt from root cause analyses can be shared with relevant staff across Queensland Health; and
- the *Termination of Pregnancy Act 2018* and Criminal Code to:
 - allow additional health practitioners to perform early medical terminations of pregnancy through the use of termination drugs;
 - make consequential amendments to the offence provision set out in the Criminal Code to align with the above change;
 - provide for more inclusive language by replacing references to 'woman' with 'person' in termination of pregnancy provisions; and
- the *Public Health Act 2005* to exempt medical practitioners from duplicate reporting of dust lung diseases to the Queensland Notifiable Dust Lung Disease Register where there has been notification to the National Occupational Respiratory Disease Registry; and

- the *Mental Health Act 2016* to clarify how Mental Health Court expert reports and transcripts may be released and used.

Human Rights Issues

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

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

- right to recognition and equality before the law (section 15)
- right to life (section 16)
- right to freedom of thought, conscience, religion and belief (section 20)
- right to privacy and reputation (section 25)
- right to a fair hearing (section 31)
- right to health services (section 37)
- rights in criminal proceedings (section 32).

For the reasons outlined in the '*Human rights promoted by the Bill*' section, I am of the view that the Bill actively supports the following human rights.

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

Human rights promoted by the Bill

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

Right to health services (section 37, Human Rights Act), right to freedom of thought, conscience, religion and belief (section 20, Human Rights Act) and right to recognition and equality before the law (section 15, Human Rights Act).

The Bill promotes the right to health services, in particular access to termination of pregnancy services, by enabling additional registered health practitioners to perform early medical terminations of pregnancy using a termination drug. By expanding the range of health practitioners able to perform early medical terminations, the Bill will allow pregnant people living in regional, rural and remote areas to have increased access to reproductive healthcare services without facing excessive barriers of cost or distance.

The Bill will allow for the performance of early medical terminations by health practitioners registered in the midwifery and nursing health professions, to the extent they are authorised to do so under the *Medicines and Poisons Act 2019*. It will also allow a regulation to prescribe additional registered health practitioners to perform medical terminations in the future, for example, practitioners registered in the Aboriginal and Torres Strait Islander health profession. Permitting additional health practitioners to be prescribed in regulation will allow Queensland Health to be responsive to community needs for access to reproductive healthcare over time.

By expanding the range of health practitioners permitted to perform early medical terminations, the Bill also promotes the right to freedom of thought, conscience, religion and belief. The Bill will advance autonomy and choice for pregnant people and further improve the wellbeing and dignity of persons accessing reproductive healthcare. The Bill also applies the existing

‘conscientious objections’ provisions in section 8 of the Termination of Pregnancy Act to the new practitioners authorised to perform early medical terminations, and to those health practitioners who may assist an early medical termination of pregnancy. This recognises that these health practitioners have, and may exercise, the right to freedom of thought, conscience, religion and belief.

The Bill also includes amendments to enable prescribed students to assist in the performance of an early medical termination performed by registered health practitioners, 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.

Every person has the right to recognition as a person before the law and the right to enjoy their human rights without discrimination. Replacing references to ‘woman’ with ‘person’ in the Termination of Pregnancy Act and Criminal Code, as well as related provisions in the *Powers of Attorney Act 1998*, will align with government efforts for more inclusive legislation. The use of gender-neutral language will ensure the legislation recognises and applies to people with gender diverse identities who seek a termination of pregnancy and promote the right to recognition and equality before the law.

Amendments to the *Mental Health Act 2016*

Right to a fair hearing (section 31, Human Rights Act), rights in criminal proceedings (section 32, Human Rights Act), and right to health services (section 37, Human Rights Act)

The Bill will amend the Mental Health Act to:

- allow the admissibility of Mental Health Court transcripts in criminal proceedings for limited purposes;
- allow the admissibility of expert reports received in evidence in Mental Health Court proceedings in unrelated criminal proceedings for limited purposes;
- allow, with leave of the Mental Health Court, the release of expert reports which have been filed in the Mental Health Court Registry but not formally received in evidence; and
- ensure that, with leave of the Mental Health Court, information in expert reports filed in the Mental Health Court Registry for proceedings can be included on a person’s health record and used or disclosed by a person in limited circumstances.

