

Interim Report

20 April 2022



**South Australian Law Reform Institute**

**Review of the *Mental Health Act 2009* (SA)**

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide Law School.

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This Interim Report has been prepared in accordance with the Terms of Reference provided by the State Government.

**Acknowledgement of Country:**

SALRI acknowledges and respects Aboriginal people as the State's first people and recognises their traditional relationship with Country. We acknowledge that the spiritual, social, cultural and economic practices of Aboriginal people come from their traditional lands and waters, and that the cultural and heritage beliefs, languages and laws are still of importance today. The University of Adelaide, where SALRI is based, stands on Kaurna land.



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## Executive Summary

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On 17 February 2022, the South Australian Law Reform Institute (SALRI) was formally requested by the Hon Josh Teague MP, the Minister for Planning and Local Government (exercising the powers and functions of the Attorney-General), to undertake an independent legislative review of the operation of the *Mental Health Act 2009* (SA) ('MHA').<sup>1</sup>

An independent review is required under s 111 of the *MHA*.<sup>2</sup> Following this review, SALRI must provide a written Final Report to the relevant Minister, examining the operation of the law and making any recommendations for possible changes to law and practice. An Interim Report, outlining the work completed to date is to be presented to the Minister by 20 April 2022 and the Final Report by 1 November 2022.

This Interim Report is a progress report of the context to this review, SALRI's work to date and future plans.

Legislative reviews provide an opportune time to determine whether the law remains fit for purpose and effective in meeting its objectives. The *MHA* provides a framework for the delivery of mental health services in South Australia. Mental health law can significantly affect the rights of consumers,<sup>3</sup> particularly in the context of involuntary treatment. As such, the law must be examined through the lens of a changing legal landscape, whereby international human rights law, principles and frameworks have shifted to a supported decision-making model over the past now outdated substitute decision making model. This shift places greater emphasis on the need to safeguard capacity, autonomy and self-determination.<sup>4</sup>

The aim of this review is to ensure South Australia remains at the forefront of mental health reform. Consequently, the review will examine the legal, human rights and other issues raised as well as the operation of the *MHA*. This will enable SALRI to identify any shortcomings of the law, areas for reform and potential changes to present law and practice to resolve any issue(s) identified. According to its terms of reference, SALRI will not examine the provision or delivery of mental health services. SALRI acknowledges that there are very real issues and needs in this area. However, issues beyond the scope of this review cannot be addressed.

To date, SALRI has:

- Liaised and continues to liaise closely with the Office of the Chief Psychiatrist;
- Undertaken initial consultation and research;
- Identified the key issues raised in the review (guided by the terms of reference);
- Prepared eight single page plain English Fact Sheets on each issue, with 1 - 3 consultation questions per Fact sheet;

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<sup>1</sup> See below 2.1.4 for the official Terms of Reference.

<sup>2</sup> *Mental Health Act 2009* (SA) s 111.

<sup>3</sup> SALRI, in accordance with modern practice, will use the term 'consumers' in preference to such past terms as 'patients'.

<sup>4</sup> See generally the voluminous work of the Victorian Royal Commission into Victoria's Mental Health System. See further at: <http://rcvmhs.archive.royalcommission.vic.gov.au/>.

- Two additional fact sheets have also been prepared: one on the background of SALRI and the terms of reference and the other is a summary list of all the consultation questions);
- Prepared the YourSAy online platform, incorporating a summary of the review, a survey and an open forum. The Fact Sheets and promotional video will also be available;
- Organised consultation (including YourSAy) to open on Tuesday 19 April and close on Tuesday 31 May (6 weeks);
- Currently preparing a short 2-3 minute promotional video to promote interest and input introducing SALRI, providing a summary of the review and how to contribute;
- Planned six roundtable discussions (by theme/professional discipline) – invite only;
- Written a media release for SALRI's review (to be published by the Media Office at the University of Adelaide);
- Planned proposed six regional trips within South Australia for consultation, namely to Port Pirie/Port Augusta, Mount Gambier, Whyalla, Berri, Port Lincoln and Mannum;
- Consulted with the Office of the Chief Psychiatrist's Lived Experience Advisory Group and the Principal Aboriginal Mental Health Advisor;
- Prepared a consultation spreadsheet identifying relevant parties to contact; and
- Prepared a draft structure of the Final Report.

SALRI acknowledges the assistance of the South Australian Department of Health and Wellbeing in providing funding for this project. In addition, SALRI also acknowledges the assistance of the Office of the Chief Psychiatrist.

SALRI looks forward to the timely completion of its Report on this important topic. Any queries should be directed to [salri\\_mha@adelaide.edu.au](mailto:salri_mha@adelaide.edu.au).

