MHLEPQ
MENTAL HEALTH LIVED EXPERIENCE PEAK
QUEENSLAND

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Advice to the Strategy, Policy and Reform Division, Queensland Health –

Proposed Amendments to the Mental Health Act 2016

19th September 2023

Proposed Changes to Mental Health Act

The Queensland Health Strategy, Policy and Reform Division (the Division) sought advice from the MHLEPQ on four potential changes to the Queensland Mental Health Act 2016.

1. Allowing exhibits (such as expert reports) from Mental Health Court proceedings to be introduced in unrelated criminal trials.
2. Allowing transcripts from Mental Health Court proceedings to be introduced in unrelated criminal trials.
3. Allowing expert reports filed with the Mental Health Courts but not yet received in evidence before the court to be released for other purposes.
4. Allowing for exhibits from the Mental Health Courts to be recorded on a person's health records on the CIMHA system available to clinicians according to policies developed by the Chief Psychiatrist (CP).

The Division were particularly interested to understand:

1. Whether the proposed changes would facilitate the policy objectives.
2. What unintended consequences may arise as a result of the proposed changes.
3. Any further considerations or protections to support meeting the policy objectives.
4. What activities would support successful implementation of the proposed changes; and
5. Any further feedback.

Background

On the 4th of September, the MHLEPQ was invited to participate in a consultation session on the 19th of September to discuss the proposed changes to the Queensland Mental Health Act 2016.

The MHLEPQ then received a confidential consultation paper on September 14th on the proposed amendments to the Mental Health Act inviting submission by the 22nd of September. This deadline was extended until the 26th of September 2023 by request.

Due to confidentiality requirements and the short timeline, it was not possible to consult with members directly on these proposed changes. The comments and feedback in this document are therefore based on general member discussions and feedback on related matters. The MHLEPQ reserve its right to change our response and position on these amendments following further consultation with our members.

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This response was prepared without having seen the text of the proposed amendments and therefore relies solely on the consultation paper and briefing session provided.

A Human Rights Perspective

Section 15 of the Queensland Human Rights Act 2019 provides all Queenslanders equality before the law and for protection against discrimination. The Human Rights Act provide general freedom of expression (section 21), the right to privacy (section 25) and the right to a fair hearing (section 31). The act also provides the right to not be compelled to testify against oneself or to confess guilt (section 32(2)(k)). Section 29 (7) of the act provides that "*a person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person's detention.*" Any limitations on these rights must be justified in meeting the stated purpose (section 13).

Australia is a signatory to the United Nations Convention on the Rights of Persons with Disabilities. The purpose of this convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all regardless of disability and respect for inherent dignity. These rights extend to matters such as the right to privacy and equality before the law.

It is important that any proposed changes to the Mental Health Act regarding the treatment of evidence and transcripts are only done in a manner and for an outcome that enhances and protects the human rights of Queenslanders, particularly vulnerable Queenslanders with a reduced mental capacity. The MHLEPQ's limited time and ability to consult our members widely on this matter has induced further caution. Hence, we urge caution, full and proper consideration and investigation prior to any legislative changes.

Recommendation:

> We recommend a full human rights review of this policy should be done to suggest lower risk ways to solve the policy problem you confront, rather than to justify the proposed mechanisms.

Use of Evidence and Transcripts in Criminal Proceedings

The primary role of the Mental Health Court (the Court) in criminal matters is to determine whether a person was of unsound mind at the time of an alleged offence. At times matters may not be completed by the Mental Health Court, for example, if the matter is withdrawn or the court decides it does not have jurisdiction to hear the matter. In such circumstances, the evidence presented to the Court is to be used by the Criminal Court for the purpose of determining a person's state of mind, and fitness for trial in sentencing the person in the same criminal matter as the Court heard evidence on.

The current legislation does not allow for transcripts from the Court to be used in proceedings in the same way. Section 158 of the Mental Health Act provides that any oral or written statements are inadmissible in civil or criminal proceedings.

It is proposed to change these provisions to ensure that "*a person's ability to rely on expert reports in criminal proceedings for any offence and a criminal court's ability to consider all*

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information relevant to a matter".

On the face of this, it seems positive that a person (or person's legal representative) who seeks a finding of diminished responsibility due to an unsound mind should have access to reports and evidence produced for an unrelated hearing in the Court. It would seem to enhance the person's access to justice.

It is however problematic if this provision is also extended to non-defendant parties in a matter. Any doubt should benefit the person who may lose their liberty. A defendant may choose to engage with an expert for the purpose of preparing a specific case but may very well choose to engage differently with an expert for the purpose of another case.

A Mental Health Court is a specialist court that provides the court to accumulate specific expertise in interpreting and understanding specific expert reports. This is not an expertise we should reasonably expect judges in the general courts to have.

Recommendation:

> We recommend that any change to the use of expert reports in unrelated criminal matters specifically be limited in the legislation to the defendant having the right to use such reports, and further that no detriment should be inferred on a defendant for choosing not to do so.