By ensuring that Mental Health Court transcripts are admissible before the Magistrates Court and in criminal proceedings, the Bill will promote the right to a fair hearing. The right to a fair hearing supports an individual’s right to procedural fairness when before a court. Transcripts of proceedings and expert reports can benefit both the courts and the person when used for the limited purposes of informing a criminal court’s consideration of a person’s unsoundness of mind or fitness for trial or for the purpose of sentencing a person. Allowing transcripts and expert reports to be used in other proceedings can avoid the need to obtain another expert report unnecessarily, for example, where a person has a permanent intellectual impairment relevant to their soundness of mind or trial. The rules of evidence will continue to apply, with Courts retaining their discretion to admit evidence to ensure only relevant information is admitted into evidence. As transcripts of Mental Health Court proceedings and expert reports may contain information about a person which could be relevant to criminal matters, the removal of the prohibition on the admissibility such information will protect the right to a fair hearing.

Section 158 of the Mental Health Act will apply to the use of transcripts and expert's reports at trial, so that any oral or written statements made by a person who is the subject of a reference are not admissible in any civil or criminal proceedings against that person. This will continue to allow a person to participate fully in Mental Health Court proceedings without fear of self-incrimination. The application of this section to the amendments promotes rights of persons in criminal proceedings not to be compelled to testify against themselves or confess to guilt.

The right to health services is also promoted by the amendments to the Mental Health Act, as the Bill allows the Mental Health Court to release expert reports which have not yet been received in evidence to plan for, or deliver, treatment and care for a person prior to their Mental Health Court hearing, and to allow authorised mental health services to provide meaningful evidence in Mental Health Court proceedings about how a person's treatment and care needs can best be satisfied. Further, the Bill provides that, with leave of the Mental Health Court, and subject to any conditions imposed by the Court, information in an expert report filed in the Mental Health Court Registry may be used and disclosed in limited circumstances. This may include, for example, including the information in a person's health record within the electronic state-wide Consumer Integrated Mental Health and Addiction (CIMHA) application. This will allow authorised mental health service clinicians to access and use information from expert reports to inform a person's mental health assessment or treatment and care needs.

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

Amendments to the *Hospital and Health Boards Act 2011*

Right to privacy and reputation (section 25, Human Rights Act)

(a) the nature of the right

Section 25 of the Human Rights Act provides that every person in Queensland has the right to be protected from interferences and attacks on their privacy, reputation, family, home and correspondence (written and verbal). Privacy is generally understood to comprise of freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law, while the concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable, and disproportionate. It protects privacy in the sense of personal information, data collection and correspondence.

The right to privacy and reputation is engaged by the amendments to the Hospital and Health Boards Act which clarify that permitted disclosure of information contained in a root cause analysis report includes the recommendations that form part of the report. The Bill also clarifies that the act of disclosing information contained in a root cause analysis report includes giving access to the information, for example by uploading the information in an information system.

The right to privacy and reputation is also engaged by the amendments to the Hospital and Health Boards Act to enable a QAC to disclose information relating to a health professional to their chief executive where the QAC reasonably believes the health professional's health, conduct or performance poses a serious risk of harm to a person. This disclosure will allow the

identity of a health professional to be shared with their chief executive so that action can be taken to address patient safety concerns.

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

The primary purpose of allowing information contained in a root cause analysis report to be shared more broadly, including recommendations, key findings and lessons learnt from these reports, is to prevent patient harm and achieve better health outcomes for patients. The amendments will ensure learnings can be shared with relevant staff across Queensland Health who can use this information to implement quality improvements and enhance patient safety. The amendments will also support more effective monitoring of the implementation of recommendations arising from root cause analyses.

The primary purpose of allowing a QAC to disclose information in relation to a health professional to the professional's chief executive is to protect and promote the health and safety of members of the community by ensuring information about a health professional's health, conduct or performance can be shared and immediate action can be taken to address patient safety concerns. For example, if a QAC becomes aware that a doctor has been intoxicated while working in a hospital, this information can be disclosed to the doctor's chief executive to allow immediate disciplinary action or other appropriate action to be taken to ensure patient safety in the hospital the doctor works in.

