

7 January 2020

Our ref: LP-Multi

Committee Secretary
Health, Communities, Disability Services and
Domestic and Family Violence Prevention Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

Health Legislation Amendment Bill 2019

Thank you for the opportunity to provide comments on the Health Legislation Amendment Bill 2019 (**the Bill**). The Queensland Law Society (**QLS**) appreciates the opportunity to provide comments on the Bill.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by members of the QLS Criminal Law Committee and Occupational Discipline Law Committee whose members have substantial expertise in this area.

Background to the Bill

The Bill amends five health portfolio acts and two regulations to implement various policy objectives. This submission is limited to the proposed amendments to the *Public Health Act* 2005 (**PHA**) and in particular the insertion of Chapter 5B which seeks to prohibit the practice of conversion therapy by health service providers in Queensland.

The Australian Psychological Society (**APS**) in its 2015 position statement on "*the use of psychological practices that attempt to change sexual orientation*" said it "*strongly opposes any approach to psychological practice or research that treats lesbians, gay men, and bisexual people as disordered. The APS also strongly opposes any approach to psychological practice or research that attempts to change an individual's sexual orientation*"¹. In March

¹ https://www.psychology.org.au/getmedia/95cfcca4-009c-4a75-a0e7-597d68e5a55c/Position_statement_on_psychological_practices_that_attempt_to_change_sexual_orientation_members.pdf.pdf.

2019, The Royal Australian and New Zealand College of Psychiatrists also presented a position statement to affirm its opposition to the use of sexual orientation change efforts of any kind².

Executive Summary

QLS agrees that conversion therapy is a reprehensible practice. QLS supports reasonable measures to prevent harmful, non-evidence based practices that seek to change or suppress the sexual orientation, gender identity or gender expression of individuals within our community.

With respect to the Bill, we hold reservations as to:

- a lack of evidence supporting any need for the new offence;
- the procedural aspects of prosecution of these kinds of offences; and
- the unintended consequences of the current drafting of the provisions.

Accordingly, we recommend the Bill be amended as follows:

1. Amend section 213H so that the provision prohibits conversion therapy without the creation of an offence.
2. Insert an additional note into section 58(d) of the *Health Ombudsman Act 2013* which lists the practice of conversion therapy as an example of conduct for which the Health Ombudsman may take immediate registration action.
3. If recommendation 1 is not adopted, the offence provision should be amended so that it is a regulatory or an indictable offence capable of summary resolution.
4. The current drafting of the offence provision makes the offence capable of prosecution by the police or the Office of Director of Public Prosecution (**DPP**). If it is the intention that the DPP will prosecute, then this needs to be expressed in the provision.
5. A broad definition of "conversion therapy" may have unintended consequences. The current drafting of section 213F is extremely broad and does not provide sufficient certainty as to what conduct is targeted and what practices are excluded.

Each of these matters is addressed briefly below.

Clause 28 Insertion of new ch 5B

Lack of evidence around the need for the offence

There is nothing in the explanatory notes about the extent or use of conversion therapy in Queensland.

QLS is concerned about the lack of any cogent data to support treating this conduct as a criminal law issue, particularly in the absence of evidence as to:

- the extent to which health service providers are practising conversion therapy; and

² <https://www.ranzcp.org/news-policy/policy-and-advocacy/position-statements/sexual-orientation-change-efforts>.

- why existing laws (whether criminal or professional disciplinary offences), do not currently address the conduct contemplated by the Bill.

As noted above, leading medical and psychological organisations have denounced these kind of practices. Where outdated and harmful therapeutic practices are used in medicine, these are almost always dealt with by way of health practitioner regulation and not by criminal offences. We consider that the practice of conversion therapy is already capable of being targeted by the relevant health regulators and referred to the Health Ombudsman.

Under the *Health Ombudsman Act 2013* (HO Act), a person providing the conversion therapy would be classed as providing a “health service” and be a “health service provider”.³ Currently, statements published by the APS assist in disciplinary action in this jurisdiction as they provide guidance when conduct deviates from a suitable standard.

