

# Health Legislation Amendment Bill 2019

## 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, the Honourable Steven Miles MP, Deputy Premier and Minister for Health and Minister for Ambulance Services, make this statement of compatibility with respect to the amendments to be moved during consideration in detail of the Health Legislation Amendment Bill 2019 (the amendments).

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

### *Amendments to new section 213F of the Public Health Act 2005*

The Health Legislation Amendment Bill 2019 inserts a new chapter 5B in the *Public Health Act 2005*. The purpose of new chapter 5B is to prohibit health service providers from performing conversion therapy. Conversion therapy is defined in section 213F(1) of the original Bill as a treatment or other practice that attempts to change or suppress a person's sexual orientation or gender identity. Examples of prohibited conversion therapy practices are provided in section 213F(1). Section 213F(2) describes a number of practices that are not conversion therapy and examples of these practices. Section 213F(3) provides a reasonable professional judgment exception to the prohibition on conversion therapy, which specifies that conversion therapy does not include a practice by a health service provider that, in the provider's reasonable professional judgment, is necessary to provide a health service in a manner that is safe and appropriate or comply with the provider's legal or professional obligations.

The amendments clarify that legitimate clinical practices are not included in the definition of conversion therapy. This is achieved by removing the word 'treatment' from the definition and prohibition of conversion therapy, as treatments may connote practices that serve a clinical function. In addition, the examples of prohibited conversion therapy practices in new section 213F(1) are replaced with more specific examples that better illustrate the types of practices that may constitute conversion therapy.

The amendments also clarify that practices that are part of the clinically appropriate assessment, diagnosis or treatment of a person, or clinically appropriate support of a person, are not conversion therapy and are excluded under the reasonable professional judgment exception to conversion therapy. The reasonable professional judgment exception is new section 213(3) in the Bill; the amendments renumber the provision as 213(2).

The exception for reasonable professional judgment is also amended to prevent it from being interpreted more narrowly than intended. As originally framed, the exception extended to practices that a health service provider reasonably believes are *necessary* to provide a health

service in a manner that is safe and appropriate or to comply with their legal or professional obligations. The requirement of necessity, if construed narrowly, may not protect clinically appropriate conduct that has a basis in evidence or clinical practice but is not strictly necessary to provide the health service safely. The amendments clarify that practices that, in a provider's reasonable professional judgment, *enable or facilitate* the provision of a health service in a safe and appropriate manner are not conversion therapy.

The Bill, at new section 213(2), sets out several practices that are not conversion therapy. The amendments clarify that the practices set out in that provision are not conversion therapy because they fall under the reasonable professional judgment exception, specifically, because they form part of the clinically appropriate assessment, diagnosis, treatment or support of a person. The amendments also update the examples provided in this provision to include practices that may not be, or may not be perceived to be, affirming of a person's sexual orientation or gender identity but are clinically appropriate. The amendments renumber the amended new section 213(2) in the Bill to new section 213(3) to clarify the provision's relationship with the professional judgment exception.

#### *Amendments to the Medicines and Poisons Act 2019*

On 26 September 2019, the *Medicines and Poisons Act 2019* received assent. The regulatory framework for the medicines and poisons scheme applies to persons carrying out regulated activities with regulated substances and will affect a broad range of stakeholders across industries as diverse as agriculture, health care, pest management and veterinary services. It also applies in a range of everyday settings including filling prescriptions at a pharmacy; receiving life-saving drugs in hospital; and enabling vulnerable people, such as children, those with a disability and the elderly, to receive the medicines they need. The scheme is not intended to regulate the everyday activities of laypersons or carers dealing with regulated substances lawfully, for example, by filling a prescription lawfully prescribed by their doctor. The focus of the scheme is on regulating trained professionals and industry members who require increased regulation and are sufficiently trained and experienced to know what is permitted under the scheme.

During drafting of the supporting regulations, technical amendments to the Medicines and Poisons Act were identified to enable the regulations to operate as intended and rectify some minor typographical errors. The amendments will:

- clarify that homeowners and occupiers can use household pesticides for pest control activities on their residential premises and allow the incidental use of household pesticides at a workplace, for example, spraying a household pesticide on a meter box before working on the box (section 44);
- facilitate staff of the Office of the Health Ombudsman (OHO) to access the monitored medicines database to assess health service complaints or investigate or monitor the activities of persons (section 224). Currently, section 224 of the Bill only allows staff to access the database for investigations. The proposed amendment is a result of amendments made through the *Health Transparency Act 2019* to the *Health Ombudsman Act 2013*. Those amendments clarified that authorised persons' powers include not only investigating but also monitoring compliance with conditions, orders and other requirements imposed by the Health Ombudsman to protect the public;
- insert an additional regulation-making power to enable schedule 5 and schedule 6 poisons to be dealt with by regulation (section 240); and

- rectify some minor technical and typographical errors (sections 31, 63, 92, 93, 157, 242, 271, 272, 279 and schedule 1).

