# Emergency mental health laws (Queensland)

## Emergency Examination Authorities
## - where there is no ‘less restrictive way’

Professor Alan Clough (PhD, LLB, GDLPP)

I acknowledge the traditional owners of the lands on which JCU operates (Cairns region) - the Djabugay, Gimuy Walubara Yidinji and the Yirrganydji peoples.

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# Overview

1. Introduction
   - Changes implemented in 2017=> *Mental Health Act 2016* (Qld) ('MHA')
     *Public Health Act 2005* (Qld) ('PHA')
   - A mental health function and a public health law – different objects and purposes - relevance of 'less restrictive way' principles - in MHA not PHA
2. Emergency Examination Authorities (EEAs) under the PHA
   - Powers under an EEA and who has them – intersection with MHA.
3. Some research results – north Queensland
   - Epidemiology – trends and patterns - how many, who, when affected?
   - System challenges and responses
4. Parliament's clear intention to distinguish 'mental illness' from 'drug and alcohol abuse'
5. Compatible with human rights?

# Introduction

- From 2008, Australian jurisdictions review their mental health legislation ~ the UN Convention on the Rights of People with Disabilities.
- 5 March 2017
  - *Mental Health Act 2016* (Qld) ('MHA') commenced.
  - *Mental Health Act 2000* repealed
  - Amended *Public Health Act 2005* ('PHA') into force.

# A mental health function for a public health law - implemented 5 March 2017

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

**new Act**

Mental illness (MHA s 10)

- '*improve/maintain the health/wellbeing of those who lack capacity to consent*' (MHA s 3)
- Safeguard rights
- Promote recovery
- Least restrictive of the person's rights and liberties
- Less restrictive = consent
- Meaning of less restrictive way (MHA s 13(1))

***Public Health Act 2005*** **(Qld) ('PHA')**

**amended**

Chapter 4A Health of persons with major disturbance in mental capacity

Immediate risk of serious harm because of a major disturbance in mental capacity (PHA s 157B(1))

- '*protect and promote the health of the Queensland public*' (PHA ss 6-7)

# Less restrictive way hierarchy (MHA s 13)

**13 Meaning of *less restrictive way***

(1) For this Act, there is a ***less restrictive way*** for a person to receive treatment and care for the person's mental illness if, instead of receiving involuntary treatment and care, the person is able to receive the treatment and care that is reasonably necessary for the person's mental illness in 1 of the following ways—

(a) if the person is a minor—with the consent of the minor's parent;

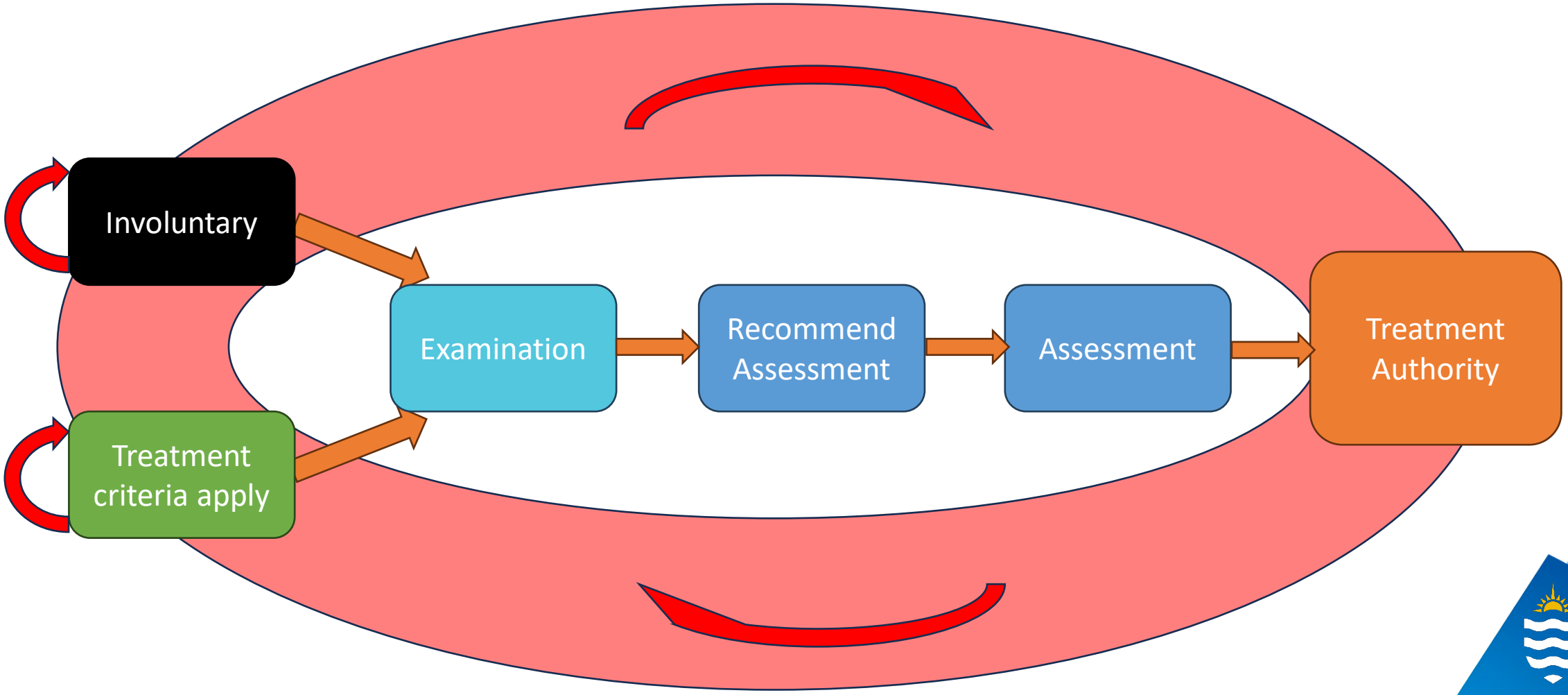
(b) if the person has made an advance health directive—under the advance health directive;

(c) if a personal guardian has been appointed for the person—with the consent of the personal guardian;

(d) if an attorney has been appointed by the person—with the consent of the attorney;

(e) otherwise—with the consent of the person's statutory health attorney.