## Part 1 – Background

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### 1.1 The South Australian Law Reform Institute

1.1.1 The South Australian Law Reform Institute ('SALRI') is an independent, non-partisan law reform body based at the University of Adelaide Law School. SALRI is not an advocacy body. Rather SALRI conducts inquiries or references into various areas of the law. It is assisted by an expert Advisory Board. The subject of a reference is determined by the SALRI Advisory Board and at the request of other parties such as the South Australian Attorney-General or the Law Society of South Australia. SALRI conducts extensive multidisciplinary research and looks at similar law and practice and its operation in other jurisdictions (both in Australia and overseas). SALRI consults widely with interested parties, experts and the community. Based on the work and research undertaken during an inquiry, SALRI makes reasoned recommendations about any appropriate changes to law and practice to the Attorney-General so that the Government and South Australian Parliament can make informed decisions about any appropriate changes. SALRI's recommendations do not necessarily become law. Rather, any decision on accepting and implementing any of SALRI's recommendations is entirely for the Government and South Australian Parliament. Impartiality and independence are two of the cornerstone principles guiding SALRI's work.

1.1.2 When undertaking its work, SALRI has a number of objectives. These include: to identify law reform options that would modernise the law, resolve any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with the law of other States and Territories. Under its guiding objectives, SALRI is required to consider the case for uniform laws where desirable.

1.1.3 SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.<sup>5</sup> SALRI is based on the Alberta law reform model, which is also used in Tasmania, and is linked to the Law Reform elective course at the University of Adelaide. The Law Reform class makes a valuable contribution to SALRI and their work informs and supports SALRI's work.

1.1.4 A central premise of law reform is to promote the clarity, comprehension and accessibility of the law. This has particular application in relation to the *MHA*. SALRI adopts the view of Kirby J in this context; that law reform exists to promote 'the right of citizens ... to have the most modern, well-informed, efficient system of law that the state can reasonably provide.'<sup>6</sup>

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<sup>5</sup> SALRI can be seen as the successor to the Law Reform Committee of South Australia which operated between 1968 and 1987. During its operation, the Law Reform Committee produced a remarkable output of 106 reports. See <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute>>.

<sup>6</sup> Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech at the Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

## **Part 2 – Review of the *Mental Health Act 2009 (SA)***

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### **2.1 Terms of Reference**

2.1.1 On the 17 February 2022, SALRI was formally requested by the Hon Josh Teague MP, the Minister for Planning and Local Government (exercising the powers and functions of the Attorney-General), to undertake an independent legislative review of the operation of the *MHA*.

2.1.2 An independent review is required under s 111 of the *MHA*.<sup>7</sup> Following this review, SALRI must provide a written Final Report to the State Government, making recommendations for any appropriate changes to law and practice. An Interim Report, outlining the work completed to date is to be presented to the Minister by 20 April 2022 and the Final Report by 1 November 2022.

2.1.3 The aim of the review is to ensure South Australia remains at the forefront of mental health reform. Consequently, the review will examine the legal, human rights and other issues raised as well as the operation of the *MHA*. This will enable SALRI to identify any shortcomings of the law, areas for reform and potential changes to present law and practice to resolve any issue(s) identified.

2.1.4 The following formal terms of reference were provided to SALRI:

1. Consult with relevant stakeholders, experts, persons with lived experience of mental illness, and other interested community groups and members, and to consider best practice from other Australian (and, if appropriate, international) jurisdictions in relation to the best practice, rights-supportive approach to mental health laws.
2. Make recommendations on best practice and appropriate legislative changes as a result of these investigations, with a view to replacing (if required) or reforming South Australia's mental health legislation to better meet the objectives of the Act.
3. In particular, examine the following matters:
  - 3.1. whether the operation of the Act unreasonably erodes patient rights to refuse treatment, or rights to access alternative, non-pharmacological approaches to treatment.
  - 3.2. Consider the findings of the Royal Commission into Victoria's Mental Health System, insofar as those findings are relevant to South Australia's mental health legislation, including the role of positive rights and objectives that promote community-wide good mental health, a focus on recovery-oriented practice, and accountability mechanism for decision-makers.
  - 3.3. Consider the operation of the "decision-making capacity criterion" for involuntary treatment orders under the Act, and its definition in section 5A, and in doing so consider:
    - 3.3.1. Whether a best-practice, rights-based approach requires the prioritisation of this criterion and a legislated supported decision-making model;
    - 3.3.2. Whether consumers, carers and mental health professionals require legislative clarification concerning the assessment of impaired decision-making capacity, with reference to the decisions in *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 and *TSC v Department for Health and Wellbeing* [2021] SASCA 93.

