

Health and Other Legislation Amendment Bill 2021

Statement of Compatibility

FOR

Amendments to be moved during consideration in detail by the Honourable Yvette D'Ath MP, Minister for Health and Ambulance Services and Leader of the House

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

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

In my opinion, the amendments are compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the Amendments

The amendments to the Health and Other Legislation Amendment Bill 2021 (Bill) will ensure that involuntary mental health patients on Norfolk Island can lawfully be transferred to and treated in Queensland if Norfolk Island treating physicians identify them as requiring more intensive support such as admission to a specialist psychiatric inpatient facility. Transfer and subsequent treatment and care will occur through the same processes that apply to involuntary patients from states and internal territories of Australia.

The Queensland Government has commenced coordination of mental health pathways on Norfolk Island, under an agreement with the Australian Government. Norfolk Island is a remote community with one health service. On occasions, there may be medical need to transfer mental health patients, including involuntary patients, to Queensland in response to immediate and/or complex mental health concerns. Involuntary transport and treatment can occur if specific legislative criteria are met, for example, where patients have severe mental illness and either there is a lack of capacity to consent to treatment and care or a specific level of risk to themselves or others that is linked to the illness.

This statement of compatibility contemplates the human rights engaged once involuntary patients from Norfolk Island arrive in Queensland. Under section 11(1) of the Human Rights Act, the rights outlined in the Act apply to people in Queensland.

Human Rights Issues

Human rights relevant to the Bill

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

- Recognition and equality before the law (section 15)
- Right to life (section 16)
- Protection from torture and cruel, inhuman or degrading treatment (section 17)
- Freedom of movement (section 19)
- Right to privacy and reputation (s 25)
- Right to liberty and security of person (section 29)
- Humane treatment when deprived of liberty (section 30)
- Right to health services (section 37)

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

Right to life (section 16, Human Rights Act); right to health services (section 37, Human Rights Act)

Every person has the right to life and the right not to be arbitrarily deprived of life. This includes a positive duty for public entities to take steps to address real and immediate threats to life.

Every person has the right to access health services without discrimination. Persons must also not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment.

The amendments engage the right to access health services because they will apply to patients on Norfolk Island whose treating physicians have identified mental health needs that are serious and urgent enough to warrant treatment and care in specialist facilities that cannot be provided on Norfolk Island and will be provided in Queensland. The right to life is engaged because this group of potential patients is likely to include patients whose mental illness is life-threatening.

New clauses 9B to 9G of the Bill amend the *Mental Health Act 2016* and *Mental Health Regulation 2017* to ensure involuntary patients from Norfolk Island can be received and treated in Queensland. Enabling access to health care upon arrival in Queensland promotes the right to life and the right to health services.

Right to liberty and security of person (section 29, Human Rights Act)

Under section 29(2) and (3) of the Human Rights Act, a person must not be subject to arbitrary detention, and must not be deprived of the person's liberty except on grounds, and

in accordance with procedures, established by law. Further, a person who is detained must be informed at the time of detention of the reason for the detention (s 29(3), Human Rights Act).

The amendments enable patients from Norfolk Island to be assessed, treated and cared for in Queensland on an involuntary basis in accordance with an existing framework under the Mental Health Act. The Mental Health Act gives authorised persons and the Mental Health Review Tribunal specific powers according to the nature of the intervention. It also imposes strict pre-conditions for involuntary care which consider the severity of mental illness and the level of risk to the patient or to others that is associated with the mental illness.

The amendments support the right to liberty and security of the person by ensuring the process for detaining and assisting involuntary patients from Norfolk Island is subject to procedures established by law, which are not arbitrary because they can only apply to defined circumstances of mental health needs. In addition, section 285 of the Mental Health Act provides a right for patients to be informed with timely, accurate and appropriate information regarding their treatment and care. This right will apply to patients transferred from Norfolk Island creating an obligation for authorised mental health services to ensure a transferred patient is informed of the purpose of their transfer to Queensland and detention for examination.

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)

Privacy and reputation (section 25, Human Rights Act); protection from torture and cruel, inhuman or degrading treatment (section 17); freedom of movement (section 19); humane treatment when deprived of liberty (section 30)

(a) The nature of the rights

These rights are addressed together as they are engaged in similar ways.

Every person has the right not to have their privacy, family, home and correspondence unlawfully or arbitrarily interfered with (section 25(a), Human Rights Act). The right to privacy is interpreted as protecting a person's right to self-determination and personal inviolability, including protecting a person's right to make their own decisions about medical treatment.¹

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

Under section 19 of the Human Rights Act, every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live.

¹ *Kracke v Mental Health Review Board (General)* [2009] VCAT 646; *PBU & NJE v Mental Health Tribunal* [2019] VSC 564 [126]-[128].

