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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Mental Health (Treatment and Care) (Amendment) Bill 1999

Explanatory Memorandum

Circulated by Authority of
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Mental Health (Treatment and Care) (Amendment) Bill 1999

Summary

This Bill seeks to amend the *Mental Health (Treatment and Care) Act 1994* ("the Act").

The Act was passed in 1994 and commenced in February 1995. Section 3 of the Act provided for the Act to expire a maximum of four years from its commencement. This provision was inserted to ensure that the Assembly would review the Act in the short to medium term given the emerging developments in the mental health area.

The Government launched a major review of the Act in March 1997 which culminated in the publication of the *Report and Recommendations of the Review of the Mental Health (Treatment and Care) Act 1994* in January 1998. The Report provided Government with over 50 recommended amendments to mental health laws (including recommended amendments to Part XIA of the *Crimes Act 1900*, which deals with mental health issues associated with criminal proceedings).

The Government spent considerable time considering the recommendations of the Report before releasing the *Mental Health (Treatment and Care) (Amendment) Bill 1998* ("the 1998 Bill") in November 1998. In introducing the 1998 Bill, the Government emphasised that it was open to comment on the proposed provisions. However, the Government did not want to further delay the presentation of the 1998 Bill as the Act (which the 1998 Bill amends) was scheduled to expire in February 1999.

In December 1998, the Legislative Assembly extended the expiration date of the Act to 30 June 1999, to enable thorough consideration of the Government's proposed amendments to the Act.

The Government received a number of representations on some of the provisions in the 1998 Bill. Following consideration of these representations the Government decided to change a number of provisions in the 1998 Bill. In order to reduce confusion, the Government has decided to withdraw the 1998 Bill and replace it with a revised Bill. This will eliminate the need for a raft of amendments to be moved on the floor of the Assembly to make the necessary changes to the 1998 Bill.

This Bill replaces the 1998 Bill.

The amendments to the 1998 Bill which are incorporated into this Bill provide for:

(i) the removal of the preventive detention provisions;

(ii) the maintenance of the role and structure of the Mental Health Tribunal;

(iii) clarification of the role of the Chief Psychiatrist and Care Coordinator in relation to mental health orders;

(iv) the separation of orders for mentally ill and mentally dysfunctional persons (however a mentally ill person may still be found to be mentally dysfunctional and vice versa);

(v) clarification of the provisions in relation to apprehension by the police;

(vi) consultation by the Tribunal with a child's parents where a child is subject to a Mental Health Tribunal Inquiry;

(vii) removal of paternalistic and archaic language; and

(viii) ensuring consistency of language throughout the Bill.

The provisions which have not changed from the 1998 Bill include provisions which:

- provide new mental health orders which seek to ensure that the service response to persons subject to orders is appropriate to their condition;
- increase safeguards for individuals subject to involuntary treatment or care through the provision of an Official Visitors Scheme for mental health facilities,
- increase the rights of people subject to emergency detention to inform a relative or friend,
- require consumers and carers to be involved in policy development, evaluation of services and services planning;
- enable the discharge of persons from involuntary orders (in most cases) as soon as the criteria for involuntary detention is no longer met;
- require the Tribunal to determine whether a person subject to a Tribunal has the capacity to consent to an order; and
- provide a process to follow where a person contravenes a mental health order.

There are also a number of amendments required as a consequence of amendments to the *Crimes Act 1900* which will also be considered by the Assembly at the same time that the amendments to the Mental Health Act are being considered. These are detailed in the *Crimes (Amendment) Bill 1999*.

DETAIL OF THE BILL

Clause 1 - Short Title

This clause provides that the short title of the Act will be the *Mental Health (Treatment and Care) (Amendment) Bill 1998* ("the Bill")

Clause 2 - Commencement

This clause details the commencement provisions of the Bill. Sections 1, 2, 3, 4 and 5 will commence on the day in which the Bill is notified in the *Gazette*. The remaining clauses will come into effect from 1 September 1999. This will provide the necessary time for the community to be advised of the substantive amendments prior to their commencement.

Clause 3 - Principal Act

This clause provides details of the principal Act which the Bill seeks to amend. The principal Act is the *Mental Health (Treatment and Care) Act 1994* ("the Act")

Clause 4 - Long Title

The long title of the Act currently reads:

> "An Act to provide for the treatment, care, control, rehabilitation and protection of mentally dysfunctional persons and related purposes"

Clause 4 of the Bill seeks to amend the long title by adding the words "or mentally ill" after the words "mentally dysfunctional". This will more accurately reflect the aim of the legislation which covers both mentally ill and mentally dysfunctional persons.

Clause 5 - Repeal

This clause repeals Section 3 of the Act. Section 3 currently provides that the Act will expire on 30 June 1999. This provision was inserted into the Act in December 1998. The repeal of this Section will enable the extension of the Principal Act through to the commencement of the remaining provisions of the Bill on 1 October 1999.

Previously, this section provided that the Act would cease 2 years after its initial commencement, with the capacity for a further 2 year extension if determined by the Minister. The Act was commenced on 6 February 1995. In accordance with the provisions of the Act, the Act was extended in late 1996 which provided an extension of its provisions from February 1997 to February 1999. In December 1998, the Assembly agreed to extend the Act to 30 June 1999 in order to enable the Assembly and the Community to consider the details of the proposed Government amendments to the Mental Health Act, which were first presented in November 1998.

Clause 6 - Interpretation

This clause amends Section 4 of the Act. This clause removes definitions which will no longer be required due to the proposed amendments to the Act and includes definitions for terms included in the new amendments.