By enabling quality improvement and patient safety measures to be put in place, the amendments to the Hospital and Health Boards Act promote the right to life. The UN Human Rights Committee has recognised the right to life is 'the supreme right' because life is 'the prerequisite for the enjoyment of all other human rights. Therefore, the purposes of the limitation are consistent with a free and democratic society based on human dignity, equality and freedom.

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

Clause 11 of the Bill will allow key findings, recommendations and lessons learnt from root cause analysis reports to be shared more broadly across Queensland Health, facilitating quality improvement and better identification of and timely response to emergent system-wide patient safety issues. A patient safety entity may only disclose this information from a root cause analysis report for an authorised purpose for which a copy of the report was given. By limiting the right to privacy and reputation by allowing key findings, recommendations and lessons learnt from root cause analysis reports to be shared, clause 11 helps to achieve the purpose of improving patient safety and facilitating quality improvements in the provision of healthcare.

While the amendments will clarify that information from a root cause analysis report can be disclosed for an authorised purpose, the Hospital and Health Boards Act contains strict safeguards to protect root cause analysis reports, including by making it an offence to disclose or use information from a root cause analysis report other than for the authorised purpose for which the copy of the report was given. The maximum penalty for breaching this requirement is 100 penalty units.

Clause 10 of the Bill, which will require a QAC to disclose a reasonable belief that a health professional's health, conduct or performance poses a serious risk of harm to a person to the relevant chief executive, will ensure that action can be taken to ensure patient safety. The limitation on a person's right to privacy will help to achieve the purpose of the amendment as it will enable appropriate disciplinary or other appropriate action to be taken in relation to a health professional to ensure patient safety.

As such, the proposed limitations are directly related to and will achieve the purpose of protecting the health and safety of members of the community.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill.

Clause 11 is the least restrictive way of ensuring that the relevant key findings, recommendations and lessons learnt from root cause analysis reports can be shared with the appropriate entities and Queensland Health staff to support quality improvements and enhancements to clinical safety. The amendments have been carefully tailored, with several safeguards in place, to ensure they operate in a least restrictive way.

Existing confidentiality protections in section 112(6) of the Hospital and Health Boards Act will apply to the amendments in the Bill, providing that any information disclosed by a prescribed patient safety entity must not contain information that may lead to the identification of patients or practitioners relevant to the subject matter of the root cause analysis. Any disclosures by a prescribed patient safety entity must also be for an *authorised purpose*, with such purposes prescribed by regulation. Additionally, the process of sharing information will be governed by existing Queensland Health directives, policy and guidelines.

With these safeguards in place, the permitted disclosure of information has appropriate regard to the rights of privacy and reputation. In order for Hospital and Health Service staff across the state to be aware of key findings, recommendations and lessons learnt from root cause analyses, information contained in root cause analysis reports needs to be able to be disclosed. The purpose can only be achieved with legislative amendment, and the Bill uses the least restrictive and reasonably available means to achieve this.

Similarly, clause 10 is the least restrictive way of protecting and promoting patient safety in response to serious risks identified by QACs. The Bill will only allow sharing of identifying information to the health professional's chief executive and only in situations where a QAC has formed a reasonable belief that a health professional's health, conduct or performance poses a serious risk of harm to a person. This high threshold protects against unreasonable, unnecessary or disproportionate information sharing and minimises the risk of any arbitrary limitations on the right to privacy. In addition, the Hospital and Health Boards Act provides that a QAC must have regard to the rules of natural justice in so far as they are relevant to the functions of a committee. Finally, the Bill puts in place restrictions on further disclosure of the information by the chief executive. The chief executive must not further disclose the information, other than to the extent necessary for them to perform their functions. With these safeguards in place, the amendments are the least restrictive and reasonably available way to achieve the purpose of promoting patient safety. The purpose can only be achieved with legislative amendment.