## Human Rights Issues

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

#### *Protection from torture and cruel, inhuman or degrading treatment*

Section 17 of the Human Rights Act provides that a person must not be subjected to torture or treated in a cruel, inhuman or degrading way.

Amendment 2 may engage this right by clarifying the practices prohibited under the ban on conversion therapy. The most extreme forms of conversion therapy, including those described in the amendment, may constitute torture or cruel, inhuman or degrading treatment. By prohibiting these practices, the amendments promote, and therefore are compatible with, the right to protection from torture and cruel, inhuman or degrading treatment.

#### *Freedom of thought, conscience, religion and belief*

Section 20 of the Human Rights Act provides that every person has the right to freedom of thought, conscience, religion and belief, including the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

Amendment 2 may engage this right by clarifying the practices prohibited under the ban on conversion therapy. The examples amendment 2 inserts in section 213F(1) include techniques or interventions that are based on the premise, or encourage a person to believe, that being lesbian, gay, bisexual, transgender or intersex (LGBTI) is a defect or disorder. Some religions are not supportive of, or condemn, diverse sexual orientations and gender identities, and teachings of these religions may promote the idea that diverse sexual orientations and gender identities require correction. Arguably, prohibiting health service providers from engaging in conversion therapy may limit their right to engage in practices based on these beliefs.

#### *Freedom of expression*

Section 21 of the Human Rights Act provides that every person has the right to hold an opinion without interference and the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds and in any medium.

Amendment 2 may engage this right by clarifying the practices prohibited under the ban on conversion therapy. The examples amendment 2 inserts in section 213F(1) include techniques or interventions that are based on the premise that being LGBTI is a defect or disorder. It is arguable that the right to freedom of expression of health practitioners who hold this opinion, or opinions about the correctness or morality of being an LGBTI person, may be limited by the amendment as people will not be able to express this opinion by engaging in the practices outlined in the amendment.

*Privacy and reputation*

Section 25 of the Human Rights Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

Amendment 1 may engage this right by facilitating OHO to access the monitored medicines database to assess or investigate health service complaints and investigate or monitor persons subject to actions or orders under the Health Ombudsman Act. Allowing OHO to access the monitored medicines database, which includes personal information, may limit the right to privacy.

*Right to health services*

Section 37 of the Human Rights Act provides that every person has the right to access health services without discrimination.

Amendment 2 clarifies the scope of the prohibition on conversion therapy. The clarification provides greater certainty for health service providers and people who may be subjected to conversion therapy and will prevent health service providers refusing to provide health services to members of the LGBTI community due to a lack of understanding of the practices that constitute conversion therapy. The amendments therefore promote and are compatible with this right.

**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*)**

*Freedom of thought, conscience, religion and belief*

(a) the nature of the right

The right to freedom of thought, conscience, religion and belief encompasses the right of everyone to develop autonomous thoughts and conscience, to think and believe what they want and to have or adopt a religion and demonstrate that religion. Religion and belief have been interpreted broadly to include both mainstream and alternative religions and beliefs.

(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 nature of any limitation on this right by amendment 2 is minor as the relevant provisions of the Bill, as amended, only prohibit practices engaged in by health service providers. The prohibition does not extend to religious teachings or practices, unless those practices are engaged in as part of the provision of a health service. Nor is a person prohibited from having a religion, holding a belief or demonstrating that religion or belief. Health service providers are not required to engage in any practice that may be contrary to their religions or beliefs.

The purpose of the limitation is to protect LGBTI people from the harms caused by conversion therapy and to send a strong message that being an LGBTI person is not a disorder that requires treatment or correction. This is a legitimate purpose, as government has a responsibility to

regulate the safety of health services and to combat discrimination against vulnerable members of the community.

(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

The limitation achieves its purpose by ensuring that conversion therapy does not occur in a clinical context. Patients have a right to expect that health service providers will offer services that are based in evidence or accepted clinical practice. Conversion therapy is known to be ineffective and harmful and any health service provider who engages in these practices breaches the trust placed in them by the community.

Arguably, the limitation could be broader and offer further protection for LGBTI people by prohibiting conversion therapy in all contexts; however it is considered that a broader limitation would impose a much greater limitation on the freedom of thought, conscience, religion and belief. At this time, the limitation strikes an appropriate balance by removing harmful and ineffectual practices from a clinical context, thereby sending the message that an LGBTI identity is not a disease or disorder that requires a cure or treatment.

