2004

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

MENTAL HEALTH (TREATMENT AND CARE) AMENDMENT BILL 2004

EXPLANATORY STATEMENT

Circulated by authority of

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Minister for Health

EXPLANATORY STATEMENT

Outline

The purpose of the *Mental Health (Treatment and Care) Amendment Bill 2004* is to provide a clear legal basis for the involuntary treatment, care, detention and restraint of persons with a mental dysfunction. Previous to these amendments the legal mechanism for providing long-term involuntary treatment, care and support, to people with mental dysfunction, has been ineffectual, because people requiring involuntary care and support have not been able to be detained in community care facilities. On occasion persons on community care orders have been admitted to approved mental health facilities, however the Act has no provisions for these people to be given medication to ameliorate their condition. The amendments enable the Mental Health Tribunal to authorise the involuntary treatment, care and support of mentally dysfunctional people and their detention.

The amendments separate the provisions dealing with psychiatric treatment orders (PTOs) from the provisions dealing with community care orders (CCOs). The purpose of this separation is to avoid confusion as to which provisions apply to which category of mental health order. While it is recognised that having separate but largely parallel sets of provisions may increase the overall length of the legislation it is considered that the benefit of the added clarity and transparency will justify the inconvenience caused by any increase in overall length of the Act.

Under the amendments, the Care Coordinator will be responsible for seeing that the Tribunal's orders are implemented, and for otherwise coordinating the care of mentally dysfunctional people who are subject to Tribunal orders. The amendments deal with the functions and powers of the Care Coordinator so that they reflect the nature of the role that the Coordinator is to perform.

The amendments provide practitioners and people in the health and disability sectors with a clear framework for caring for people with mental dysfunction. These amendments recognise that many mentally dysfunctional people have complex needs and that service providers (health professionals, senior health officials, community service workers etc) must work together effectively to address these complex needs.

The Act is also amended to clarify the issue of the termination of a mental health order other than a restriction order. The amendments provide that it is clearly the Mental Health Tribunal (or a higher court) that revokes mental health orders. The Chief psychiatrist and care coordinator are still required to treat, care and support persons "in a manner that is least restrictive of their human rights" and will now tell the tribunal and the community advocate that the person no longer requires involuntary orders and the tribunal will review the order within 72 hours.

Revenue/Cost Implications

There is no additional cost involved in the Bill as all infrastructure is in place under the existing regime.

Formal Clauses

Clause 1 – Name of Act – states the title of the Act, which is the *Mental Health (Treatment and Care) Amendment Act 2004*.

Clause 2 – Commencement – states when the Act commences. The amendments are to commence on the day after the *Mental Health (Treatment and Care) Amendment Act 2004* is notified.

Clause 3 – Act amended – provides that this Act amends the ACT Mental Health (Treatment and Care)Act 1994.

Clause 4 – Definitions for Act Section 4 definitions of care coordinator, substitutes that the care coordinator is appointed under new section 120A

Clause 5 – Definitions for Act Section 4 definitions of community care order, substitutes that the community care order is an order made under new section 36

Clause 6 – Definitions for Act Section 4 definitions of mental health order, substitutes that the mental health order is a psychiatric treatment order, a community care order or a restriction order

Clause 7 – Definitions for Act Section 4 definitions of psychiatric treatment order substitutes that the psychiatric treatment order is an order made under new section 28

Clause 8 – Definitions for Act Section 4 definitions of restriction order. Means an order made under new section 30 or section 36B.

Clause 9 Orders for assessment Section 16 (1)(b) - the new reference to section 36L replaces the reference to section 36

Clause 10 – Section 16A Determination of ability to consent– inserts "or other" after "psychiatric" so that a persons capacity to consent to other therapies, for example psychological therapies, is also assessed.

Clause 11 – Divisions 4.3 and 4.4– is substituted by the new divisions 4.3, 4.4, 4.5, 4.6 and 4.7.

Division 4.3 Making of orders – preliminary matters

The new division replaces sections 23 to section 25. The language has been simplified in line with current drafting practise. This division addresses who the Mental Health Tribunal will consult and the matters the Mental Health Tribunal takes into account in making a mental health order.

New Section 23 Tribunal must consider assessment replaces existing section 23, the language has been updated to current drafting practise, the intent remains the same as the section it replaces.

New Section 24 Tribunal must hold inquiry replaces existing section 24. The new section requires the Mental Health Tribunal to hold an inquiry before making any mental health order. This changes the intent of the existing section 24 which only requires the holding of an inquiry before the making of orders under section 26. The Mental Health Tribunal, in practise, holds inquiries before making restriction orders, this new section reflects this and now requires it.

New Section 25 Consultation by tribunal etc replaces section 24A. New subsection 25(1)(a) "if the person is a child – the person or persons with parental responsibility for the child" reflects the wording in the *ACT Children and Young Peoples Act 1999*.