In appropriate circumstances, the Ombudsman may take immediate registration action (pursuant to section 58 of the HO Act) or issue a prohibition order (under section 68 of the HO Act) to address an immediate concern about public health and safety or if it is otherwise in the public interest.

If there is evidence to demonstrate that regulators are currently not able to commence disciplinary actions, then we submit a more appropriate than creating a criminal offence is to prohibit the conduct in the PHA. This would allow regulators prosecute this conduct.

A statutory prohibition in a health care context (for example, the prohibitions under the Drugs and Poisons Regulations) provides a clear foundation for a regulator act. If the PHA prohibited conversion therapy, a foundation for the Health Ombudsman or the relevant Boards to act would exist.

For the reasons outlined in this submission, in our view, a prohibition of conduct does not need to be in the form of a criminal offence.

In addition, the note in section 58(d) of the HO Act provides an example that it may be appropriate for the Health Ombudsman to take immediate action where a practitioner has been charged with an offence which is unrelated to their practice.

58 Power to take immediate registration action

(1)The health ombudsman may take immediate registration action under this division in relation to a registered health practitioner if—

(d)the health ombudsman reasonably believes the action is otherwise in the public interest.

Example of when action may be taken in the public interest—

A registered health practitioner is charged with a serious criminal offence, unrelated to the practitioner's practice, for which immediate registration action is required to be taken to maintain public confidence in the provision of services by health practitioners.

We suggest it would be appropriate to insert a further example in the note about a circumstance where someone provides conversion therapy to provide the Health Ombudsman with a clear basis to taking immediate action against a practitioner, where it would be in the public interest to do so.

³ Sections 7 and 8 of the *Health Ombudsman 2013*.

Who should prosecute these kinds of offences?

If the offence provision remains in the Bill, then QLS is of the view that these kinds of harmful medical “treatments” and therapies should not be monitored by the police, but are properly within the realm of AHPRA and other health regulation authorities including the Health Ombudsman.

Specifically, section 213I should be amended as follows:

- First, the drafting suggests that the offence is to be strictly indictable, that is, it appears there is no right of election for prosecution or defence for summary resolution. This is contrary to other indictable offences which are capable of being dealt with summarily including, offences under the PHA. The explanatory notes provide no justification for this distinction.

Accordingly, if the offence is to remain in this legislation, then it should be regulatory or an indictable offence capable of summary resolution.

- Secondly, the current drafting of this provision makes the offence capable of prosecution by the police or the DPP. If it is the intention that the DPP will prosecute, then this needs to be expressed in the provision.

Finally, there is the risk, in our view, that the provisions are not sufficiently drafted and therefore, prosecution may be difficult. This requires a careful balance to ensure that there is sufficient clarity as to the capturing of the conduct which is sought to be prohibited whilst also providing health practitioners with sufficient protection in relation to clinically and medically necessary appropriate practice.

Unintended consequences

The definition of conversion therapy is currently defined in proposed section 213F of the Bill.

A broad definition of “conversion therapy” may have unintended consequences. The current drafting of section 213F is extremely broad and does not provide sufficient certainty as to what conduct is targeted and what practices are excluded.

QLS is concerned that the prospect of criminal prosecution may fetter otherwise legitimate aspects of psychological and psychiatric treatment. Some providers may be concerned that reasonable clinical interventions might be captured within the definition of conversion therapy. We query whether section 213F(3) provides sufficient protection for health service providers who are providing appropriate treatment.

Further, the definition of ‘gender identity’ still includes aspects of gender expression and therefore does not seem to accord with commonly used definitions⁴. Definitions must be carefully considered so that they align with the common use and understanding of the terms used and provide appropriate clarity for providers and those charged with the prosecution of these offences.

⁴ See for example: <https://smartsexresource.com/topics/gender-identity-expression>.

Health Legislation Amendment Bill 2019

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President