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

The limitation is necessary, as there is no reasonably available, less restrictive way to protect LGBTI people from the harms of conversion therapy. Health service providers who engage in conversion therapy may already face regulatory consequences, including disciplinary action by the Health Ombudsman and, in the case of registered health practitioners, the Australian Health Practitioner Regulation Agency and the National Boards that regulate the health professions. Health service providers may also be subject to additional professional sanctions on the basis that conversion therapy is a breach of their professional obligations. Despite these potential consequences, some health service providers continue to engage in conversion therapy in Queensland.

To avoid unduly limiting the right to freedom of thought, conscience, religion and belief, the prohibition of conversion therapy set out in the amended provisions of the Bill is aimed narrowly at ensuring that health service providers do not continue to engage in these harmful practices. It applies only to health service providers, who have a professional and public responsibility to provide health services that are safe and evidence based. The prohibition does not extend to religious teachings or practices, unless those practices are engaged in as part of the provision of a health service. Health service providers are not prohibited from having a religion, holding a belief or demonstrating that religion or belief, nor will they be required to engage in any practice that may be contrary to their religions or beliefs.

For these reasons, prohibiting conversion therapy, including the practices described in amendment 2, is the least restrictive reasonably available means to deter these dangerous and discriminatory practices.

(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 amendments and provisions of the Bill to which they apply achieve a fair balance between the protection of LGBTI individuals and of the right to freedom of thought, conscience, religion and belief. The benefits of prohibiting conversion therapy in the context of health service delivery are substantial since they will protect LGBTI individuals from practices that can inflict severe harm, including psychological trauma and increased risk of self-harm and suicide. The prohibition also combats discrimination against LGBTI individuals by sending a strong message that conversion therapy is unacceptable. In contrast, for the reasons stated above, any potential limitation of the right to freedom of thought, conscience, religion and belief is minor and is substantially outweighed by the need to protect the health and wellbeing of vulnerable members of the community. In achieving this purpose, the amendments and the Bill also promote the human rights of LGBTI individuals.

*Privacy and reputation*

(a) the nature of the right

The right to privacy protects the individual from all interferences and attacks upon their privacy, including the protection of personal information. The scope of this right is subject to an internal limitation as the right provides that a person has the right to protection from unlawful or arbitrary interferences with their privacy. An interference with a person's privacy will be arbitrary if it is capricious, unpredictable or unjust, or if the interference is not proportionate to a legitimate aim.

(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

Amendment 1 will facilitate OHO to access the monitored medicines database to assess or investigate health service complaints and investigate or monitor persons subject to actions or orders under the Health Ombudsman Act. The monitored medicines database is established under the Medicines and Poisons Act. The database will monitor prescription information related to high-risk medications such as pharmaceutical opioids and other prescription-only medicines associated with abuse and drug-seeking. In accessing the monitored medicines database, OHO will have access to the personal information stored on the database. Allowing OHO to access this information for the purposes set out in amendment 1 may limit the right to privacy of the persons whose information is stored in the monitored medicines database.

The purpose of this limitation is to protect the health and safety of the public. This is a legitimate and important purpose as the government has an obligation to protect the community from the harm caused by public health risks, including the public health risks caused by the inappropriate use of prescription medicines.

(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

The limitation achieves its purpose by authorising OHO to access the information required to undertake well-informed and comprehensive investigations into activities that may endanger the health and safety of the public, such as the inappropriate prescription of drugs associated with abuse and drug-seeking, and effectively monitor and assess the conduct of health practitioners subject to regulatory action to ensure compliance with existing regulatory actions

and orders. A public health risk may emerge if this information is not shared with OHO as this may delay or prevent appropriate regulatory action being taken against health practitioners. The limitation also ensures consistency between the Medicines and Poisons Act and the Health Ombudsman Act. If the amendment is not made, OHO will be authorised to access the monitored medicines database to perform some functions but not others. This will result in inconsistent outcomes and may hamper the ability to effectively regulate health practitioners and prevent public health risks.

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

The amendment is necessary to provide OHO with access to monitored medicines information, which is the only effective way to provide them with the information they need to perform proper monitoring and enforcement of certain regulatory actions that protect the public from harm.

The amendment is the least restrictive way to achieve this purpose. Consistent with the nature and scope of the right to privacy, safeguards are in place to ensure that any interference with the right to privacy is not unlawful or arbitrary. The purposes for which staff of the health ombudsman can access the monitored medicines database are clearly defined and linked to the key functions of OHO under the Health Ombudsman Act. The confidentiality provisions of the Medicines and Poisons Act specify that information may only be disclosed to OHO if the disclosure is reasonably necessary for them to exercise their functions and the confidential information will be collected, stored and used in a way that protects the privacy of persons to whom the information relates from unjustified intrusion. OHO is subject to the confidentiality provisions of the Health Ombudsman Act and are liable for a penalty of up to 100 penalty units if they use confidential information in a manner that is not authorised under that Act. These safeguards are appropriate to ensure any interference with a person's privacy is not unlawful or arbitrary and that the access is no greater than necessary to achieve the aim of protecting public health and safety.