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<sup>7</sup> *Mental Health Act 2009 (SA)* s 111.

3.3.3. the findings and Recommendation 4 of the Deputy State Coroner Anthony Schapel dated 4 November 2021 regarding the death of Theo Nicholas Papageorgio, which relates to the impact of legislative criteria and suicide prevention.

3.4. In the context of a discussion around shifting the focus of the Act towards encouraging good mental health and wellbeing, consider whether the role of Mental Health Commissioners should be statutory under the MH Act.

3.5. Consider improvements that could be made to the operation of the Act, including to address the issues identified [by the Office of the Chief Psychiatrist]. These issues have been identified following internal consultation in the Office of the Chief Psychiatrist and preliminary external consultation with a limited number of stakeholders. While many are administrative matters concerning the current operation of the Act, several are substantive legal or rights-impacting issues. They may be grouped into the following categories: (1) human rights protections, (2) involuntary treatment orders and care and control powers, (3) Consumer representation, (4) Electroconvulsive Therapy, (5) Prescribed Psychiatric Treatment Panel, (6) Functions of the Chief Psychiatrist and Community Visitor Scheme, and (7) Miscellaneous other issues.

2.1.5 According to its terms of reference, SALRI will not examine the provision or delivery of mental health services. SALRI acknowledges that there are very real issues and needs in this area. However, issues beyond the scope of this review cannot be addressed by SALRI.

## 2.2 Consultation Approach

2.2.1 SALRI is committed to an impartial, inclusive and accessible consultation process with the South Australian community and all interested parties, including but not confined to the legal profession.<sup>8</sup> SALRI is especially committed to including Aboriginal communities<sup>9</sup> as well as remote, rural and regional communities<sup>10</sup> in an active and inclusive consultation process. Such wide and inclusive consultation is integral to modern law reform.<sup>11</sup> As Neil Rees has observed:

Effective community consultation is one of the most important, difficult and time-consuming activities of law reform agencies ... community participation has two major purposes: to gain responses and feedback and to promote a sense of public 'ownership' over the process of law

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<sup>8</sup> Michael Kirby, 'Are We There Yet' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 433, 436. See further Sarah Moulds, 'Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide' (2017) 38(2) *Adelaide Law Review* 441.

<sup>9</sup> See also Law Council of Australia, *The Justice Project: Aboriginal and Torres Strait Australians* (Final Report, August 2018) 7–10. SALRI is committed to 'honest and respectful consultation' with Aboriginal communities. There are regular criticisms of token or perfunctory consultation with Aboriginal communities. See Melinda Miller, 'Consultation with Aboriginal and Torres Strait Islander People in Early Childhood Education: The Impact of Colonial Discourses' (2015) 42(5) *Australian Educational Researcher* 549, 553; Kylie Lingard, 'The Impact of the Law on Consultation Practices and Purpose: A Case Study of Aboriginal Cultural Heritage Consultations in NSW' [2012] (1) *International Journal of Rural Law and Policy* 1; Janet Hunt, Australian Institute for Family Studies, *Engaging with Indigenous Australia: Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander Communities* (Issues Paper No 5, 2013) 30.

<sup>10</sup> This theme has widely emerged in past SALRI references, notably by the Hon Geoff Brock MP, Minister for Local Government and the Member for Stuart.

<sup>11</sup> Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160; Sarah Moulds, 'Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide' (2017) 38(2) *Adelaide Law Review* 441.



reform ... consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter.<sup>12</sup>

2.2.2 SALRI typically follows a multi-faceted consultation approach and adapts its approach as required. This is particularly notable in SALRI's consultation with Aboriginal communities. SALRI meets individually with Aboriginal Elders and members of Aboriginal communities and agencies and travels regionally to various locations. SALRI acknowledges the importance of culturally appropriate and sensitive engagement and fosters a culturally safe environment to undertake its consultation.

2.2.3 As part of its present consultation, SALRI plans, circumstances allowing, to travel to various locations in regional South Australia to engage with the community and relevant parties. This includes proposed trips to Port Pirie and Port Augusta, Berri and the Riverland, Port Lincoln, Whyalla, Mount Gambier and Mannum.<sup>13</sup> These visits will provide SALRI with the opportunity to engage widely with relevant parties and gain insight into particular implications or issues experienced by individuals living and/or working in regional South Australia as well as by Aboriginal communities.