# Queensland's Civil mental healthcare system 'Treatment Authority' (MHA ch 2) (formerly 'Treatment Order') - majority made after examination and assessment



# North Queensland population ~5000-7000 EEAs/year

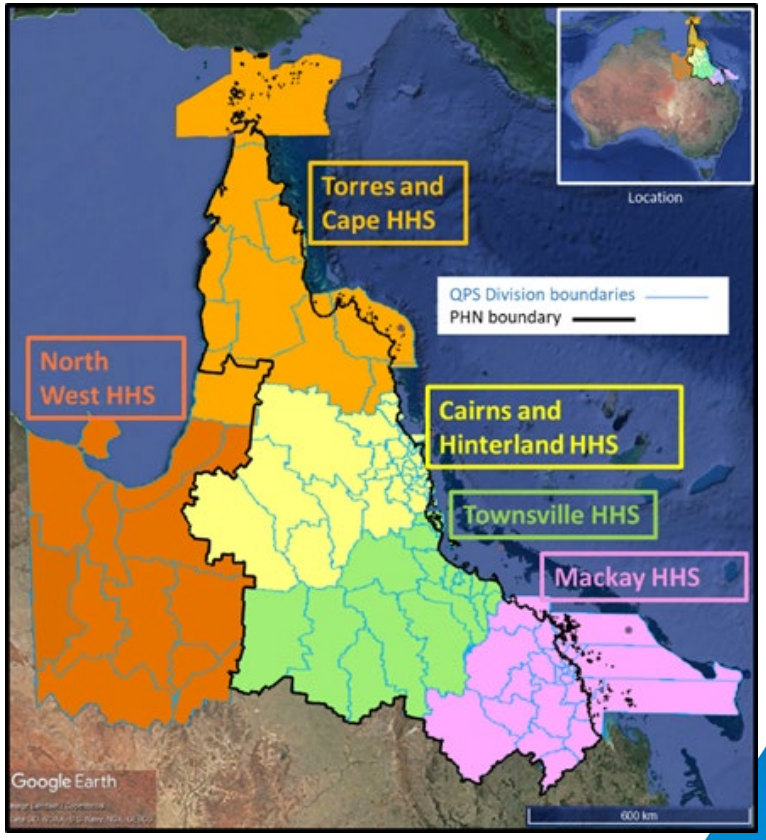
**Population: ~720,000 including ~135,000 (19%) Aboriginal and Torres Strait Islanders**

HHS populations:

- Cairns and Hinterland 253,753
- Townsville 237,090
- Mackay 173,892
- Torres and Cape 26,514
- North West 28,296

Queensland Government Statistician's Office. *Queensland Regional Profiles - North Statistical Area Level 3 (SA3) Compared with Queensland.* Queensland Treasury; 2019

**Northern Queensland showing overlapping administrative boundaries of Hospital and Health Services (HHSs)/Local Ambulance Service Networks (LASNs), Queensland Police Service (QPS) Divisions and Primary Health Networks (PHNs).**



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# Emergency Examination Authorities (new) and Emergency Examination Orders (old)

- After March 2017 -Emergency Examination Authority ('EEA')

(PHA, s 157B) '*… ambulance officer or police officer believes* [a person] … *is at immediate risk of serious harm* … [due to] … *a major disturbance in the person's mental capacity, whether caused by illness, disability, injury, intoxication or another reason*' (PHA s 157B(1))

- Before March 2017 -Emergency Examination Order ('EEO')

(*Mental Health Act 2000*, s 33) '… *police officer or an ambulance officer reasonably believes a person has a mental illness*'

# PHA – ch 4A powers to detain and transport – Police (‘QPS’) and Ambulance (‘QAS’) officers

Section 157B applies if a QPS or QAS officer believes

‘the person appears to require urgent examination or treatment and care’ (1)(c) and there is

‘immediate risk of serious harm’, e.g. threatening to commit suicide’ (1)(a) because of an apparent

‘major disturbance in the person’s mental capacity, whether caused by illness, disability, injury, intoxication or another reason’ (1)(b)

Section 157D EEA requires an EEA to be made out (using the approved form) and given to a health service employee

# PHA – ch 4A powers to detain, examine without consent, using necessary force – health service employees

Section 157E – power to detain

‘may be detained in a treatment or care place ... not more than 6 hours’ initially (1)(e) and for ‘not more than 12 hours’ (4) so that an examination can be carried out

Section 157F – power to examine

‘A doctor or health practitioner may examine a person ... to decide the person’s treatment and care needs’

Section 157O – without consent, using force

‘... without the consent of the person or anyone else’

‘... using the force, that is necessary and reasonable in the circumstances’

Part 3 - To arrange for the return of a person who absconds

Part 6 - To search a person detained in the ED

# Two outcomes of examination under an EEA

- Examination (PHA s 157F)

**157F Examination**

(1) A doctor or health practitioner may examine a person subject to an emergency examination authority to decide the person's treatment and care needs.

(2) Also, a doctor or authorised mental health practitioner may examine the person to decide whether to make a recommendation for assessment for the person under the *Mental Health Act 2016*.