Without the lawful ability to share the information that is able to be disclosed by the Bill, the relevant recipients are unlikely to be made aware of the findings of the root cause analyses or the health, conduct or performance of a health professional, and will be unable to take appropriate action to respond. This may result in the continuance or repetition of the actions that are the subject of the root cause analysis reports or the conduct of a health professional and prevent measures being taken to swiftly promote public safety and quality improvement.

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

On balance, any limitations to the right to privacy and reputation are considered reasonable and justifiable. The guiding principles of the Hospital and Health Boards Act include that the best interests of users of public sector health services should be the main consideration in all decisions and actions under the Act and that there is a commitment to ensuring quality and safety in the delivery of public sector health services. If information that is critical to ensuring the safety of patients in health facilities in Queensland cannot be appropriately disclosed, the Bill's functions, the objects of the Hospital and Health Boards Act and public confidence in Queensland public and private health facilities, cannot be achieved.

Provisions restricting privacy rights to allow disclosure of personal information for a purpose permitted or required by law are common in Queensland legislation. Such provisions effectively balance the individual right to privacy and public interest factors.

The amendments to increase information sharing strike a fair balance between the public benefit of increasing patient safety and quality improvement against an individual's right to privacy and reputation. In cases where a person's privacy is limited, preventing patient harm and serious clinical incidents sufficiently achieves the purpose of the Bill and promotes the right to life (section 16).

Any impacts on human rights are only to the extent reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act.

(f) any other relevant factors

Nil.

Amendments to the *Mental Health Act 2016*

Right to privacy and reputation (section 25, Human Rights Act)

(a) the nature of the right

As outlined above, the right to privacy and reputation is interpreted broadly and includes protection against unlawful or arbitrary interferences. The right is relevant when a person's personal information is being collected, stored, used or disclosed without their consent.

The Bill allows for increased release and use of expert reports prepared for Mental Health Court proceedings and transcripts of these proceedings. Clauses 14 to 17 amend the Mental Health Act to:

- allow transcripts of Mental Health Court proceedings and expert reports given in evidence in Mental Health Court proceedings to be admissible in criminal proceedings for any criminal offence for the purpose of informing a criminal court's consideration of a person's unsoundness of mind, fitness for trial and sentencing; and
- clarify that the Mental Health Court can release and permit the use of expert reports filed in proceedings before reports are formally received in evidence; and
- provide that, with leave of the Mental Health Court, information in an expert report filed in the Mental Health Court Registry may be recorded on a person's health record or used or disclosed for other purposes, subject to any conditions imposed by the Court.

All the amendments to the Mental Health Act included in the Bill impact the right to privacy and reputation of individuals who are the subject of a Mental Health Court reference as they result in a greater number of interested parties having access to expert reports and transcripts which may include sensitive and personal information about a person.

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

There are two main purposes of allowing confidential and sensitive information used in, or related to, Mental Health proceedings to be released and used in a broader range of circumstances. The first is to ensure that criminal courts have all the relevant information to engage in decision making about a person's unsoundness of mind, fitness for trial or sentencing. The second is to allow expert reports to be released and used to plan for, or deliver, treatment and care for a person prior to their Mental Health Court hearing, and to allow authorised mental health services to provide meaningful evidence in Mental Health Court proceedings about how a person's treatment and care needs can best be satisfied.

Ultimately, the purposes for the limitation on the right to privacy and reputation are to support the administration of justice, fair hearings and the health of individuals before the Court. These purposes are consistent with a free and democratic society based on human dignity, equality and freedom as they support the administration of criminal justice in Queensland.

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

Clauses 14 to 17 of the Bill allow for expert reports and transcripts from Mental Health Court proceedings to be released and used in more circumstances. The purpose of the amendments is to ensure the Mental Health Act continues to adequately support the appropriate release, admission, use and storage of information used in Mental Health Court proceedings. The purpose of the Bill cannot be achieved without releasing confidential information.

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

The approach taken in the Bill is the least restrictive way to achieve the purpose of the amendments and there are no other reasonably available ways to achieve the purpose.