The terms "Director" and "psychiatric illness" are replaced by the terms "Chief Psychiatrist" and "mental illness" respectively. The use of the term "Chief Psychiatrist" will clearly distinguish the clinical duties of the position from the administrative office of the Executive Director of ACT Mental Health Services. The term "mental illness" is the term widely used in the mental health field for the conditions currently referred to under the definition of "psychiatric illness".

Other terms defined include:

- "community care facility"
- "official visitor"
- "care coordinator"
- "psychiatric treatment order"
- "community care order"
- "restriction order"

These terms are defined in the relevant explanations of the clauses of this Bill.

Clause 7 - Objectives of the Territory

The current paragraph 8(e) in the Act states that it is an objective of the Territory that formal and informal consultative mechanisms should be established to enable genuine consultation with carers and consumers on provision of services and facilities for persons with a mental dysfunction.

The Government believes that it should be an objective of the Territory to include consumers or carers in more than just service provision matters.

This clause will amend paragraph 8(e) of the Act by making it an objective of the Territory to consult with consumers and carers on the provision of services and facilities and:

- the development of mental policy;
- planning for mental health services;
- the delivery of services; and
- the evaluation of policies and services.

This will ensure that consumers and carers are involved in all facets of mental health service provision, and that services more accurately reflect the needs of their clients.

Clause 8 - Applications by other persons

This clause will require that, where lay persons make an application for a mental health order in respect of another person, the application must be in a form approved by the Minister. This provision seeks to reduce the number of frivolous applications made to the Tribunal. At present, under Section 14 of the Bill, any person may make an application to the Tribunal by means of a Statutory Declaration. This provision will enable the Minister to determine the type and level of information required to be furnished to the Tribunal before the Tribunal will consider the application.

Clause 9 - Determination of the ability to consent

Under Section 16 of the Act, the Tribunal must refer a person for a psychiatric assessment prior to holding an inquiry into whether a mental health order should be imposed.

This provision will insert a new Section 16A which will require a person conducting an assessment to determine, as far as it can be ascertained, whether the person subject to the assessment has the capacity to consent to treatment, care or support. This determination will assist the Tribunal when it considers whether to make an order in respect of the person, by advising the Tribunal whether the person can consent, but refuses to do so or is incapable of forming consent.

Clause 10 - Assessments to be conducted as soon as practicable

Section 17 of the Act requires an assessment to be completed as soon as practicable, and in any event within 7 days, after the person attends the premises specified in the order. Under the proposed new orders at Clause 13 of the Bill, it may not be possible to complete the necessary assessment of a person within 7 days. The imposition of a community care order may require the development of a 'service package' to meet complex needs of a person which may include the provision of services from a wide range of service providers. This process may, in a very limited number of cases, require longer than 7 days to complete.

This provision will enable the Tribunal to order a further 7 day assessment period, consecutive with the original assessment order, where the Tribunal is satisfied that such an extension is required on clinical grounds. The Tribunal will not order an additional assessment period where such an extension is required due to administrative delays.

Clause 11 - Consultation

This provision moves the current Section 103 from Part IX of the Act *Tribunal Membership and Procedure* and places it at Section 24A in Part IV *Mental Health Orders*. This provision requires the Tribunal to consult with a number of persons prior to the making of an order. As this provision deals with processes involved in the making of an order, it is more appropriately placed among the provisions dealing with the considerations of the Tribunal in making mental health orders.

Clause 12 - Matters to be taken into account

Section 25 of the Act provides a number of matters which the Tribunal must take into account before making an order. These include, as an example, that the views of the person subject to a Tribunal hearing are taken into consideration, that the possible benefits of any proposed treatments or services are considered and that any order would be the least restrictive form of care.

This provision adds a further 2 matters which must also be considered. These are:

- a consideration of whether a person has the capacity to consent to treatment or care and, where the person has such capacity, whether the person is refusing to consent to that treatment or care; and
- the religious, cultural and language needs of the person subject to a Tribunal hearing.

Both these matters can have a significant impact on the type of order to be imposed and the type of services which will need to be available to give effect to the order.

There is also the need to change the reference to Section 103 of the Act which has been relocated to Section 24A.

Clause 13 - Mental health orders, requirements in relation to orders and role of the Chief Psychiatrist and Care Coordinator

This clause repeals Sections 26, 27, 28 and 29 of the Act. Section 26 requires the Tribunal to seek the consent of any person prior to the making of an order. Section 27, 28 and 29 detail the type of mental health orders currently available and list the powers provided under those orders. These sections will be replaced by a new system of mental health orders.

Section 26 of the Act is no longer required as the Tribunal, under amendments referred to above, will be required to consider the issue of consent prior to making an order. Sections 27, 28 and 29 of the Act currently provide the type of mental health orders which are available to the Tribunal and the powers which accompany those orders. These provisions have been subsumed into new provisions relating to the imposition and operation of treatment orders.

The proposed new Section 26 provides the criteria which must be satisfied before a mental health order can be made in respect of a person. There will be two types of orders available to the Tribunal:

26(1) Psychiatric treatment order -
The Tribunal may make a psychiatric treatment order where it is satisfied that: a person has a mental illness; that due to that illness the person is likely to do serious harm to self or others; that psychiatric treatment is likely to reduce that harm; and that the treatment can not be provided in a less restrictive manner.