- Examination (MHA s 31)

**31 Examination**

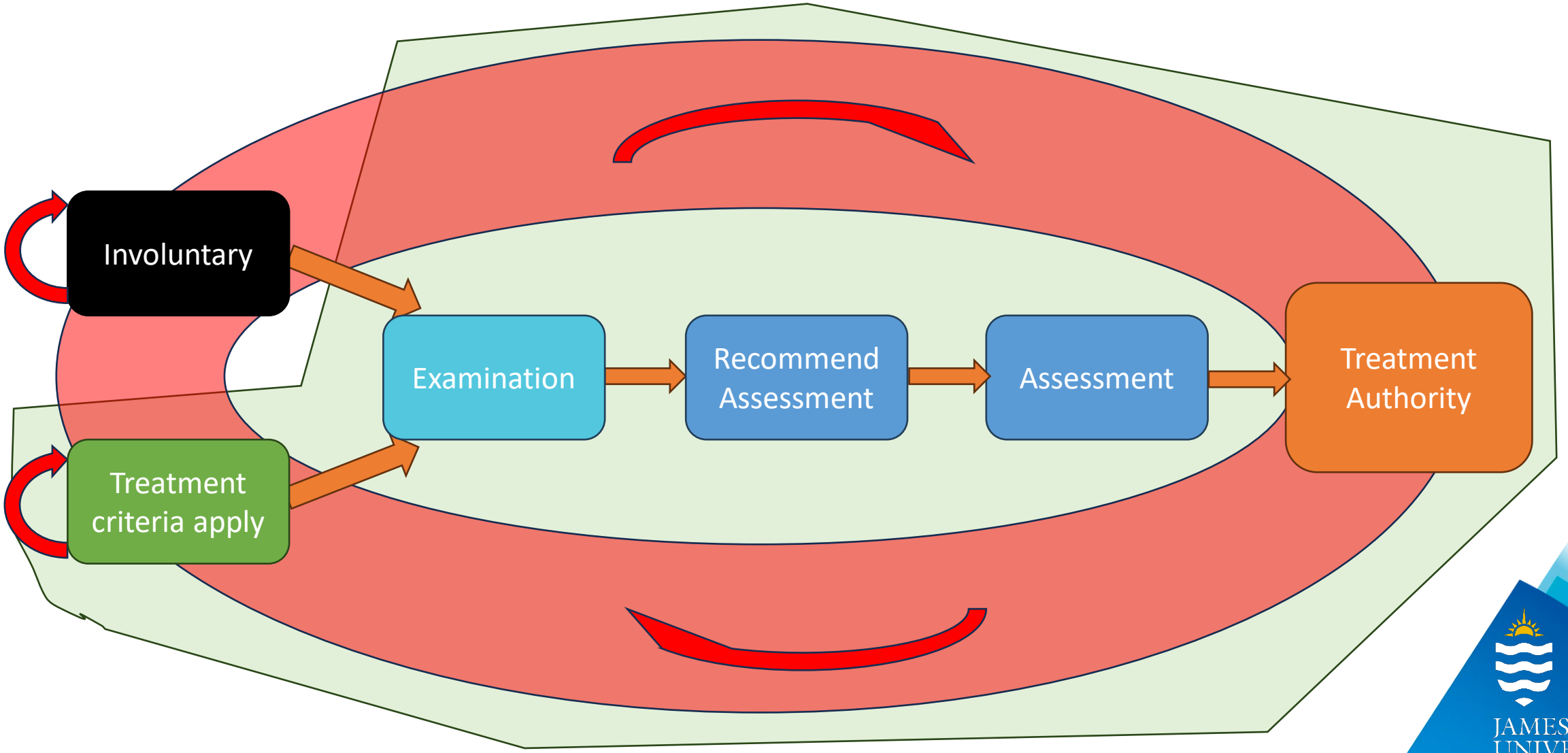
(1) A doctor or authorised mental health practitioner may examine a person to decide whether to make a recommendation for assessment for the person.

(2) Without limiting subsection (1), the examination may be carried out—

(a) if the person asks for, or consents to, the examination; or

(b) under this Act or another Act providing for the examination, including, for example, under an examination authority or emergency examination authority.

# Civil mental healthcare system ‘Treatment Authority’ (MHA ch 2) (formerly ‘Treatment Order’) Majority made after examination and assessment