Given the sensitive nature of information contained in expert reports and transcripts of proceedings, the Bill includes a range of safeguards to protect against their improper disclosure. This ensures the provisions are carefully tailored to be as least restrictive as possible to achieve the purpose.

The Bill ensures that expert reports and transcripts can only be available in criminal proceedings for the limited purposes of informing a criminal court's consideration of a person's unsoundness of mind or fitness for trial or for the purpose of sentencing a person. Existing provisions of the Mental Health Act also provide that any oral or written statements made by a person who is the subject of a reference are not admissible in any civil or criminal proceedings against that person. This allows a person to participate fully in Mental Health Court proceedings without fear of self-incrimination. Further, the Mental Health Act contains strict confidentiality provisions, including providing that it is an offence to disclose personal information, other than as permitted under the Mental Health Act or other laws, without the consent of the person to whom the information relates.

Without the amendment, expert reports and transcripts will not be admissible in criminal proceedings for any criminal offence for the purpose of informing a criminal court's consideration of a person's unsoundness of mind, fitness for trial and sentencing. This would not achieve the purpose of the Bill and may result in a criminal court not having adequate information about a person's mental state and infringe upon a person's right to a fair hearing and equality before the law (section 15, Human Rights Act).

The Bill provides that the release of expert reports prior to a hearing can only occur with the leave of the Court and any conditions that the Court considers appropriate. There is no less restrictive way to allow release of these reports to facilitate the use of evidence or advice for use in Mental Court proceedings or to provide for a person's mental health assessment, treatment or care. Use of an expert report that is contrary to the purpose for which the Court released a report may attract penalties such as a contempt of court as provided for by section 665 of the Mental Health Act.

In addition, the Bill amends the Mental Health Act to provide that information in an expert report filed in the Mental Health Court Registry may be used or disclosed, with the leave of, and subject to any conditions imposed by, the Mental Health Court. This may include recording the information on a person's health record in CIMHA so that it can be accessed by authorised mental health services responsible for the person's mental health assessment or treatment and care needs.

It could be viewed as less restrictive to require the consent of the person to whom the report relates to for all use and disclosure of information in the report. However, this would not achieve the purpose of ensuring that relevant people, such as clinicians in an authorised mental health service providing treatment and care to a person, can access the information necessary to inform appropriate treatment and care of that person.

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

The purpose of the Bill will ensure that, to the greatest extent possible, the criminal courts, expert witnesses and people directly involved in providing treatment and care to a person can

access relevant information to inform their decision-making about a person. Allowing the admissibility of expert reports and transcripts from the Mental Health Court in any criminal proceeding will promote the right to a fair hearing (section 31). In addition, clarifying the circumstances in which the Mental Health Court can grant leave for the release, use and storage of expert reports will promote the right to health services (section 37) by allowing clinicians assessing and treating a person to have access to all the information that is relevant to their treatment and care needs. The limitations on the right to privacy will be authorised by law and strike a fair balance between the benefits gained and the limitations on a person's right to privacy and reputation.

There are a range of appropriate safeguards in place to ensure that the limitations are not unreasonable or disproportionate to the means of protecting the parties' rights to a fair hearing, equality before the law and access to health services.

For example, transcripts of Mental Health Court proceedings and expert reports given in evidence in Mental Health Court proceedings will only be admissible in criminal proceedings for the limited purpose of informing a criminal court's consideration of a person's unsoundness of mind or fitness for trial or for the purpose of sentencing a person. Expert reports and transcripts will also be subject to the rules of evidence.

In addition, section 778 of the Mental Health Act provides a duty of confidentiality which applies broadly to a range of people who receive or access confidential information under the Mental Health Act. The section, which would apply to authorised mental health service clinicians who would access a person's health record, contains a maximum penalty of 100 penalty units for the use and disclosure of personal information which is unnecessary for the purpose of performing functions under the Act.

On balance, the purpose of the amendments outweighs any potential limitation that may occur on the rights to privacy and reputation. Any limitations on the right to privacy and reputation are therefore considered reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Bill is compatible with human rights under the Human Rights Act because it limits the identified human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

THE HONOURABLE SHANNON FENTIMAN
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and MINISTER FOR WOMEN