The use of Mental Health Court transcripts in other criminal proceedings (related or unrelated) is highly problematic. Hearings are part of exploring the wider social context of a person's life to make an overall assessment and decision, and they serve the purpose of assisting the judge in understanding the totality of the case and deciding accordingly. Transcripts are therefore useful in the totality of the hearing, and we would argue the risks to the person in taking them out of that context is too great. In a determination, a Mental Health Court can choose to highlight parts of transcripts and evidence significant and important in the Court reaching its decision. This in turn makes them admissible in the context of the court's determination.

We do not believe limiting the right to bring transcripts into related or non-related criminal proceedings to the defendant will mitigate this risk as the transcript in its totality would need to be submitted.

Recommendation:

> There should be no change to the admissibility of Mental Health Court Transcripts to any Criminal Hearings

Use of expert reports prior to Mental Health Court Hearings

Currently expert reports and evidence are released to the parties to a Mental Health Court proceeding once they have been filed with the court to allow preparation for a hearing. The Court may also release such evidence to other parties where it is deemed to be required for treatment, care and safety. The Court will make a decision to what extent and to whom the evidence or reports are released. This is generally done during the hearing of the matter or

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in urgent circumstances by a special sitting of the Court.

The provisions of Section 160 of the Mental Health Act permitting such release are narrow and it provides the court with powers to limit the release of such reports to protect a person's privacy.

The amendment proposed would allow the release of such reports once filed with the Court. This presumably would not require the Court to convene to release them or place limitations on such release. It is presumably proposed that limitations on the distribution of such reports would occur in the legislation generally rather than in consideration of the specific case and circumstances.

The purpose of the Criminal Court is to provide justice and penalty for crimes committed without relevant defence. The Court's role is to support the Criminal Court in assessing whether the defendant was of sound mind at the time of the crime and was fit to stand trial. The Queensland Mental Health Systems' role is to provide patient-centred care in the least restrictive way possible.

We submit that decisions regarding care of a consumer subject to a Mental Health Court proceeding should be no different to other decisions made relating to treatment, care and safety. We suggest that expert reports provided for the purpose of a court and not a treatment service would and could unduly influence the care offered and the manner it is offered.

Release of evidence for treatment, care and safety purposes should be limited to such circumstances where the Court finds it appropriate to do so considering the unique and individual circumstances of the consumer.

Recommendation:

> That there be no change to Section 160. Alternatively, if changes are made that the changes are limited to how the court makes a decision regarding the release of Court records. We do not support making records available without a decision of the Court including the specifying how such records released can be used.

Storage of Mental Health Court Exhibits

The Chief Psychiatrist is a party to all matters before the Mental Health Court. The Mental Health Act provides that the CP make policies regarding how records relating to the Mental Health Act is stored. The CP currently does this in an application called CIMHA.

CIMHA provides for differing levels of access to files kept on a consumer and hence it is possible to restrict access to Mental Health Court documents. The CP currently allows some access to some clinicians relating to Court documents to support treatment, care and safety. It is unclear whether the current legislation permits this.

It is proposed to amend the Mental Health Act to make it explicit that the CP may determine how and where Court documents are stored and who they are available to. The purpose is

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that "*regardless of where a person presents to an authorized mental health service, relevant information is available due to the state-wide nature of the CIMHA applications.*"

Queensland Health is currently implementing a new digital strategy. This strategy will impact how data is stored, how it is shared, and where it is available. While CIMHA is the main frame for storing data in the Mental Health area data is also stored on other platforms and parts of the consultation the MHLEPQ has been engaged in were around how to consolidate these data into a single platform available across the system.

Records generated through the Mental Health Court process are not generated for treatment and clinical purposes, but for the purpose of assessing a person's mental capacity and ability to stand trial. It is undisputed that these records also contain information that could be useful for a treating clinician, but clinicians already have processes to assess and gather information from mental health consumers who do not seek to please insanity in the Court. Perhaps it would be safest to use the same methodology across the Mental Health system regardless of criminal status in assessing consumers' treatment, care and safety needs.

We note that records are currently governed by the Court by a deliberate decision to allow the use of documentation rather than general permission. There could be a case for a Court to be allowed to order that some evidence and records be made available for clinical purposes where the Court deems this will be in the best interest of the consumer.

Systemic stigma towards mental illness is common across the mental health system. The MHLEPQ members continually report this to us. While a treating psychiatrist could gain a marginal treatment benefit by having access to legal records, the risk of a visiting doctor in Emergency Department accessing this information while treating a consumer for an unrelated issue ten years later, leading to stigmatization, in our opinion outweighs any potential benefit.

Where a matter impact on a person's human rights and privacy the balance should always favour human right and privacy over efficacy and efficiency. In no other area of health and law we are aware of will a medical record generated for the purpose of a legal proceeding automatically be made available across the State health system at the discretion of that system. We suggest this is carefully examined in the light of the United Nations Convention on the Rights of Persons with Disabilities as providing differential treatment and care based on a person's disability.

Any use of Court records for purposes other than the Court proceedings should be limited to circumstances where the Court makes orders to do so. At a time where the status of electronic records is fluctuating and changing, our opinion is that this is not the right time to remove an important privacy guard.

Recommendation

> That any amendments to the storage of records should ensure that evidence from proceedings around criminal matters is only available to clinical staff where the Court has expressly permitted it and is subject to the current limitations on sharing as identified by the Court.