2.2.4 SALRI has prepared ten Fact Sheets, reflecting its terms of reference (of which eight discuss a key issue raised in this review):

- Background (about SALRI and the terms of reference);
- Capacity and supported decision-making;
- Inpatient Treatment Orders;
- Community Treatment Orders;
- Restrictive Practice and Control Powers;
- Electroconvulsive Therapy;
- The South Australian Civil and Administrative Tribunal and Legal Representation;
- The Role of South Australia Police;
- Other Issues (addresses outstanding issues that are not raised in detail by the preceding fact sheets); and
- Summary List of Consultation Questions.

2.2.5 These Fact Sheets will also form the broad structure of SALRI's Final Report. Each issue has been identified in accordance with the terms of reference and with the suggestions of the Office of the Chief Psychiatrist.

2.2.6 Each substantive Fact Sheet contains 1-3 consultation questions, which will also guide SALRI's roundtable discussions and form the basis of the survey available on YourSAy. The data and comments received during consultation forms an integral part of SALRI's Final Report and informs any recommendations for any changes to law or practice.

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<sup>12</sup> Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Conference Paper, Australasian Law Reform Agencies Conference, Vanuatu, 10–12 September 2008), <[http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B\\_NeilRees.pdf](http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf)>.

<sup>13</sup> See also Part 2.3 Regional Consultation.

2.2.7 On 1 March 2022, SALRI received confirmation from the Attorney-General's Department to use the YourSAy site to conduct consultation. The YourSAy platform for the review has been prepared, containing:

- An overview of the review and SALRI's terms of reference;
- The nine fact sheets concerning the key issues raised within the review (excluding the Summary List of Consultation Questions);
- A survey consisting of SALRI's consultation questions;
- An open forum, in which members of the public may provide a comment about their experience in dealing with the *MHA*;
- SALRI's contact details and website;
- Frequently asked questions; and
- Lifecycle of the project (open, closed and under review and consultation outcome).

2.2.8 SALRI adopts a flexible and multi-faceted consultation approach.

2.2.9 The YourSAy platform acts as a conduit between SALRI and the community. It provides an opportunity for the wider community to contribute and express their views on the relevant issues and questions to be examined in this review. SALRI is aware of the limitations associated with the use of YourSAy, most notably, it requires a level of computer, reading and writing literacy and access to a computer with an internet connection.<sup>14</sup> SALRI's experience over several past references has shown the importance of diverse consultation across a number of avenues (survey, fact sheet, video) and through various methods (community forum, private meeting, roundtable discussion). In addition, SALRI adapts its consultation approach to cater to specific groups or consultees, to ensure meaningful input and engagement.

### **Aboriginal Communities**

2.2.10 SALRI is committed to an active and inclusive consultation process with Aboriginal communities. Consultation with Aboriginal communities may take a different approach. Over the years, SALRI has built a rapport with a number of Aboriginal elders, community members and organisations, both in metropolitan and regional South Australia. This is a product of ongoing discussions and visits to different communities. A SALRI visit generally occurs at the beginning of a project to ascertain initial views and identify key issues, towards the end of a project to receive feedback on recommendations (based on consultation) and upon the completion of a project to provide a copy of the finalised report.

### **Culturally and Linguistically Diverse Communities**

2.2.11 SALRI also engages with culturally and linguistically diverse ('CALD') communities, most notably, through the Multicultural Communities Council of South Australia. For example, a community forum with members may be facilitated by SALRI. This provides a valuable opportunity

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<sup>14</sup> This may well be an issue in remote and rural locations.

to consult with members of CALD communities. Such a discussion in a safe environment enables SALRI to better understand particular issues or concerns facing members of CALD communities.

### **Disability Sector and Community**

2.2.12 SALRI has close links with the disability sector and community – this includes organisations such as Purple Orange and persons with a disability. In previous projects undertaken by SALRI, community forums have been organised. Most recently, a focus group was convened to discuss one of SALRI’s ongoing projects on the law of witness competence. This proved a valuable session.

2.2.13 SALRI’s engagement with Aboriginal communities, CALD communities and people with a disability reflects the ways in which modern consultation can be adapted to enhance meaningful engagement.

## **2.3 Regional Consultation**

2.3.1 As part of this review, SALRI is planning (subject to the availability of proposed participants, sufficient interest and venues) six regional trips with the following preliminary dates (emphasising that these are only provisional and depend on all the circumstances):

<b>Date*</b>	<b>Location</b>
<b>19<sup>th</sup> – 20<sup>th</sup> May</b>	Port Pirie and Port Augusta
<b>26<sup>th</sup> – 27<sup>th</sup> May</b>	Berri
<b>3<sup>rd</sup> June</b>	Whyalla
<b>9<sup>th</sup> – 10<sup>th</sup> June</b>	Mount Gambier
<b>14<sup>th</sup> – 15<sup>th</sup> June</b>	Port Lincoln
<b>July</b>	Mannum

\*All dates still to be confirmed.

