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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Mental Health (Treatment and Care) (Amendment) Bill 1998

Explanatory Memorandum

Circulated by Authority of
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Summary

This Bill seeks to amend the *Mental Health (Treatment and Care) Act 1994* ("the Act"). The Act expires on 6 February 1999 The Act was presented in the Assembly in 1994 and was the culmination of a long process which began with the major review of mental health legislation in 1990. The publication *Balancing Rights* provided details of the review and provided the basis of the development of new mental health legislation for the ACT

The Act, prior to its passage in 1994, was considered by the Standing Committee on Social Policy. The Committee recommended that the Act be passed as interim legislation with a 24 month life, with the capacity for a further 24 month extension where determined by the Minister

This 'sunset clause' was imposed as there was a considerable diversion of views at that time and there was also considerable effort being applied to the development of nationally consistent legislation that was also consistent with human rights principles.

The sunset clause would therefore force Government to review the Act in light of developments such as the National Model Mental Health Legislation and the National Mental Health Plan, while still providing a more balanced regime for consumers of mental health services.

The Government initiated a review of the Act in March 1997 and produced a preliminary report in January 1998. The review found that there was general support in the community for the provisions in the Act

There has been further consideration of the issues prior to the Government position as outlined in the *Mental Health (Treatment and Care) (Amendment) Bill 1998* The Bill provides increased safeguards for individuals subject to involuntary treatment or care through the provision of an Official Visitors Scheme for mental health facilities, by increasing the rights of people subject to emergency detention to inform a relative or friend, through the requirement to include consumers and carers in policy development, evaluation of services and services planning and enabling the discharging of persons from involuntary orders (in most cases) as soon as the criteria for involuntary detention is no longer met.

There are also major changes to the type of mental health orders and the composition of the Mental Health Tribunal Under the new mental health orders, in most cases, clinicians will determine how long a person must be treated involuntarily under an order. The time spent on an order will be determined by clinical issues only (not legal issues). The Mental Health Tribunal will be reconstituted as a body with a single office holder This will ensure that all deliberataions of the Tribunal are transparent.

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 and 3 will commence on the day in which the Bill is notified in the *Gazette*. The remaining clauses will come into effect on a date to be set by the Minister by a further notification in the *Gazette*. Where 6 months elapses from the initial notification in the *Gazette*, the remaining provisions will come into force automatically.

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 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. There is no further capacity to extend the Act without an amendment to the Act (see also Clause 38).

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"
- "custodian"
- "official visitor"
- "prescribed custodian"
- "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 - Orders for assessment

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. 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 - Insertion

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 - Substitution

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 a danger to self or others, that psychiatric treatment is likely to reduce that danger, 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 a danger to self or others; that some form of care is likely to reduce this danger, 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.

A community care facility cannot be a psychiatric facility or a prison.

The proposed new Section 28 provides details on how the new orders outlined above will operate. Subsections 28(1) and (2) provide that every order made by the Tribunal will include the custodian into whose care the person subject to an order will be placed. In the case of a psychiatric treatment order, the custodian will, in general, be the position of the psychiatrist directly responsible for providing treatment to the person subject to the order. In the case of a community care order the custodian will be designated as the "prescribed custodian" and will be a senior ACT public servant appointed by the Minister by Regulation. The prescribed custodian will be responsible for monitoring the service plan in place for a mentally dysfunctional person.

Subsection 28(3) 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(4) 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(5) requires the Tribunal to notify the custodian of an order under Section 26(1) or (2) of the imposition of a restriction order under Section 27. This is to ensure that the custodian is aware that the person should not be discharged without further reference to the Tribunal.

Subsection 28(6) provides that a restriction order shall not exceed 3 months duration.

Subsections 28(7) and (2) 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(9) provides that only the Tribunal may revoke a restriction order.

Clause 14 - Role of custodian

Subsection 29(1) provides the matters for which a custodian of a person subject to an order 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 breach of a restriction order has occurred.

These powers are seen to belong more appropriately to the custodian of an order as the custodian has the clinical expertise to determine such matters

Subsection 29(2) requires the custodian to, wherever practicable, consult with the person subject to an order in 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. This sort of involvement can improve clinical outcomes and accelerate recovery.

Subsection 29(3) requires a custodian 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 significant improvements for the individual

Subsection 29(4) requires a custodian 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 a custodian, 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.

Clause 14 - 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 and only for as long as such seclusion is the least restrictive form of treatment or care.

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), a custodian 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 a custodian to inform the Tribunal of any change in residential arrangements of persons subject to orders

Clause 15 - Insertion

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 custodian 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 custodian may apprehend and detain the person within a mental health facility.

Subsection 32A(2) requires the custodian to advise the Tribunal of any detention including the reasons for the detention and the place of detention.

Clause 16 - 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 a custodian that·

- the custodian 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 custodian 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;
- make an order for an assessment under Section 16 of the Act to ascertain whether an additional order is required; or
- refer the matter to the Supreme Court for a preventive detention order (see Clause 17)

The Tribunal may only refer the matter to the Supreme Court if it is satisfied that all forms of treatment or care available have been tried but have not proved successful and the person poses an unacceptable risk to the community.

Subsection 36(5) requires the Tribunal to refer a person for an assessment under Section 16 of the Act where it has referred a person to the Supreme Court for the making of a preventive detention order.

Subsection 36(6) provides the ability to detain a person for up to 20 days in order to enable the application to be determined by the Supreme Court.

Clause 17 Insertion

This clause amends the Act by inserting a new Section 36A in Part IV of the Act. The new Section 36A enables the Supreme Court to issue a preventive detention order in respect of a person A preventive detention order enables the detention of a person where the person has not been charged with criminal offence and cannot be defined as mentally ill, but who poses a significant risk to the community.