(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 safeguards against the misuse of confidential information disclosed as a result of amendment 1 ensure that the right to privacy is not limited in a manner that is inconsistent with the Human Rights Act. The benefits of the amendment are substantial as it will allow OHO to act swiftly to prevent a risk to public health caused by the inappropriate and illegal use of prescription medicines by health practitioners. This could include the health ombudsman investigating how a prescriber is treating patients or potentially placing the public at risk because they are impaired. The amendment achieves an acceptable balance between preserving the right to privacy and protecting public health and safety. Any limitation imposed on the right is therefore reasonable and justifiable.

#### *Freedom of expression*

(a) the nature of the right

The right to freedom of expression protects the rights of persons to hold an opinion without interference and the rights of persons to seek, receive and express information and ideas. The right protects against attempts to coerce a person to hold or change an opinion. The forms of expression that are protected are broad and include verbal and non-verbal forms of communication.

(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

An argument could be made that the definition of conversion therapy, as amended by amendment 2, limits the right to freedom of expression. The nature of any limitation on this right is minor. Amendment 2 provides examples of the types of practices prohibited under the prohibition on conversion therapy and clarifies practices that are not conversion therapy. Neither the amendment nor the Bill prohibits a person from holding an opinion about conversion therapy. However, some health practitioners may perceive a limitation to their right to hold and express an opinion about the effectiveness of conversion therapy as a medical treatment. Individuals who are struggling with their sexual or gender orientation may also believe that their right to seek and receive information about conversion therapy from health practitioners is limited.

The purpose of the limitation is to protect LGBTI people from the harms caused by conversion therapy and to send a strong message that being an LGBTI person is not a disorder that requires treatment or correction. This is a legitimate purpose, as government has a responsibility to regulate the safety of health services and to combat discrimination against vulnerable members of the community. The government also has a responsibility under the Human Rights Act to promote the rights of Queenslanders, including the LGBTI community, to access health services without discrimination.

(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

The limitation achieves its purpose by ensuring that conversion therapy does not occur in a clinical context. Patients have a right to expect that health service providers will offer services that are based in evidence or accepted clinical practice, not a health practitioner's personal opinions or beliefs. Conversion therapy is known to be ineffective and harmful and any health service provider who engages in these practices breaches the trust placed in them by the community.

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

The limitation is necessary, as there is no reasonably available, less restrictive way to protect LGBTI people from the harms of conversion therapy. Health service providers who engage in conversion therapy may already face regulatory consequences, including disciplinary action by the Health Ombudsman and, in the case of registered health practitioners, the Australian Health Practitioner Regulation Agency and the National Boards that regulate the health professions. Health service providers may also be subject to additional professional sanctions on the basis that conversion therapy is a breach of their professional obligations. Despite these potential

consequences, some health service providers continue to engage in conversion therapy in Queensland.

For these reasons, prohibiting conversion therapy, including the practices described in amendment 2, is the least restrictive, reasonably available means to deter these dangerous and discriminatory practices.

(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 amendments achieve a fair balance between the protection of LGBTI individuals and of the right to freedom of expression. The benefits of the amendments are substantial since they will protect LGBTI individuals from practices that can inflict severe harm, including psychological trauma and increased risk of self-harm and suicide. The amendments also combat discrimination against LGBTI individuals by sending a strong message that conversion therapy is unacceptable.

In contrast, any potential limitation of the right to freedom of expression is minor. No person is prohibited from holding an opinion or expressing that opinion, except that health practitioners may not perform conversion therapy (arguably a type of communication) in a clinical context. Patients are also not prohibited from seeking medical advice if they are struggling with their sexuality or gender identity. However, given the harm that may be caused by conversion therapy and that such practices are ineffective, it is entirely appropriate that patients not be subjected to these practices and that any patient seeking medical advice with regards to their sexual orientation or gender identity be provided proven, evidence based support. Any limitation of the right to freedom of expression is substantially outweighed by the need to protect the health and wellbeing of vulnerable members of the community. In achieving this purpose, the amendments also promote the human rights of LGBTI individuals.

## Conclusion

In my opinion, the amendments to be moved during consideration in detail of the Health Legislation Amendment Bill 2019 are compatible with human rights under the Human Rights Act because they limit a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

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