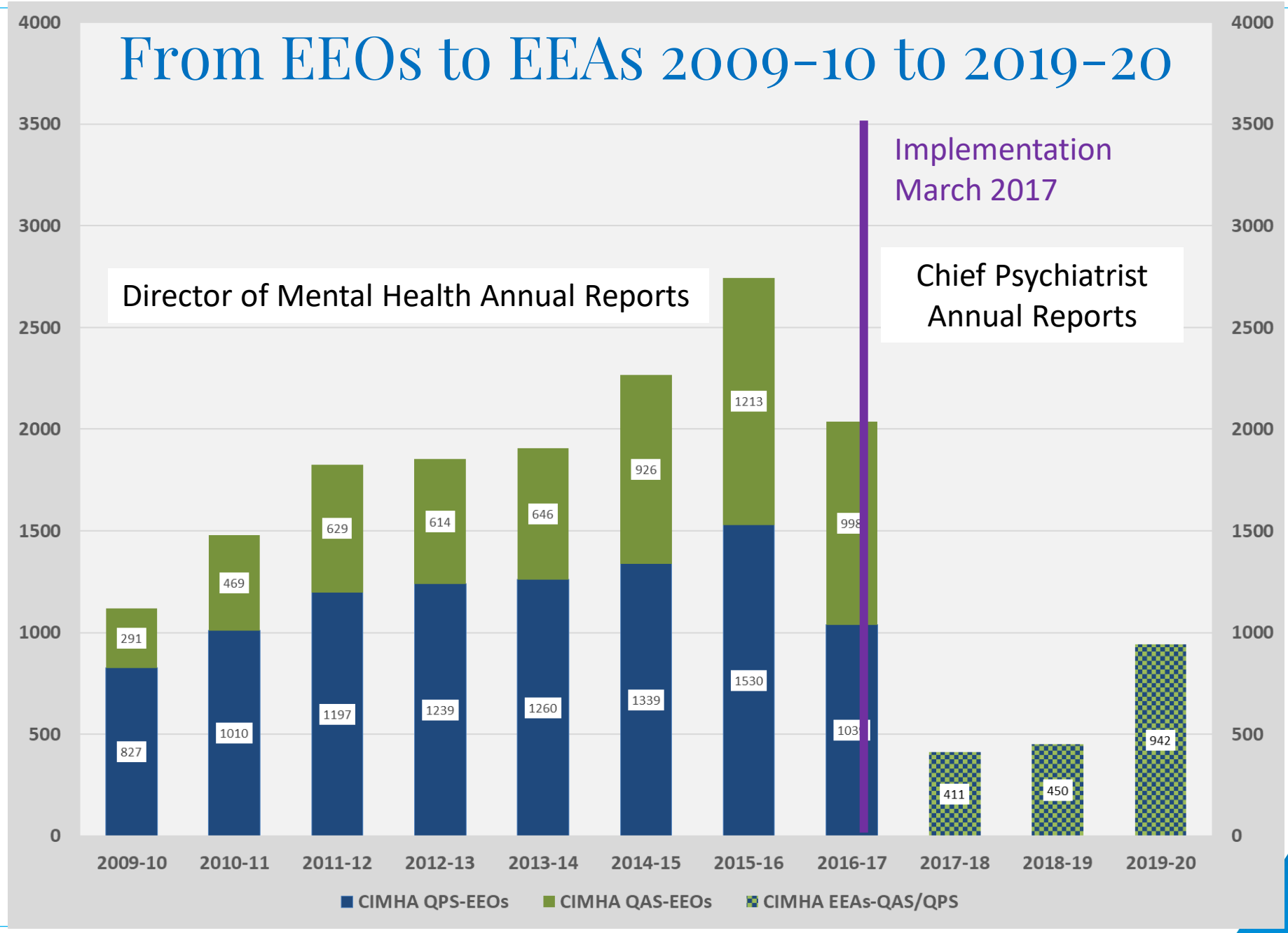


# How many EEOs and EEAs made out for what types of people?

- Prior to 5 March 2017, for EEOs under the repealed *MHA 2000*, annual reports to the Minister by the Director of Mental Health contained information aggregated for Queensland's authorised mental health services, allowing broad patterns and trends in EEOs and differences between hospitals to be readily assessed

- No public reporting of EEA data post 2017, unless an EEA resulted in a recommendation for assessment under the *MHA 2016*

# From EEOs to EEAs 2009-10 to 2019-20



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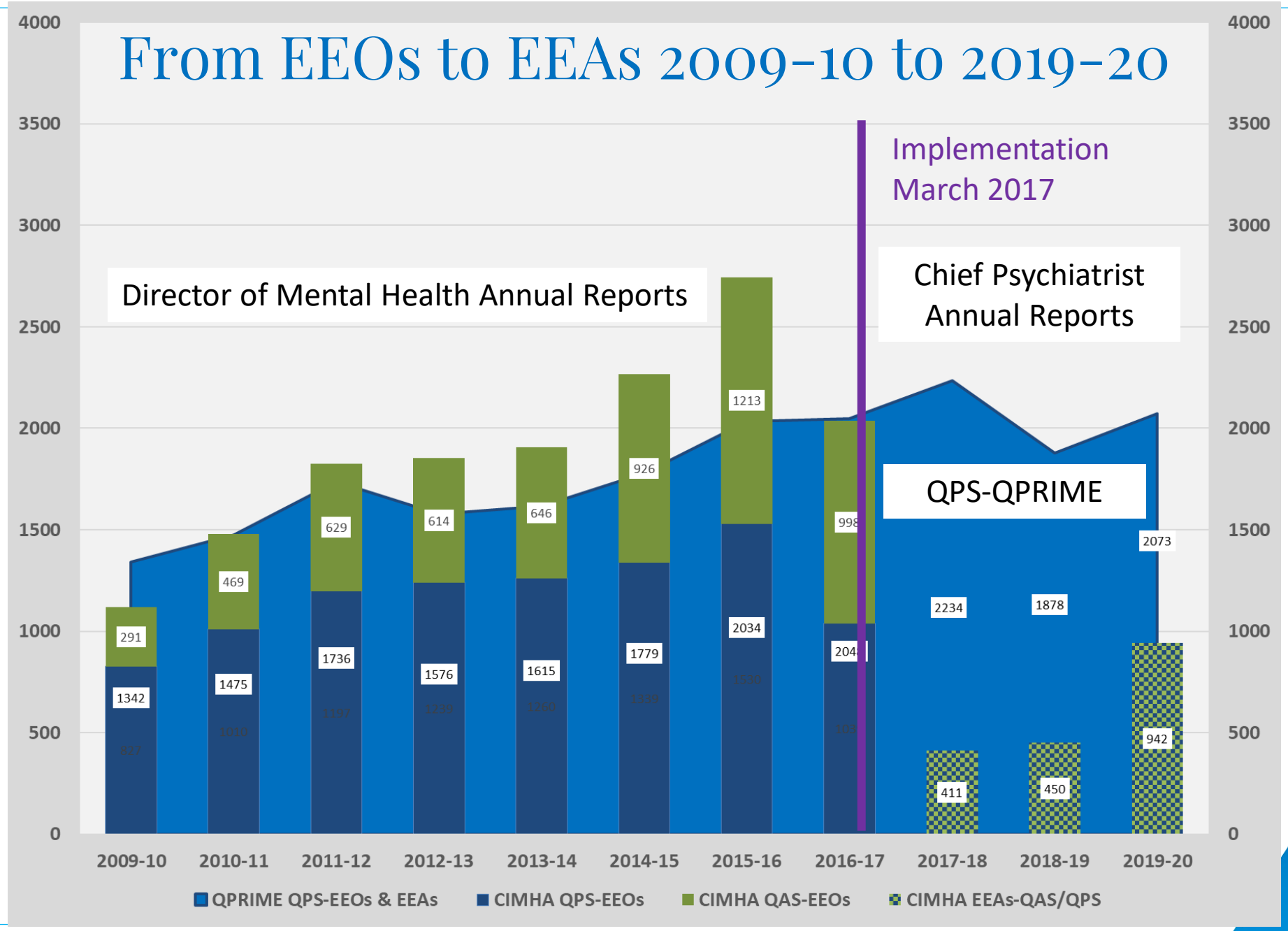

