Queensland Law Society

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Office of the President

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Committee Secretary
Health and Environment Committee
Parliament House
George Street
Brisbane QLD 4000

By email: [redacted]

Dear Committee Secretary

HEALTH AND OTHER LEGISLATION AMENDMENT BILL (NO. 2) 2023

Thank you for the opportunity to provide feedback on the Health and Other Legislation Amendment Bill (No. 2) 2023 (**the Bill**). The Queensland Law Society (**QLS**) appreciates the opportunity to provide comments to this inquiry.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 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 with the assistance of the QLS Criminal Law Committee and QLS Health and Disability Law Committee, whose members have substantial expertise in this area.

The Bill makes amendments to various legislation including the:

- *Hospital and Health Boards Act 2011*
- *Termination of Pregnancy Act 2018 and Criminal Code*
- *Public Health Act 2005; and*
- *Mental Health Act 2016*

Our comments on the Bill are limited to those aspects outlined below.

Hospital and Health Boards Act 2011 (**Hospital and Health Boards Act**)

The Bill makes a number of amendments to the Hospital and Health Boards Act including amendments which seek to:

- require a Quality Assurance Committee (**QAC**) to disclose information about a health professional to the chief executive where the QAC reasonably believes the health

professional poses a *serious risk of harm* to a person because of the health professional's health, conduct or performance;

- 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; and
- make clear that for root cause analysis reports, permitted disclosures of information contained in the report extend to the disclosure of recommendations that form part of the report

Sharing of information by a Quality Assurance Committee

Clause 10

Clause 10 inserts a new section 85A into the Hospital and Health Boards Act and introduces a new obligation for the QAC to disclose information regarding identified patient safety issues.

QLS generally considers the QAC proposal to be appropriate. The threshold of "serious risk of harm" to a person because of the health professional's health, conduct or performance is in line with the mandatory reporting obligation under the Health Practitioner Regulation National Law for which *notifiable conduct* requires a "significant departure".

Sharing of information from Root Cause Analyses

Clause 11

Clause 11 amends section 112 of the Hospital and Health Boards Act and requires the relevant chief executive to give a copy of each root cause analysis report and other relevant information to a prescribed patient safety entity for an authorised purposed.

QLS is supportive of the proposal to amend the Hospital and Health Boards Act to allow broader sharing of information contained in root cause analysis reports.

Sharing of information and learnings is important however it is paramount to the root cause analysis (**RCA**) process that the identity of not just the patient and practitioner but also the department and the hospital be kept confidential. If the Hospital and Health Service (**HHS**) is named, the practitioner can easily be identified. In our view, the fear of publication of a mistake will detract from the purpose of the RCA and will lead to focus being placed on blame rather than learning.

Under the current legislation, de-identified RCA reports are required to be submitted to the OHO. Our members with expertise in this area report that incidents are being processed through 'RiskMan' (which do not need to be disclosed) and avoiding the RCA process and need to notify.

As such, we highlight the need for training on the importance of the RCA process or the publication of a series of key points. This will support the efficient and correct implementation of the procedure. For example, an RCA will be stopped if an issue with a practitioner and their practice is identified.

Mental Health Act 2016 (Qld) (**Mental Health Act**)

Admissibility and use of evidence

QLS is generally supportive of the proposed amendments to the Mental Health Act which we understand are proposed to facilitate the availability of relevant information from Mental Health Court proceedings to be admissible in criminal proceedings.

Clause 15

Clause 15 amends section 157 of the Mental Health Act (Admissibility of expert's report at trial) to cover the admissibility of a transcript of the proceeding of the Mental Health Court and also broaden the admissibility of expert's reports so they may also be admissible at the trial of the person for any other offence alleged to have been committed by the person.

QLS supports the proposal to make expert reports admissible in criminal proceedings for any offence alleged to have been committed by the person. This will assist in criminal proceedings in a number of circumstances, including, for example, in circumstances where a criminal matter is not legally aided. Legal Aid funding for expert reports is often limited. Further, Legal Aid funding for a report may only be available for one offence but a report used in the Mental Health Court could be relevant for other offences for which a defendant may be charged.

QLS is also supportive of the proposal to ensure that Mental Health Court transcripts are admissible in criminal proceedings for the purpose of consideration of a person's unsoundness of mind, fitness for trial or for the purpose of sentencing a person. QLS can see the benefit of these transcripts being admissible in certain circumstances and importantly, we note the Courts will retain their discretion to admit evidence in this regard.

Broader proposals for consideration

QLS suggests that consideration might also be given to extending this proposal beyond criminal law proceedings to potentially apply to other concurrent civil proceedings. For example, access to expert reports received as evidence before the Mental Health Court may also be relevant for Queensland Civil and Administrative Tribunal (**QCAT**) applications where simultaneous guardianship matters are also on foot and for example, capacity is in issue.

Where it is the individual's choice and preference for the report to be used in that forum then this would be appropriate and would also enhance access to justice, particularly considering there is currently no Legal Aid funding for guardianship matters. We emphasise that any extended access and use of expert reports should reflect the preference of the individual.

Members of our Criminal Law Committee have also queried whether, in the context of this review, there is scope to revisit the circumstances under which Mental Health Court expert reports may be disclosed in other criminal proceedings.