26(2) Community Care order-
The Tribunal may make a community care order where it is satisfied that: a person is mentally dysfunctional or mentally ill; due to such disorders the person is likely to do harm to self or others; that some form of care is likely to reduce this harm; that a psychiatric treatment order is not appropriate; and that the care can not be provided in a less restrictive manner.

The proposed new Subsection 27(1) provides for the Tribunal to make a restriction order in addition to either a psychiatric treatment order or community care order. A restriction order cannot be made in isolation from a psychiatric treatment order or a community care order.

A restriction order would be placed on a person where the Tribunal is satisfied that the person subject to an order under subsections 26(1) or (2) poses a significant risk to public safety. A restriction order would only be able to be revoked by the Tribunal.

The proposed new subsection 27(2) gives the Tribunal the Authority to determine the content of a restriction order. The Tribunal may order a person subject to an order:

- to reside at a specified place (if the person has a mental illness);
- to reside at a community care facility (if the person has a mental dysfunction); or
- not to approach a specified person or specified place or undertake specified activities.

The proposed new Section 28 provides details on how the new orders outlined above will operate.

Subsection 28(1) provides that the Chief Psychiatrist or his or her delegate will be responsible for the treatment and care for a person subject to a psychiatric treatment order (that is, an order under the proposed new subsection 26(1)).

Subsection 28(2) provides that an order made under subsection 26(1) may specify the health facility to which a person subject to the order may be taken.

Subsection 28(3) requires that a community care order (that is, an order under subsection 26(2)) shall specify the person (the care coordinator) into whose care the person subject to the order shall be placed.

Subsection 28(4) provides the Tribunal with the possible contents of a psychiatric treatment or community care order. Under this provision, where the Tribunal makes a psychiatric treatment order, the Tribunal may require a person to undergo psychiatric treatment, counselling, training, therapy or rehabilitation. In the case of a community treatment order, the Tribunal may require a person to receive care and support.

Subsection 28(5) requires any order to include a statement as to whether the person could have consented to the order but refuses to do so or whether the person does not have the capacity consent.

Subsection 28(6) requires the Tribunal to notify the Chief Psychiatrist or Care Coordinator (as the case requires) where a person subject to an order under Subsection 26(1) or (2) is also placed under a restriction order under Section 27. This is to ensure that the Chief Psychiatrist or Care Coordinator is aware that the person should not be discharged without further reference to the Tribunal.

Subsection 28(7) provides that a restriction order shall not exceed 3 months duration.

Subsections 28(8) and (9) provide the process for discharging a person from an order under Subsections 26(1) or (2) where the person is also subject to a restriction order under Section 27. Where a custodian considers that the criteria for detention of a person under a restriction order are no longer evident, the custodian must notify the Tribunal of this opinion. The Tribunal must then convene within 72 hours to review the matter. The processes involved in such a review are detailed at Clause 16 of this memorandum.

Subsection 28(10) provides that only the Tribunal may revoke a restriction order.

Subsection 29(1) provides the matters for which the Chief Psychiatrist or Care Coordinator (as the case requires) is responsible for determining. This includes:

- where a person must attend for treatment or care;
- the type of treatment or care to be provided for a person subject to an order;
- for a person under a psychiatric treatment order, the place the person shall reside;
- when a person subject to a restriction order has contravened that order.

These powers are seen to belong more appropriately to the Chief Psychiatrist or Care Coordinator, rather than the Mental Health Tribunal, as they have the clinical expertise to determine such matters.

Subsection 29(2) requires the Chief Psychiatrist or Care Coordinator to consult with the Mental Health Tribunal and, wherever practicable, with the person subject to an order, before making any determinations under the above subsection 29(1). This is to ensure that a person subject to an order has the opportunity to be involved in the planning of any treatment and care to be provided as part of an involuntary treatment or care order and that the Tribunal is satisfied that the proposed treatment or care is consistent with the order made by the Tribunal. This sort of involvement can improve clinical outcomes and accelerate recovery.

Subsection 29(3) requires the Chief Psychiatrist or Care Coordinator to weigh up the positive and negative aspects of any treatment that is to be administered to ensure that any side effects or implications of a treatment that is to be administered are of a small consequence in consideration of the positive aspects of such an administration. Treatment should not proceed where there are significant risks involved in the treatment and the treatment will not result in identifiable improvements for the individual.

Subsection 29(4) requires the Chief Psychiatrist or Care Coordinator to release a person from an involuntary status as soon as the person subject to an order no longer meets the criteria for the imposition of that order. This is only the case where a person subject to a treatment or care order does not also have a restriction order in effect.

Subsection 29(5) requires the Chief Psychiatrist or Care Coordinator, who discharges a person under subsection 29(4) above, to inform the Tribunal within 72 hours of discharging the person from the order. This is to ensure that the Tribunal is aware of the status of persons for whom the Tribunal has made an order.

Subsection 29(6) provides the process for dealing with the discharge of persons under an order under subsection 26(1) or 26(2) who also are subject to a restriction order. In such cases, the Chief Psychiatrist or Care Coordinator will be required to refer the person to the Tribunal for the Tribunal to determine whether the person should be discharged from the restriction order as well, or whether a further assessment should be conducted to confirm whether the person should be still subject to an order under subsection 26(1) or 26(2).

Clause 14 - Duration of orders

Clause 14 amends section 30 of the Act which provides for the duration of mental health orders. Subsections (2) and (3) are omitted. These provisions applied to orders in respect of mentally dysfunctional offenders, that is, those persons who had been required to submit to the jurisdiction of the Tribunal pursuant to an order made by a court under Part XIA of the Crimes Act.