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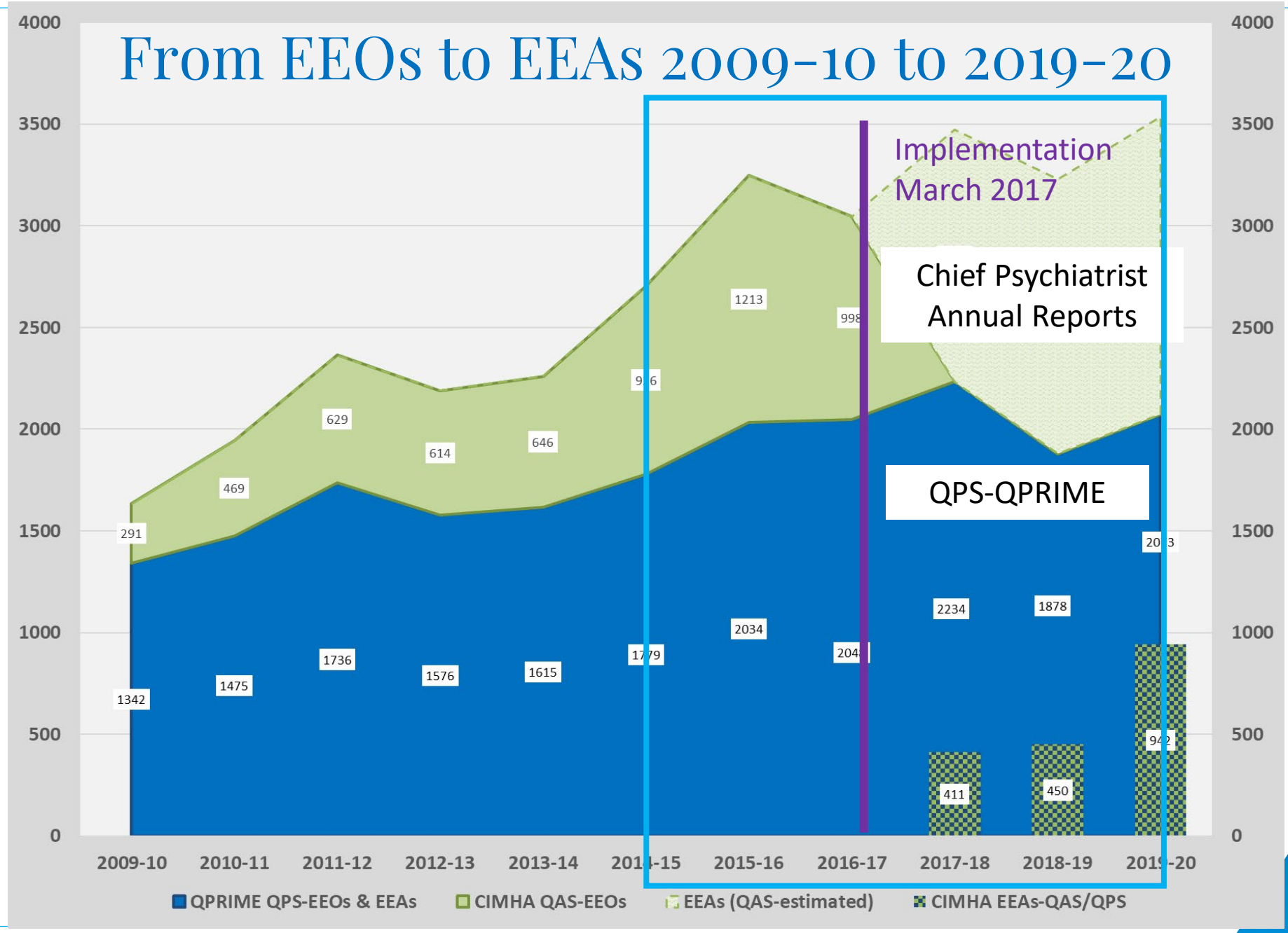