2.3.2 SALRI members will join these proposed regional trips.

## **2.4 Roundtable Discussions**

2.4.1 SALRI will hold a number of roundtable discussions with a wide range of interested parties and individuals and affected agencies and both Government and non-Government bodies. These sessions are by invitation only. At the commencement of the roundtable, attendees are informed that SALRI adopts the Chatham House Rule (individual attributable views expressed cannot and will not be repeated outside the session).<sup>15</sup> Agreement is often reached at these sessions between attendees on many of the issues arising. SALRI also prepares detailed minutes of each roundtable discussion.

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<sup>15</sup> Sometimes attendees will meet separately SALRI outside a roundtable and agree or ask that their individual views are publicly attributable to them in any Report.

Once prepared, these minutes are distributed to attendees, in order to ensure their accuracy and to arrive at an agreed record of the session. These minutes may be referred to in SALRI's Report, especially if agreement was reached on a particular question.

2.4.2 Roundtables are arranged according to a particular theme (such as industry or practice) or professional discipline (such as legal or medical). These discussions allow targeted consultation, enabling SALRI to focus on particular issues raised within a theme or professional discipline. Each roundtable discussion is two hours and is generally hosted at the University of Adelaide.<sup>16</sup>

2.4.3 The following roundtables will be held as part of this reference (by theme/professional discipline):

- Medical
- Allied Health
- Advocacy/NGOs
- Government/Peak Body
- Consumers and Carers
- Regional/Community

2.4.4 The Roundtables will be held in late May and June 2022. In light of the ongoing COVID-19 situation, measures to offer remote participation can be arranged, if required.

2.4.5 It is important to note that any consultation process needs to be flexible and adaptable, especially with the ongoing COVID-19 situation.

2.4.6 SALRI looks forward to the timely completion of its Report on this important topic. Any queries should be directed to [salri\\_mha@adelaide.edu.au](mailto:salri_mha@adelaide.edu.au).

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<sup>16</sup> SALRI has previously held community forums at venues external to the University of Adelaide. For example, a forum was arranged and undertaken at the offices of the Multicultural Communities Council of SA.

## Part 3 Addendum

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### 3.1 Proposed New Term of Reference

3.1.1 Following the submission of SALRI's initial Interim Report to the Attorney-General and Minister for Health and Wellbeing, SALRI's ongoing work and consultation on the Review of the *Mental Health Act 2009* (SA) (*MHA*) has been temporarily postponed. On 14 April 2022, the new Minister for Health and Wellbeing, the Hon Chris Picton MP, suggested the addition a new term of reference for its review of the *MHA*. SALRI was asked by Minister Picton to consider the intersection between the legislative provisions of the *MHA* and the access block currently faced by consumers.

3.1.2 SALRI notes that this term of reference can be viewed as an extension of Point 3.2 under the agreement, in which SALRI must:

3.2. Consider the findings of the Royal Commission into Victoria's Mental Health System, insofar as those findings are relevant to South Australia's mental health legislation, including the role of positive rights and objectives that promote community-wide good mental health, a focus on recovery-oriented practice, and accountability mechanism for decision-makers.

3.1.3 This additional term requested by Minister Picton does not extend to an examination of the provision or delivery of mental health services, nor does it concern the quality and safety of these services. Rather, SALRI is to consider the extent to which the current *MHA* imposes barriers, if any, for consumers to access services. This additional proposed term of reference is consistent with Recommendation 42 of the Royal Commission into Victoria's Mental Health System, which suggested legislative mechanisms to promote an effective and rights-based mental health system. Arrangements to enhance and enforce accountability and monitoring of services may also be a relevant consideration.

3.1.4 In liaison with the Office of the Chief Psychiatrist, SALRI has considered Minister Picton's request and, in principle, is agreeable to the amendment of the terms of this review, in accordance with the above scope and interpretation of this proposed additional term of reference. This extension will require an additional Fact Sheet, suitable consultation question(s) and chapter of the Final Report. SALRI will also ensure that its consultation is appropriately tailored, including with consumer and advocacy groups, to ensure the proposed term of reference is adequately addressed.

3.1.5 SALRI's consultation has been delayed whilst clarification of the Minister's additional term for reference and its implications was considered. However, SALRI's consultation is ready to go live following completion of the additional fact sheet and consultation questions.

3.1.6 Due to the additional workload and delay beyond its control in consultation, SALRI has sought a three-month extension for submission of the Final Report (February 2023). This will allow an appropriate period of time to undertake consultation, as initially planned, for six weeks.