As a result of the omission of the provisions, and related amendments to section 72 of the Act made by Clause 33, the same criteria for, and limitations on, orders for involuntary detention will apply in respect of persons who are required to submit to the jurisdiction of the Tribunal for it to make an order as apply where the Tribunal makes such an order in respect of any other person.

This is because the basis for making or revoking such an order is the same irrespective of whether the person in respect of whom the order is made comes before the Tribunal via the courts or some other route, such as where an order is sought by a family member.

Similarly, the grounds for a restriction order to be made in respect of a person are not different having regard to whether the person is before the Tribunal as result of criminal proceedings or an application to the Tribunal for an order.

The Tribunal will still be able to take into account the nature and circumstances of the offence with which a mentally dysfunctional offender is charged, the likely effect of the person's mental dysfunction or illness on his or her future behaviour and whether the person is likely to do harm to himself or herself or others in deciding whether to make a mental health order in respect of the person.

Clause 15 - Powers under custodial orders

This provision adds two subsections to the current Section 32 of the Act. This provision seeks to increase the protection of the human rights of persons subject to involuntary detention under a mental health order.

Subsection 32(2) will allow a custodian to place a person, subject to an order, in involuntary seclusion where such seclusion is the only means available to prevent the person from harming self or others.

As a safeguard, subsection 32(3) will require that all instances of involuntary seclusion must be: entered into the person's medical record; advised to the Community Advocate; and recorded in a register approved by the Minister for this purpose.

Under the new order at Section 26(1), the Chief Psychiatrist or Care Coordinator will be able to determine the most appropriate place at which a person subject to a psychiatric treatment order should reside. This place of residence may change over the period of an order based on the most appropriate living arrangements for the clinical need at a given time. However, the Tribunal should be aware of where a person subject to an order is residing. This provision requires the Chief Psychiatrist or Care Coordinator to inform the Tribunal of any change in residential arrangements of persons subject to orders.

Clause 16 - Contravention of mental health orders

This clause provides for the insertion of a new Section 32A in the Act. The proposed new section provides the process for dealing with a person who is receiving treatment in the community and refuses to comply with the terms of a mental health order.

Subsection 32A(1) provides a three step process to seek compliance with an order. The Chief Psychiatrist or Care Coordinator should first warn the person orally that continued non compliance could lead to detention in order to enforce the order. Where non compliance continues the custodian should advise the person in writing that continued non compliance may lead to detention. Where the person continues to refuse, the Chief Psychiatrist or Care Coordinator may apprehend and detain the person within a mental health facility.

Subsection 32A(2) requires the Chief Psychiatrist or Care Coordinator to advise the Tribunal of any detention including the reasons for the detention and the place of detention.

Subsection 32A(3) enables a police officer, a mental health officer or a doctor, with the authorisation of the Chief Psychiatrist or Care Coordinator, to apprehend a person in contravention of an order and have that person taken to an approved health facility.

Subsection 32A(4) gives police officers, mental health officers or doctors the authority to use such force and assistance as necessary to apprehend a person who has been deemed to be in contravention of a mental health order by the Chief Psychiatrist of care coordinator. It also enables police officers, mental health officers or doctors to enter premises using such force and assistance as is necessary in order to apprehend a person deemed to be in contravention of a mental health order by the Chief Psychiatrist of care coordinator.

Clause 17 - Review, variation and revocation

This clause amends the current Section 36 of the Act which relates to the review of mental health orders by the Tribunal. These additions are required to provide for new review provisions related to the proposed mental health orders.

Subsection 36(3) requires the Tribunal to review a restriction order within 72 hours of receiving a notification from the Chief Psychiatrist or care coordinator that:

- the Chief Psychiatrist or care coordinator intends to discharge a person from an order under subsection 26(1) or (2) where that person also is the subject of a restriction order under section 27; or
- the Chief Psychiatrist or care coordinator is of the opinion that the person subject to a restriction order under section 27 is in breach of that order.

Subsection 36(4) provides the Tribunal with options which it may invoke in its review of an order under subsection (3) above. After reviewing the order the Tribunal may:

- revoke the restriction order; or
- make an order for an assessment under Section 16 of the Act to ascertain whether an additional order is required.

Clause 18 - Apprehension

Subsection 37(1) of the Act provides details for the apprehension of a person by the police where the police believe that the person meets the criteria for the emergency detention in a mental health facility. It is proposed to replace the current subsection 37(1) with a new provision.

There is a concern in the community that the current provision requires police officers to make a clinical decision without the necessary skills. However, it is still important for police to have the capacity to apprehend persons who may have a mental illness or dysfunction and who are likely, given the circumstances, to seriously harm themselves or others.

The Bill provides a new Subsection 37(1) which requires police to make a judgement based on observed actions rather than seeking some form of clinical analysis. Subsection 37(1) allows a police officer to apprehend a person and take that person to an approved health facility where the person has attempted or is likely to attempt

suicide or where the person has attempted or is likely to attempt to seriously harm himself or herself or others.

The provisions at Paragraphs 37(1)(a) and 37(2)(a) of the Act require that a person must be in need of immediate treatment or care prior to apprehension and detention under emergency detention provisions.

The Government is concerned that is circumstances where a person's condition is deteriorating (but not yet at a crisis point) the person is not able to be involuntarily detained. This situation does not recognise that early intervention may significantly reduce the impact and the duration of a mental illness or episode.