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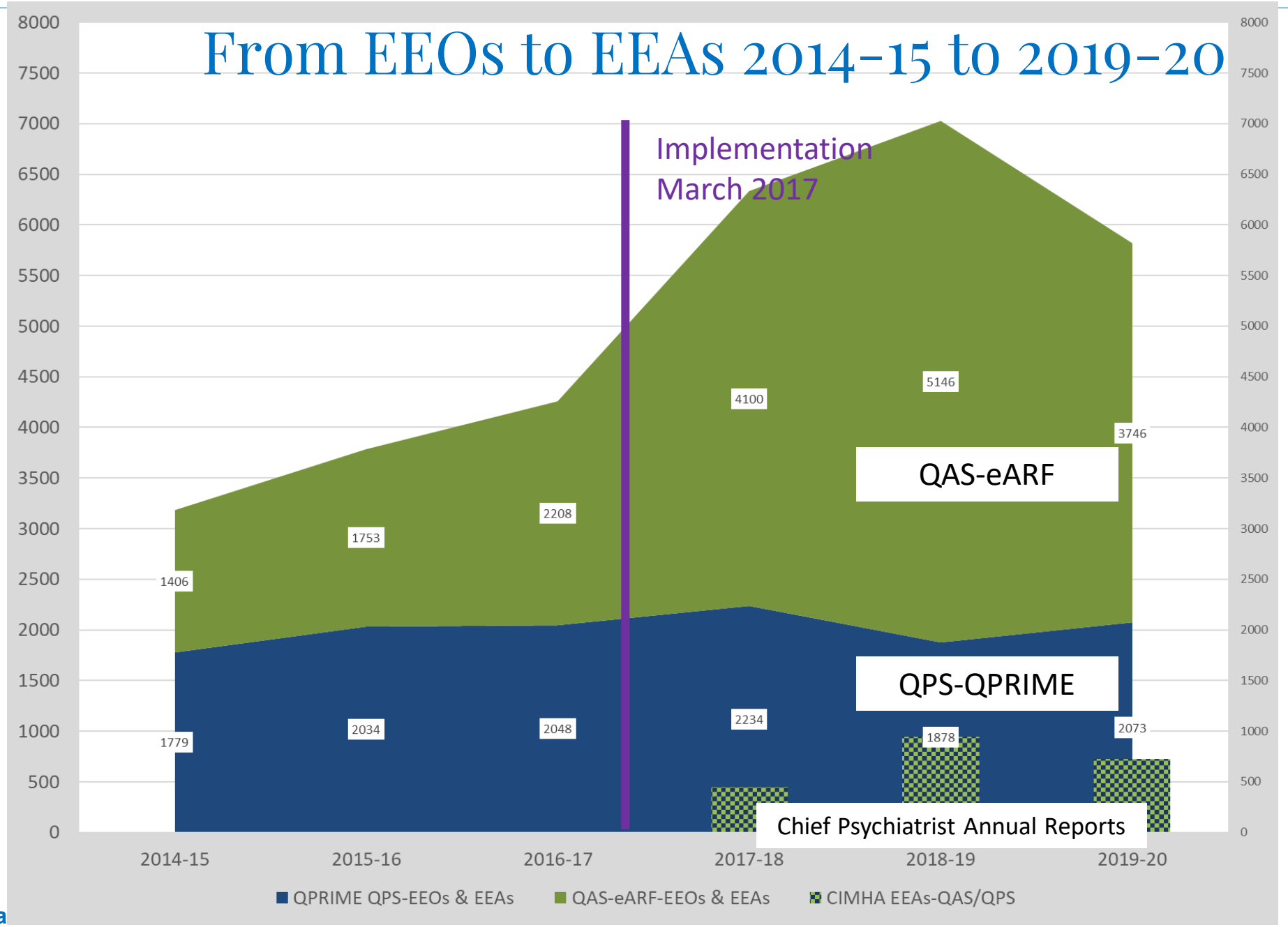
# From EEOs to EEAs 2014-15 to 2019-20



# Information extracted from a sample of n=942 prescribed EEA forms 2017-2020

| | |
|---|---|
| QPS-declared | n=342 (36%) |
| QAS-declared | n=600 (64%) |
| Median age | 28 years (range 9 years - 85 years)<br>with 17% (n=159) aged<18years |
| Self-harm | ~40% |
| Aggression | ~25% |
| Drugs and alcohol | ~53% - 1.25 times more often QPS-declared |

EEAs in 'larger central' hospitals ~3 times more likely QAS-declared

~4/5 (78%) 'examined, treated, discharged, EEA ended'

~1/5 (22%) recommendation for assessment made

~one-quarter (23%) with more than 1 EEA in the three-year observation period

~Indigenous status 47% (from QPS QPRIME only)

# QPS and QAS response – 19 semi-structured interviews - an aid for managing risk

## Police

- *'I can't really say that they're used too much. They're used because they're the only option. They are used to mitigate risk I feel'*
- *'… you're always doing risk assessments. An EEA unfortunately has become a backstop … I can always do an EEA because it's so broad - the person is impaired … it literally says for any reason... an easy way for us to have said ok now I know that they are safe …'*
- *… but as soon as the new legislation came in we did heaps more. Which has knock-on effects to the emergency department, the care people are getting and so on.'*