It is expected that a referral to the Supreme Court for a preventive detention order would be a rare occurrence. The removal of a person's liberty by the State is a serious matter and is generally reserved for criminal offences, for treatment for mental illness or for major public health grounds It is also considered necessary for the Territory, in extreme cases only, to detain a person where he or she poses a definite risk to the safety of others and there is no evidence that treatment or care in any form can be provided, to lessen the risk to the community

A preventive detention order would only be imposed in the most serious of cases. It may even be suggested that there is no need for such a provision. However, if there is acceptance for the introduction of a restriction order on a person, there will need to be some way to enforce such orders and to counter any major or continuous disregard for the contents of such a restriction order

Given the serious nature of a preventive detention order it is considered that such an order should only be made by the Supreme Court.

Subsection 36A(1) provides the Supreme Court with the jurisdiction to hear and determine an application for a preventive detention order.

Subsection 36A(2) requires the Supreme Court to hear an application for a preventive detention order within 20 days of receiving the application.

Subsection 36A(3) provides that the prescribed custodian is the applicant in any matter under this Section.

Subsection 36A(4) provides the options that the Court may choose after conducting a hearing. The Supreme Court may·

- make a preventive detention order;
- make any order which the Tribunal may make;
- refer the matter back to the Tribunal for further consideration; or
- by order, discharge the person from the restriction order.

Subsection 36A(5) provides the criteria which the Supreme Court must use in determining whether a person should be detained for preventive detention. These are:

- that the person is mentally dysfunctional;
- by reasons of the dysfunction, the person poses an unacceptable risk to the community;
- all other forms of treatment or care reasonably available have been tried and have not proved successful; and
- in the circumstances, the person should be detained for the protection of the community.

Subsection 36A(6) enables the Supreme Court to decide where a person subject to a preventive detention order may be detained. This includes a prescribed detention facility or any other facility in which a person may be lawfully detained. This may include a mental health facility if the Court so decides.

Subsection 36A(7) provides that the custodian for the person subject to a preventive detention order is the person in charge of the facility in which the person is detained.

Subsection 36A(8) provides that the original preventive detention order remains in force for a maximum period of three months from the date of the order.

Subsection 36A(9) requires the Supreme Court to review a preventive detention before it ceases to have effect in order to determine whether the order should be revoked or renewed. After the initial period of preventive detention, the Supreme Court may extend the period of preventive detention by up to 6 months. Further extensions of 6 months at a time are available where the Supreme Court is satisfied

that the person subject to the detention continues to pose a significant risk to others. As part of the review, the Supreme Court may also make an order which the Tribunal may make, may refer the matter back to the Tribunal or discharge the person from the order

Subsection 36A(10) enables the Supreme Court to extend a period of preventive detention where the Court is in the process of reviewing a preventive detention order. Such an extension is only available while the Court is in the process of conducting such a review.

Clause 18 - Apprehension

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 - Authorisation of involuntary detention

Clause 19(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 19(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 19(d) will amend subsection 41(2) 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 20 - Notification of certain persons about detention

This clause amends Section 42 of the Act by adding to the persons who may be notified of an emergency detention. At present, the doctor who authorises an emergency detention must advise the Community Advocate and Tribunal within 12 hours of the detention This clause will add subsection 42(2) to the Act which will require the person in charge of the facility at which a person is detained under emergency provisions to ensure that the person so detained should have the opportunity to notify a relative or friend of the detention.

Clause 21 - 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 22 - 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 23 - 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 24 - Heading - Part VI

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 "mentally ill" in the Act

Clause 25 - Restrictions on use

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 26 - Determination of fitness to plead

Clause 26 amends section 68 of the Act which provides for the Tribunal to determine whether a person is fit to plead The Supreme Court can order a person to submit to the jurisdiction of the Tribunal to enable it to make such a determination.

Subsection 68(3) is omitted and new subsections 68(3) and (4) 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(4) is a codification of the common law rule in R v Padola [1959] 3 All ER 418.

Clauses 27 to 30 - Membership of Mental Health Tribunal

At present the Act in Part IX provides for the establishment of a Mental Health Tribunal which, in a number of cases, is comprised of 3 persons - being the President, who is a magistrate or legal practitioner, a psychiatrist or psychologist chosen from a panel of up to 9 psychiatrists and 9 psychologists appointed for this purpose and a community member appointed from a panel of up to 9 community members.

It is proposed to amend the Act to establish the Tribunal as the President sitting alone, with the requirement that the President be a magistrate.

This arrangement is suggested to ensure that all matters which effect the decision of the President are open to the person who is the subject of the Tribunal hearing. The Act still allows the President to call for additional expert legal and psychiatric opinions. These opinions will also be available to all parties to the hearing.

Sections 76 and 77 which provide for the membership of the Tribunal will be repealed by this provision and replaced with a new Section 77 which provides that the Tribunal will be composed of the President alone.

References to the terms and conditions of members of the Tribunal at Section 79 are also repealed.

Section 80 of the Act which provides for reimbursement of expenses for members is repealed by Clause 29.

Subsection 82(3) is omitted from the Act. This provision currently requires that an acting member of the Tribunal must be able to be appointed as a member to hold an acting position. As Clause 27 removes members from the Tribunal, other than the President, this provision is no longer required.

Clause 31 - Repeal

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 32 - 34 - 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 35 - 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 36 - 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.

Clause 37 - Interpretation

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 38 - Insertion

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 39 - 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 40 - 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*

Clause 41 - 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 Clause 41(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, 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.