This clause proposes that Section 37 be amended to enable a doctor or mental health officer to order the emergency detention of a person where the person is mentally dysfunctional or mentally ill and, as a consequence requires immediate treatment or care, or where the person's condition, on the opinion of the doctor or mental health officer, will deteriorate within three days so as to require immediate treatment or care.

The Act, at paragraphs 37(1)(c) and 37(2)(c) provide for the apprehension of a person where it is considered "necessary for the person's own safety or for the protection of members of the public". This criterion fails to recognise that persons with a mental illness or mental dysfunction may be at risk, due to their condition, of endangering their reputation or financial position.

This provision now provides for the apprehension of persons where they are a danger to others or are a danger to their own physical safety, reputation or financial position.

Clause 19 - Detention

Clause 19 amends section 38 of the Act which authorises the detention of persons taken to an approved health facility for emergency assessment, pursuant to section 37 of the Act.

This amendment is one of a number to support the new provision in Part XIA of the Crimes Act (new section 428DA) which will enable the Magistrates Court, where it believes that a defendant needs immediate treatment or care for a mental dysfunction or mental illness, to order that the defendant be conveyed to an approved health facility for an examination and, if necessary, treatment.

The amendment made by clause 19 has the effect of applying the provisions of section 38 of the Act to persons who are taken to an approved health facility pursuant to the Magistrates Court order. This authorises the confinement and restraint of such a person in custody.

Clause 20 - Circumstances in which copy of court order to be provided

Clause 20 inserts a new section 38A. This requires the police officer or custodial escort who conveys a defendant to an approved health facility for examination,

pursuant to an order of the Magistrates Court under paragraph 428DA(1)(a) of the Crimes Act, to provide a copy of the order to the person in charge of the facility. It is important that the person in charge of the facility have a copy of the order as the order will stipulate that a defendant who has been conveyed to the facility under section 428DA should only be released into the custody of a police officer.

Clause 21 - Examination by doctor

Clause 21 amends section 40 of the Act which requires that a person taken to an approved health facility under section 37 of the Act be examined by a doctor within 4 hours of arrival at the facility. The amendment imposes the same requirement in respect of persons taken to an approved health facility pursuant to an order under section 428DA of the Crimes Act.

Clause 22 - Authorisation of involuntary detention

Clause 21(a) and (b) provide the same additions to the Act in terms of emergency detention as the provisions at Clause 18 provide for the apprehension of persons. Persons will be able to be detained where their condition is liable to deteriorate within 3 days or where they are a threat to their own financial or social well being.

At present, under subsection 41(2) of the Act, an application to the Tribunal to extend the period of emergency detention from 3 days for a further 7 days can be made by anyone. Clause 20(c) will amend the Act to require a psychiatrist to make such an application. This is to ensure that such an application is made in accordance with good clinical practice.

Subsection 41(2) of the Act does not state how an application for an extension to a period of emergency detention should be made. It is also silent on when the Tribunal should consider such an application. Clause 21(d) will amend subsection 41(2) of the Act to require that any application for an extension will be made in a form prescribed by the Minister. It will also require that the Tribunal review such an application within 2 working days of its receipt.

Clause 23 - Notification of Magistrates Court about emergency detention or release from emergency detention

Clause 23 inserts a new Section 41A which requires a person in charge of an approved health facility to:

- notify the Magistrates Court of the result of the examination of a person conveyed to the facility pursuant to section 428DA of the Crimes Act; and
- release or discharge the person only in accordance with the Magistrates Court's order, whether or not the person is detained for any period to receive treatment or care.

It is important that a defendant taken to an approved health facility be discharged or released into police custody in accordance with the order of the Magistrates Court, because police will then be able to give effect to the Court's order that either:

- the defendant be admitted to bail by an authorised officer, for the purpose of the *Bail Act 1992;*
- the defendant be taken back before the court as soon as is practicable; or
- the defendant be dealt with by an authorised officer in accordance with the Bail Act.

Clause 24 - Notification of certain persons about detention

This clause amends Section 42 of the Act which requires that certain persons be notified where a person has been detained for emergency treatment under section 41 of the Act. If a person who is taken to an approved health facility pursuant to an order under section 428DA of the Crimes Act is detained for treatment under section 41, the new subsection 42(2) is intended to ensure that the Magistrates Court is notified of the reasons for the person's involuntary detention and care.

The new subsection 42(3) provides persons who have been detained involuntarily under emergency detention provisions to, if they wish, advise a relative or a friend of the fact of the detention.

Clause 25 - Psychiatric examination

Section 40 provides that a person who has been involuntarily detained at an approved facility must be examined by a doctor within 4 hours of arrival. Section 43 further provides that a person who is being held under emergency detention provisions must receive a physical and psychiatric examination by a doctor within 24 hours of their detention. It is not a legal requirement that either of these doctors be registered as a psychiatrist.

This clause amends the Act to provide that the physical and psychiatric examination referred to in Section 43 should be undertaken by a psychiatrist. A psychiatrist is defined in the Act as "a doctor who holds post graduate qualifications in psychiatry". It is appropriate that this examination be undertaken by health professionals with the relevant skills and knowledge for therapeutic and human rights reasons.

Clause 26 - Treatment during emergency detention

Section 44 of the Act provides that any confinement, restraint or treatment of a person under emergency detention must be "the minimum necessary to prevent any immediate and substantial risk of the person detained causing harm to himself or herself or to another person". It is proper that this provision apply as a person under emergency detention has not been before the Tribunal and has not had the opportunity to state their case.