## Ambulance

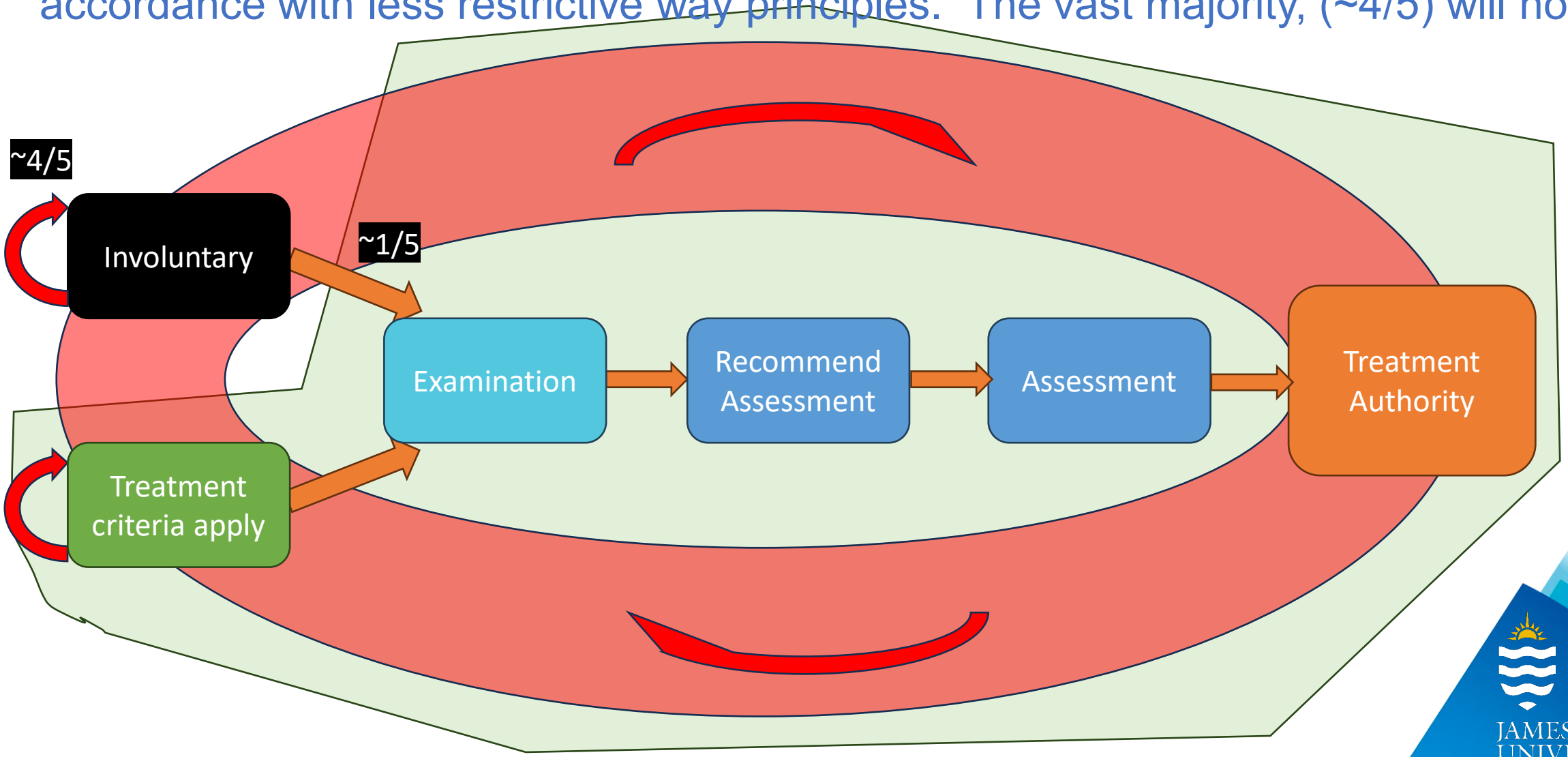
- *'I suspect there are more being done. Like, there's more EEAs being written down. That was the training we received about when it changed, is what they're pushing us to do. Yeah. It's like they meet the criteria. It's for your own protection. Very little talk about whether it's in the best interest of the patient, that was in order to be very focused on reducing the professional risk to us and the organization'*

# ED - mental health and ED clinicians – 65 semi-structured interviews

- Stakeholders ill-prepared for the reforms,
  - especially in hospitals with inexperienced staff and where specialist mental health skills were lacking.
- The initial increased burden of care shifted to emergency healthcare stakeholders.
  - Adaptive response, constrained by a general lack of mental healthcare support services and a dearth of suitable facilities. Goodwill between stakeholder groups and consistent leadership, striving for best practice.
- Stakeholders relied on fundamental healthcare principles;
  - respect for patient autonomy and beneficence in clinical decision-making.

# Interim conclusion about EEAs

Some, around (~1/5), may be examined, and receive treatment and care in accordance with less restrictive way principles.  The vast majority, (~4/5) will not.



# Interim conclusion - Parliament's clear intent

Explanatory notes to the Mental Health Bill 2015 and Mental Health Amendment Bill 2016 state that the amended *PHA* provisions apply to the 'general health system' and are separated from those which apply to the 'mental health system'.[1] Underpinning this separation was Parliament's express concern for the efficient use of health system resources, safety in public sector health service facilities and the belief that the majority of people subject to an EEA 'are instead suffering from drug or alcohol abuse, and have no underlying mental illness that warrants action under the Act'.[2]

1. Explanatory Notes, Mental Health Bill 2015 (Qld) 2 ('Mental Health Bill 2015'); Explanatory Notes, Mental Health Amendment Bill 2016 (Qld) 23.
2. Health and Ambulance Services Committee, Queensland Parliament, *Mental Health Bill 2015 and Mental Health (Recovery Model) Bill 2015* (Report No 9, November 2015) 38 ('*Mental Health Bill 2015 and Mental Health (Recovery Model) Bill 2015*'). See also Queensland Health, 'Review of the Mental Health Act 2000' (Discussion Paper, May 2014) ('*Queensland Mental Health Commission*') 8 <https://www.qmhc.qld.gov.au/sites/default/files/wp-content/uploads/2014/02/Mental-Heath-Act-Discussion-Paper.pdf> ('*Queensland Mental Health Commission*').
3. Mental Health Bill 2015 (n 43) 1-2; *Queensland Mental Health Commission* (n 44) 9. See also *Mental Health Bill 2015 and Mental Health (Recovery Model) Bill 2015* (n 44) 38.

# Implemented January 2020

***Human Rights Act 2019* (Qld) ('*HRA*')**

Emergency Examination Authority ('EEA') provisions of the *PHA* =>

- *MHA* ss 13(1)(a)-(e) - least restrictive way principles apply
- *PHA* ss 157B-F - no least restrictive way principles

EEA provisions distinguish between 'substance abuse problem' and 'mental illness'

*HRA* s 37(1) 'right to access health services'

# Steps in a human rights compatibility analysis[1]

1. Nature and scope of the right to health services
2. Does a 'less restrictive way' lie within the scope of the right?
3. Is the limitation on the right reasonable and demonstrably justified?
   a) Reasonable limits?
   b) Demonstrably justified?
   c) Whether any less restrictive and reasonably available way to achieve the purpose?
4. If the limitation is not justified then re-interpret the provisions with human rights obligations to the extent possible.