If persons other than the subject individual sought to access or use the report/s, there may be limitations on the right to privacy and a fair hearing that would need to be justified. For example, an individual is less likely to have legal representation in QCAT to interrogate the content and

context of the expert report, to ensure its relevance to the matter before QCAT. Further, irrespective of confidentiality protections, the more a report is disclosed and used, the increased risk of the report being used and disclosed for other purposes.[1]

Whilst we acknowledge these matters are outside the scope of the Bill, QLS would be pleased to provide further information if it would assist the Committee and to participate in further consultation to discuss these proposals further.

Other use of expert's report

Clause 17

Clause 17 replaces current section 160 of the Mental Health Act and seeks to clarify that the Mental Health Court can release and permit the use of expert reports *filed* in the Mental Health Court registry (MHC registry) before the reports are received in evidence.

According to the Explanatory Notes, this change is intended to allow, with leave of the Mental Health Court, information from an expert report filed in the MHC registry to be recorded in a person's health record and to be used or disclosed by a person to support access to mental health care and facilitate cross-agency planning for the person's treatment and care.

QLS is generally supportive of the proposed amendment to allow for the provision of expert reports for these limited purposes. The provision of expert reports to limited entities without leave may also assist in reducing backlogs in the Mental Health Court.

However, in our view, the drafting of new s160 should more clearly articulate the circumstances under which leave is required and on what basis a report may be released.

We provide the following comments in this regard:

Expert's report filed in the MHC registry – release of expert's report with leave

For clarity, QLS suggests the drafting should state the purposes for which a report may be released, for example, for the person's mental health assessment, treatment and/or care, the provision of further expert opinions to the Court or for any other purpose for which the Court provides leave.

In addition, it may be the case that an expert report is tendered during a proceeding and not *filed* in the registry. QLS suggest that the drafting should cover expert reports received in evidence and those filed in the MHC registry to ensure that with leave, those reports may be released for these purposes.

Expert's report received in evidence – release of expert's report without leave

In relation to s160(4) it appears the drafting would allow an expert report received in evidence to be released to the listed entities without leave of the court. That is, to an administrator of an

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authorised mental health service, the administrator of a forensic disability service or the tribunal for conducting a review.

Current section 160 of the Mental Health Act requires leave of the court in these circumstances.

QLS considers that removing the requirement to seek leave where a report has been received in evidence to these entities may be of assistance however we suggest the drafting should be clarified to make clear this is the legislative intention. We also discuss potential privacy implications below which should be considered.

As with the earlier proposal, consideration might also be given to the potential application of these proposals in concurrent guardianship matters being heard by QCAT.

We reiterate our earlier comments as to the need to ensure that any limitation on an individual's rights in this respect are legitimate, necessary and proportionate.

Storage of information used in, or related to, Mental Health Court proceedings

The amendments to the use of expert reports prior to a Mental Health Court hearing will allow authorised mental health services to access expert reports as part of their consideration of appropriate treatment and care. Accordingly to the Explanatory Notes, this may be done for example by including a relevant expert report, with leave of the court, on a person's health record.

QLS has previously raised some concern about the proposal to store Mental Health Court exhibits on the CIMHA system. These reservations are raised from a privacy perspective, and are compounded by the fact that often those involved in Mental Health Act proceedings may have a limited ability to consent to storage and access to those records in this way.

Whilst the Bill includes a safeguard for expert reports where leave is granted with the ability for the court to impose any conditions it considers appropriate (such as limitations in access), there is no equivalent safeguard for expert reports received in evidence.

Privacy considerations

Generally, the disclosure or use of personal information requires informed consent and consent should only be obtained for legitimate disclosures or uses. The specificity required in terms of obtaining such consent may also depend on the sensitivity of the personal information being disclosed. It may also be inappropriate to use the report for a purpose other than the purpose for which it was created.

QLS suggests that further consideration be given to ensuring there are appropriate privacy safeguards within the Bill particularly in circumstances where leave is not required to give the report to specific entities.

Termination of Pregnancy Act 2018 (**the Termination of Pregnancy Act**) *and Criminal Code*

Clause 22

QLS understands the intention of the amendments in the Bill are to enable nurses and midwives to perform medical terminations using a registered termination of pregnancy drug in appropriate circumstances. *Medical termination* is defined in the Bill as a termination caused by use of a termination drug.

According to the Explanatory Notes to the Bill, the *Medicines and Poisons (Medicines) Regulation* 2021 and Extended Practice Authorities (**EPAs**) for registered nurses and midwives are proposed to be updated to require that termination drugs must be given in accordance with the approved medicine information available from the Therapeutic Goods Administration (**TGA**). This includes the approved gestational limits for the safe use of the drug.

QLS is supportive of an increased scope for registered health practitioners in Queensland, other than medical practitioners, to perform early terminations of pregnancy through the use of a registered termination of pregnancy drug. This is particularly important for those in rural and remote areas to ensure access to these services, without which they would be put to the cost of travel and associated expense to attend a city centre where they can consult with a doctor.

QLS holds some reservations with the regulation-making power in proposed section 6A(1)(c) which we understand is intended to allow additional types of registered health practitioners to be added in the future. We suggest the inclusion of additional health practitioners should be the subject of appropriate stakeholder consultation as well as sufficient scrutiny by the Legislative Assembly.

Adopting inclusive language

Finally, QLS supports the amendments in the Bill which seek to ensure the legislation recognises and applies to people with gender-diverse identities.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

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President