However, there are limited cases where a person under emergency detention is known to have a mental illness for which the provision of long acting medication is the most appropriate form of treatment and the least restrictive of a person's human rights. Notwithstanding the provisions in Section 44, it would be appropriate in such a situation to administer long acting medication as failure to do so could lead to a

dramatic deterioration in a person's condition which is not in that person's best interest.

This Clause qualifies the implied restriction at Section 44 on long acting medications to enable such administrations in situations where the person is known to have a mental illness for which, in the opinion of the treating psychiatrist, the most appropriate and least restrictive form of treatment available is the administration of long active medication. The Clause also requires the treating psychiatrist to consider any likely deterioration in a person's condition over the next three days in making such a decision.

Clause 27 - Orders for release

Clause 27 amends section 46 of the Act. Section 46 provides that where the justification for detaining a person in an approved health facility, for emergency treatment, in the view of the doctor who examined the person, the Chief Psychiatrist or the Tribunal, no longer exists, the doctor, Chief Psychiatrist or Tribunal can order the release of the person. The amendments in Clause 27 are to the effect that in the case of a person in respect of whom an order under section 428DA of the Crimes Act applies, instead of being able to order the release of the person, the doctor, Chief Psychiatrist or Tribunal, as the case may be, can notify the person in charge of the approved health facility of their view.

Clause 28 - Duty to release

Clause 28 amends section 47 to the effect that where a notification under the new subsection 46(2) has been made, the person in charge of an approved health facility shall, as soon as is practicable, release the person of whom the notification was made, into the custody of a police officer.

Clause 29 - Approved facilities

This clause amends Section 48 of the Act by providing that a facility to which a person is detained under a mental health order at Subsection 26(1) must be approved for that purpose by the Minister. Subsection 48(2) will further provide that any determination by the Minister of an approved facility is a disallowable instrument under Section 10 of the *Subordinate Laws Act 1989*.

Clause 30 - Heading - Part VI - Rights of mentally dysfunctional persons

This clause amends the heading of Part VI of the Act so that it will also apply to mentally ill persons. The heading will read "RIGHTS OF MENTALLY DYSFUNCTIONAL OR MENTALLY ILL PERSONS" This is required due to the adoption of the term "mental illness" in the Act.

Clause 31 - Restrictions on use (convulsive therapy)

Section 55 of the Act provides for restrictions on the use of convulsive therapy. This clause changes the criteria for the making of an order by the Tribunal for convulsive therapy for persons who cannot consent to the treatment. It provides that convulsive therapy should only be administered in such cases where the therapy is likely to result in significant improvement to the person and either all other forms of treatment that may be available have been tried or convulsive therapy is the most appropriate form of treatment available.

Clause 32 - Determination of fitness to plead

Clause 32 amends section 68 of the Act which provides for the Tribunal to determine whether a person is fit to plead. The amendment to subsection 68(1) is to ensure that the Tribunal can determine whether the accused persons before both the Magistrates Court and the Supreme Court are fit to plead.

Subsection 68(3) is omitted and new subsections 68(3) and (3A) inserted. New subsection 68(3) is to the same substantive effect as the omitted subsection. Paragraphs (a) to (f) define the criteria for unfitness to be tried. They are a codification of the common law criteria in R v Presser [1958] VR 45 and the rule in R v Kesavarajah [1994] 181 CLR 230.

The new provision is substituted as it is considered to be a clearer and more accurate articulation of the Presser test.

New subsection 68(3A) is a codification of the common law rule in R v Padola [1959] 3 All ER 418.

Clause 33 - Periodic review of orders for detention

Clause 33 amends section 72 consistent with the amendments made to section 30 by clause 14 and new provisions limiting detention of persons ordered to be detained under Part XIA of the Crimes Act.

The amendment made by paragraph 33(a) is necessary because a mental health order involving the detention in an approved health facility of a mentally dysfunctional offender, pursuant to an order of the Tribunal, will now be of the same maximum duration (that is 6 months) as such orders made in respect of any other person. As is the case with persons other than mentally dysfunctional offenders, it will be possible for successive mental health orders to be made by the Tribunal, authorising the detention of a mentally dysfunctional offender.

But, because the maximum of any single order will be 6 months, there is no longer a need foe section 72, requiring six monthly reviews, to apply to orders in respect of mentally dysfunctional or mentally ill offenders.

The amendment made by paragraph 33(b) applies the section 72 review provisions to orders for the detention of a person made by the Magistrates Court, as well as those made by the Supreme Court. This is necessary due to amendments to the Crimes Act, enabling the Magistrates Court to order the detention of defendants, until the Tribunal orders otherwise.

Paragraph 33(c) replaces paragraph 72(3) of the Act withe a new paragraph 72(3)(c). Subsection 72(3) sets out the matters to which a court must have regard when considering whether or not to order the release of a person who has been ordered to be detained by a court, until the Tribunal otherwise orders. When courts make such orders under Part XIA Crimes Act, they will now be required to give an estimate of the period of imprisonment to which they would have sentenced the person whose detention is ordered, if they had been dealing with the person in normal criminal proceedings. Other amendments to this Act and the Crimes Act will limit the detention of persons pursuant to an order under Part XIA of the Crimes Act, to a period no longer than the period of imprisonment the court indicates it would have imposed.

As consideration of the nature and circumstances of the offence charged, will now be taken into account by the courts when estimating the prison sentence that would have been imposed on an accused, it is more relevant for the Tribunal, when considering whether or not to release a detained person, to consider the sentence estimation given by the relevant court in respect of the person.