Adapted from *Kracke v Mental Health Review Board* [2009] VCAT 646 [67]-[218] (Bell J)

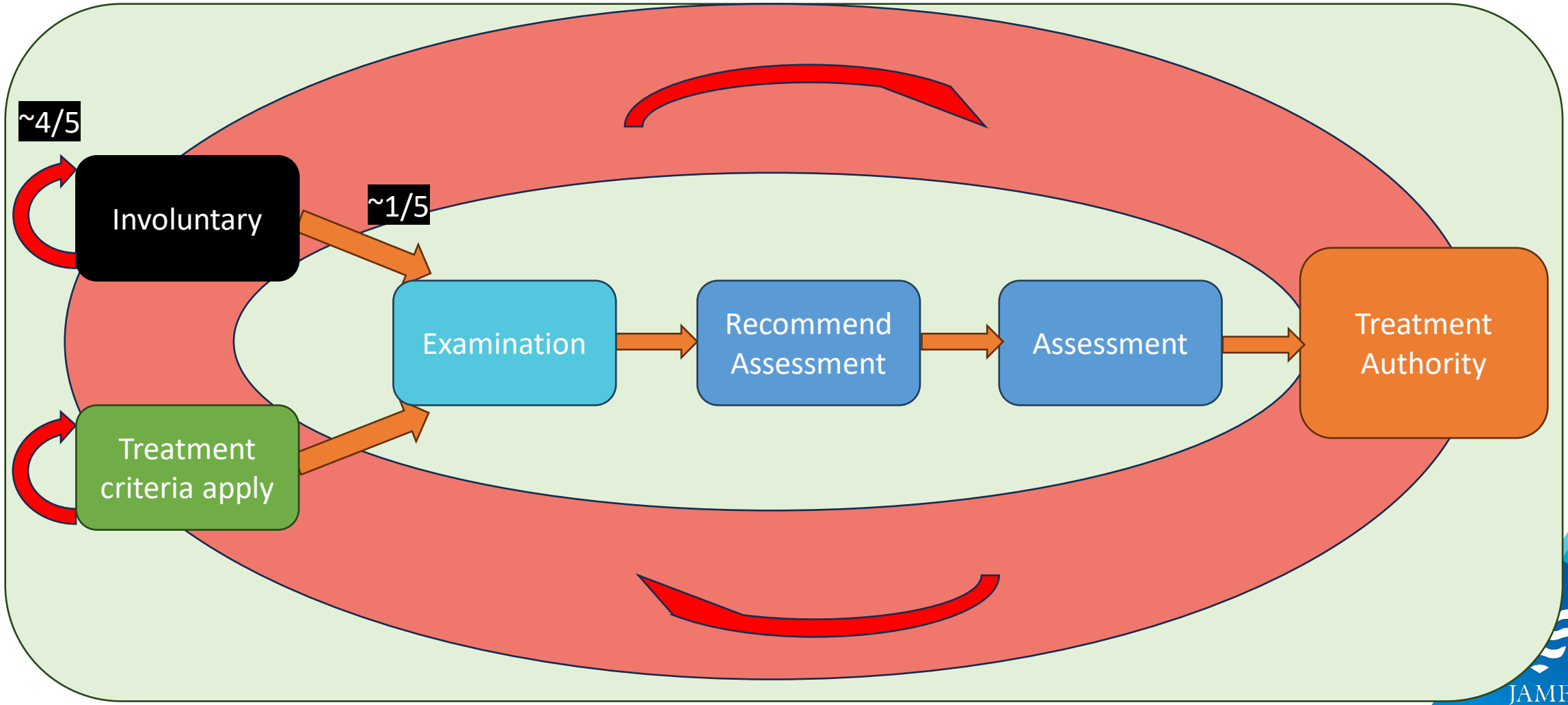
# Nature, scope and ‘less restrictive way’

- Section 37(1) HRA ‘[e]very person has the right to access health services without discrimination’.
- Article 12 International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) - right to access health services and right to access the underlying determinants of health.
- Articles 10(c) and 12(2) CRPD - right to be free from non-consensual medical treatment and full, free and informed consent.
- Sections 5(a)-(b) MHA require person’s views wishes and preferences to be taken into account to greatest extent practicable.
- Section 4 HRA requires public entities to act and make decisions in a way compatible with human rights.

# Reasonable and demonstrably justifiable

3. Is the limitation on the right reasonable and demonstrably justified?
   a) Reasonable limits?
   b) Demonstrably justified?
   c) Whether any less restrictive and reasonably available way to achieve the purpose?

# Reinterpretation - conclusion



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# Thank you


**Professor Alan Clough**

**CPHMVS, Cairns Nguma-bada Campus**

**alan.clough@jcu.edu.au**

**T: 07 4232 1604**

**M: 0417 844 161**

**Room: Health Sciences: E1, 102M**


**My consult hours are: Wednesdays – other days by appointment**



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# Some relevant resources


Queensland Government, *Final report - June 2019: Queensland Health response to the Final Report - When mental health care meets risk: A Queensland sentinel events review into homicide and public sector mental health services* (June 2019) https://www.publications.qld.gov.au/dataset/mental-health-sentinel-events-review-2016/resource/2729969e-7e2c-403f-aef9-32002ca957ff

Queensland Government, Queensland Health, 'Chief Psychiatrist Policy – Treatment Criteria, Assessment of Capacity, Less Restrictive Way and Advance Health Directives' *Chief Psychiatrist Policies* (Webpage, 1 June 2020) <https://www.health.qld.gov.au/clinical-practice/guidelines-procedures/clinical-staff/mental-health/act/policies-guidelines>

Queensland Health, 'Review of the Mental Health Act 2000' (Discussion Paper, May 2014) https://www.qmhc.qld.gov.au/sites/default/files/wp-content/uploads/2014/02/Mental-Heath-Act-Discussion-Paper.pdf

*Kracke v Mental Health Review Board* [2009] VCAT 646

*Human Rights Act 2019* (Qld)

Human Rights Bill 2018 (Qld), Explanatory Notes

*Mental Health Act 2000* (Qld)

*Mental Health Act 2016* (Qld)

Mental Health Bill 2015 (Qld), Explanatory Notes

Mental Health Amendment Bill 2016 (Qld), Explanatory Notes

*Public Health Act 2005* (Qld)