Section 30(1) of the Human Rights Act provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

New clauses 9B to 9G of the Bill will result in persons who are involuntarily transported from Norfolk Island to Queensland for mental health care to be able to be lawfully received, detained, assessed and treated on an involuntary basis if the existing criteria for interstate transfers are satisfied. The right to privacy and right to not be treated or punished in a cruel, inhuman or degrading way are engaged given the involuntary nature of mental health support upon arrival in Queensland. The right to freedom of movement and right to humane treatment when deprived of liberty are relevant because the Mental Health Act permits a patient to be detained while they are involuntarily assessed and treated.

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

The purpose of any limitation to these rights is to facilitate access to essential mental health care that reflects the level of support that patients in crisis, which may involve patients at risk of suicide, are identified as needing. The amendments also ensure appropriate medical treatment is not withheld from a person because they lack the capacity to consent.

As above, the amendments support the right to life and the right to health services. The UN Human Rights Committee has recognised the right to life as ‘the supreme right’ because life is ‘the prerequisite for the enjoyment of all other human rights’.² All human rights also rely on the right to health services to ensure a person’s health and wellbeing, and human dignity is an underpinning value of the right to health services.

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

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

Any limitation relevant to privacy and reputation, protection from torture and cruel, inhuman or degrading treatment, freedom of movement and humane treatment when deprived of liberty achieve the purpose of facilitating access to necessary emergency mental health care in Queensland. The Bill will achieve this purpose by allowing the Norfolk Island Mental Health Act to be prescribed as a corresponding law for Queensland and as a corresponding law for provisions of the Mental Health Act that relate to interstate transfers from within Australia. The result will be that the existing framework for interstate transfers is extended to Norfolk Island to allow involuntary patients on Norfolk Island to receive the health care recommended by their treating physicians.

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

A less restrictive approach would be to not make the amendments, so that mental health patients can only be received, assessed and treated in Queensland with their consent.

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

However, this approach is not reasonable as it fails to account for fluctuating health and capacity, or for how formerly voluntary patients can rapidly decline in a way that warrants involuntary support. Without the amendments, appropriate mental health support could not lawfully be provided to involuntary patients who have arrived in Queensland.

The amendments will operate in the context of ensuring each patient is subject to the least restrictive approach appropriate for their treatment and care. Under the Mental Health Act, once patients arrive in Queensland, their treatment and care under the Mental Health Act is limited to specific powers of authorised persons subject to strict criteria and, according to the circumstances, review by an authorised psychiatrist, the Mental Health Review Tribunal and/or the Mental Health Court.

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

The Bill appropriately balances the rights that may be limited with two fundamental rights: the right to life and the right to health services. The rights may only be limited as authorised by the Mental Health Act's legislative criteria for involuntary assessment, treatment and care. Overall, any limitations on human rights are reasonable, justified and outweighed by the amendments fulfilling positive human rights obligations that facilitate access to specialist mental health services that are not available on Norfolk Island.

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

(a) The nature of the right

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

The amendments mean that patients on Norfolk Island, once they arrive in Queensland, may be provided with treatment that does not align with their views and wishes. This affects their recognition as an autonomous person before the law. As the framework for supporting involuntary patients from Norfolk Island in Queensland will only apply to persons with mental illness, the amendments also limit the right to enjoy human rights without discrimination.

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

As outlined in respect of the other rights that may be limited, the purpose of the limitation is to facilitate access to essential mental health care that corresponds to the severity of a patient's mental illness. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom because the purpose promotes the right to life and the right to health services, which are rights without which other human rights cannot be properly enjoyed.

In respect of the amendments only impacting persons with mental illness, the purpose of the limitation is to ensure that involuntary mental health patients can lawfully receive support. It is therefore appropriate that the amendments only affect persons with mental illness.

Involuntary treatment and care are subject to defined powers and criteria within the Mental Health Act.

(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

As outlined in respect of the other rights that may be limited, the limitation achieves the purpose by ensuring that health care for involuntary patients can be provided once they arrive in Queensland.

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

If the amendments are not made, then there would be no mechanism for patients to be supported in Queensland on an involuntary basis. The purpose of the amendments cannot be achieved without the amendments in the Bill. As outlined above, the Mental Health Act strictly regulates involuntary treatment and decisions are subject to appropriate review.

(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

Recognition and equality before the law is appropriately balanced with the right to life and the right to health services. These are fundamental rights that are necessary to enjoy other human rights. On balance, the promotion of the right to life and right to health service, combined with the purpose of the amendments, outweighs and reasonably justifies limitations to other rights.

Conclusion

In my opinion, the amendments to be moved during consideration in detail of the Bill are compatible with human rights under the *Human Rights Act 2019* because they limit 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.

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

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