Clause 34 Limit on detention

Clause 34 amends section 75 of the Act so that the maximum period for which a person who is ordered detained by a court, until the Tribunal orders otherwise, can be detained is determined by reference, not the maximum sentence of imprisonment which could have been imposed on the person but by reference, to the term nominated by the court as what it would most likely have imposed as a sentence of imprisonment in the particular circumstances.

Clause 35 - Membership (of the Mental Health Tribunal)

This clause changes the composition of the possible membership of the Tribunal. At present, under Section 76 of the Act, the Tribunal consists of:

- a President, who is a magistrate of lawyer with at least 5 years of practice;
- a panel of not more than nine psychiatrists;
- a panel of not more than nine psychologists; and
- a panel of not more than nine members of the community who are suitable to deal with the need of mentally dysfunctional persons.

All members are appointed by the Minister.

This clause adds a further class of members to the Tribunal being:

- not more than nine persons who are not psychiatrists or psychologists, but who, in the opinion of the Minister, have skills and experience in providing mental health

clinical services (including mental health nurses, occupational therapists and social workers)

This clause also adds two new provisions which bar membership to the Tribunal for persons who are subject to an order under the Mental Health Act or have been subject to such an order in the 12 months preceding the proposed appointment. While these provisions are framed in the negative, they emphasise the Government's commitment to ensure that mental health consumers who are not subject to orders have the opportunity to sit as members of the Tribunal.

Clause 36 - Constitution of the Tribunal for certain purposes

This clause amends subsection 77(2) of the Act by increasing the flexibility of the President in establishing the Tribunal for the purpose of certain proceedings. At present, the Tribunal, for most functions, is constituted by the President, a community member and either a psychiatrist or psychologist dependent on whether the person subject to the Tribunal hearing is mentally ill or mentally dysfunctional.

The amendments allow the President to choose a member from the panel of psychiatrists, psychologists or other mental health professionals dependent on the needs of the Tribunal given the facts of the case before it.

Clause 34(b) adds a provision which prohibits a magistrate, who has ordered a person to submit to the jurisdiction of the Tribunal, to sit as a member of the Tribunal in proceedings relating to that person. This is consistent with the principles of natural justice.

Clause 37 - Repeal of Section 103

This clause repeals the current Section 103 of the Act. The contents of Section 103 have been moved to Section 24A of the Act (see Clause 11). This Section provides details of persons who should be consulted by the Tribunal before the making of an order. It is considered more appropriate that this provision should be included in Part IV of the Act which contains all other requirements for the making of orders.

Clause 38 - 40 - Chief Psychiatrist

These clauses amend Part X of the Act. At present Part X comprises provisions relating to the offices of the Director of Mental Health ("the Director") and Mental Health Officers. Administrative changes within ACT Mental Health Services have resulted in the establishment of two offices which share the duties formerly entrusted to the Director. The Executive Director of ACT Mental Health Services is responsible for the administration of ACT Mental Health Services. The Director of Mental Health Services is now solely responsible for the clinical performance of employees of ACT Mental Health Services. It is appropriate that the Act only contain provisions relating to the clinical responsibilities of the Director. In order to reduce confusion, it is also proposed to change the title of the clinical position to "Chief Psychiatrist" which is more reflective of the clinical responsibilities of the position.

Clause 32 amends the heading of Part X by removing the title "DIRECTOR OF MENTAL HEALTH" and replacing it with "CHIEF PSYCHIATRIST".

Clause 33 removes the term "Director of Mental Health" in Section 112 and replaces it with the term "Chief Psychiatrist".

Clause 34 removes from Section 113 of the Act certain duties of the current Director which are more appropriately the responsibility of the administrative head of ACT Mental Health Services.

Clause 41 - Mental Health Officers

This clause amends Section 119 of the Act by requiring that persons appointed as mental health officers should be issued with identity cards. Mental Health Officers have the capacity to apprehend and detain persons for emergency detention. These are significant powers. It is appropriate that persons with this power have the appropriate identification especially when exercising such powers.

This clause also requires a person to return their identity card on ceasing employment as a mental health officer.

Clause 42 - Official Visitors

The Act currently does not provide for official visitors. Official visitors are persons independent from health service providers who visits places that have been approved to provide mental health services. Official visitors monitor, review, investigate complaints in relation to mental health services and report to the Government and service providers on areas needing reform. An annual report by the official visitors should be tabled in the Assembly to provide public scrutiny of the findings of official visitors.

The new section 121 provides for the Minister to appoint official visitors for approved mental health facilities in the ACT.

Subsection 121(2) provides that an official visitor must be:

- a legal practitioner qualified to practice for not less than five years;
- a medical practitioner;
- a person nominated by an organisation representing consumers of mental health services; or
- a person with relevant skills in the care for persons with a mental illness or mental dysfunction.

Subsection 121(3) provides that an official visitor must not be:

- a person who is in the employment of the Territory;

- a person with any direct interest in any contract with a mental health facility or mental health care provider; or
- a person who has any financial interest in a private hospital.

Subsection 121(4) requires the Minister to ensure that a person appointed as an Official Visitor has the appropriate qualifications and experience to be appointed as an official visitor.

Subsection 121(5) provides that a person may resign or be removed from their position as an official visitor on the grounds of:

- mental or physical incapacity to carry out satisfactorily the duties of a member;
- neglect of duty as an official visitor;
- proven misconduct; or
- ceasing to have any status or qualifications on the basis of which that person was appointed.

Under the proposed Section 122 of the Act, the Functions of an Official visitor are to visit and inspect any mental health facility in the ACT and inquire into:

- the adequacy of services for the assessment and treatment of persons with a mental illness or mental dysfunction;
- the appropriateness and standard of facilities for the recreation, occupation, education, training and rehabilitation of persons receiving treatment or care for a mental illness or mental dysfunction;
- the extent to which people receiving treatment or care for a mental illness or mental dysfunction are being given the best possible treatment or care appropriate to their needs in the least possible restrictive environment and least possible intrusive manner consistent with the giving of that treatment and care;
- any failure to comply with the provisions of this Act;
- any other matter that an official visitor considers appropriate having regard to the objectives specified in Sections 7 and 8 of this Act;
- any matter as directed by the Minister; and
- any complaint made to an official visitor by a person receiving treatment or care for a mental illness or mental dysfunction.

Subsection 122(2) provides that an official visitor may visit a mental health facility with or without previous notice at such times and for such periods as the community visitor thinks fit. Every approved mental health facility will be visited at least once every three months.

Subsection 122(3) allows the Minister to direct an official visitor to visit an approved mental health facility at such times as the Minister thinks fit.

Section 122A provides that an official visitor is entitled when visiting a mental health service to:

- inspect any part of the premises;
- see any person who is receiving treatment or care for a mental illness or mental dysfunction unless that person has asked not to be seen;
- make enquires relating to the admission, detention, care, treatment and control or persons receiving treatment for mental illness or mental dysfunction;
- inspect any document or medical record relating to any person receiving treatment or care for a mental illness or mental dysfunction if he or she has given consent in writing and any records required to be kept by or under this Act.

Subsection 122A(2) provides that where an official visitor wishes to perform or exercise any power, duty or function under this Act, the person in charge and every other member of the staff or management of the mental health facility must provide the official visitor with such reasonable assistance as the official visitor needs to perform or exercise that power, duty or function effectively.

Subsections 122A(3) and (4) provides penalties where persons interfere or obstruct the duties of an official visitor. Persons are guilty of an offence under this Act if they:

- unreasonably refuse or neglect to render assistance when required under the above;
- do not give full and true answers to the best of the person's knowledge to any questions asked by an official visitor in the performance of any power, duty or function under this Act; or
- assault, obstruct, hinder, threaten, intimidate or attempts to obstruct or intimidate an official visitor performing any power, duty or function under this Act.

The penalty for the first two offences is set at 50 penalty units for a natural person and 250 penalty units for a body corporate. The same penalties apply to the third offence with the added penalty of imprisonment for 6 months for a natural person.

Subsection 122B(1) provides that an official visitor may at any time make a report to the Minister relating to the exercise of his or her powers under the Act

Section 122B(2) enables the Minister to request that an official visitor report to the Minister on any matter specified by the Minister at the time and in the manner directed by the Minister.

Subsection 122B(3) provides that an official visitor is required to report to the Community Advocate and the Minister (or his delegate) following each visit to a mental health facility on his or her findings in relation to their powers, duties and functions.

Subsection 122B(4) provides that where an official visitor has, as part of his or her duties, determined that a facility is not providing services in accordance with the relevant standards, or where a mental health service is deficient in any of the services

mentioned in the functions above, the official visitor will advise the manager of the facility and the Community Advocate in writing of such findings within 7 days.

Subsection 122B(5) provides that on receipt of such a report made under Subsection 122B(4), the manager of a facility must respond to the Community Advocate and the official visitor in writing within 21 days, stating his or her response to the findings, including any remedial action taken to resolve the issues in the Report.

Subsection 122B(6) enables a person to inspect the report of an official visitor.

Subsection 122B(7) enables a person to obtain a copy of a report of an official visitor on the payment of reasonable copying costs.

Clause 43 - Interpretation (private psychiatric institutions)

At present, the Act at Section 123, includes within the definition of a private psychiatric institution an institution for persons addicted to alcohol or another drug. This is not an appropriate definition of a mental health facility. Facilities for persons with drug addiction problems do not cater solely for persons with a mental illness or dysfunction. This clause removes the reference to institutions for persons addicted to alcohol and other drugs from the definition of a private psychiatric institution.

Clause 44 - Review of Act

This Clause inserts a new Section 148 of the Act which will ensure that there is a further review of the Act within 10 years of the passage of these amendments. The Clause also requires that the results of the review be tabled in the Assembly within 6 months of the completion of the review.

Clause 45 - Savings and transitional provisions

This clause details the transitional arrangements necessary to ensure the smooth operation of mental health services once the amendments pass into law. The proposed subsection 148(2) provides that the person appointed as the Director of Mental Health will continue to hold office under the amended Act as if appointed as the Chief Psychiatrist. In addition, subsection 148(3) provides that any order in effect when the amendments commence will continue as if the Act had not been amended. This will reduce any confusion in the operation of mental health orders.

Clause 46 - Further amendments of the Principal Act

This clause provides for a number of consequential amendments that need to be made to the Act to reflect the above amendments. This includes changing references to mental health orders, replacing the term "Psychiatric illness" with "mental illness", replacing the office of the "Director of Mental Health" with "Chief Psychiatrist" and ensuring that references to persons with a "mental dysfunction" also apply to persons with a "mental illness". These amendments are detailed at Schedule 1 of the Bill.

Clause 47 - Consequential amendments of other Acts

This clause provides for amendments to other Acts which are required as a consequence of the proposed amendments detailed above. These changes relate to a reference to mental health orders in the *Children's Services Act 1986* and the use of the term "Chief Psychiatrist" in the place of "Director of Mental Health" in the *Coroners Act 1997*.