New Section 26. What the tribunal must take into account replaces section 25, the language has been updated to current drafting practise, and the intent remains the same as the section it replaces. The numbering for points l, m and n become k(i), k(ii) and k(iii) to reflect that these points are directly related to point k. The subsequent numbering reflects this change. Additional "q" is inserted to cover anything else that may be included by future regulation.

New Section 27. Tribunal may not order particular drugs etc replaces section 31, the language has been updated to current drafting practise, the intent remains the same as the section it replaces.

Division 4.4 Psychiatric Treatment Orders

New Section 28. Criteria for making psychiatric treatment order replaces section 26(1), the language has been updated to current drafting practise, the intent remains the same as the section it replaces.

New Section 29. Content of psychiatric treatment order replaces the references to psychiatric treatment orders in section 28 (2), (4) and (5). New Section 29 (3)(a) is an addition to the existing section28(5) and includes the position where a person has capacity to consent to an order and does so. This is consistent with section 13(1) where a person can make an application for a mental health

order on their own behalf. A person may acknowledge the benefit of a mental health order in the treatment and care of their mental illness. New subsection 29(1)(c) refers to new section 36H Limits on communication, and clarifies that section 36H is not a restriction order. (Refer to Explanatory Statement New Section 36H)

New Section 30. Criteria for making restriction order replaces section 27(1) in relation to psychiatric treatment orders with restriction order. The Tribunal's review of the intention to discharge from the order is dealt with by new section 34. Otherwise the intent of the replacement section remains the same as the existing section.

New Section 31. Content of restriction order replaces section 27(2), section 31(a)(i) clarifies the intent of the existing restriction order that the meaning of "*reside* " does not imply an order to detain. For example, a person may be ordered to live at a rehabilitation facility by the tribunal with the intention that this will provide the support for the person to appropriately access and participate in the general community without further restriction. The tribunal may separately order under Section 31(a)(ii) that a person is detained at a stated place.

New Section 32. Role of chief psychiatrist replaces section 28(1) and 29 (1) to (4) in relation to references to the chief psychiatrist. The new section describes the role of the chief psychiatrist in relation to discharging their responsibility for persons subject to psychiatric treatment orders. The chief psychiatrist now must consult with the person or any guardian under the *Guardian and Management of Property Act 1991* or appointed attorney before making a determination. It is also clear that while they are to be consulted neither guardians nor attorneys can make decisions in relation to the treatment care or support of persons subject to psychiatric treatment orders. The chief psychiatrist now gives copies of determinations to the tribunal and community advocate but is not required to consult with them prior to making the determinations.

New Section 33. Treatment to be explained replaces section 35. The language has been simplified, otherwise the replacement section has the same effect as the existing section.

New Section 34. Action if psychiatric treatment or restriction order is no longer appropriate replaces section 28 (8), section 29 (5), (6) and (7). The existing section 29(5) states that the chief psychiatrist shall discharge a person in respect of whom an order under section 26 applies, however it is unclear if this revokes the order of the Tribunal. If it is not revoked then the chief psychiatrist is caught by section 28(1) which would still apply. As only the originating tribunal/ court or a higher court can revoke a court order, the new section now requires the chief psychiatrist to notify the Tribunal when the chief psychiatrist is satisfied that a person no longer requires involuntary treatment and care, and the tribunal must review the order within 72 hours. This would allow the chief psychiatrist to treat the person under section 28 in a manner that is the least restrictive of their human rights and in line with the Objectives of the Act, and allows the Chief Psychiatrist to make a determination that respects their voluntary choices, while the matter is being reviewed.

New Section 35. Power in relation to detention, restraint replaces section 32. Section 35 recognises that the place that is appropriate for a person requiring involuntary treatment of mental illness, will vary with the persons clinical needs. For most people their treatment and care will be undertaken in the community and they will continue to reside in their own home. For some people the episode of involuntary treatment and care may begin in hospital and continue thereafter in the community. The stabilisation of psychiatric conditions may include relapses of the condition, so it is necessary that the legal order supports the therapeutic variance of the environment in which the involuntary treatment and care is carried out. New Section 35 in conjunction with new section 32 provides this flexibility. The insertion of subsection 35(3) keeps the focus of the powers to detain, confine or seclude a person in the light of the Objectives of the Act.

"Detention', "confinement" and "seclusion" as used in this section and the rest of the Act, are to be interpreted in the ordinary sense of the words. They give a cascade of options to use as a persons risk to themselves or other persons changes. As the measures to treat and care for someone become more restrictive the time that someone is subject to the restriction would decrease. Detention would be to a facility, confinement to part of a facility and seclusion to a single room. For example an involuntary

person is **detained** at the Psychiatry Unit of a hospital for the period of their treatment and is subject to the ordinary supervision of the Unit, the person requires closer supervision and is **confined** to the High Dependency Unit within the Psychiatry Unit and the staff ratio increases and the observations are recorded more frequently. The person is then assessed as being at high risk, or has acted as a risk, to themselves or other persons and is **secluded**. In seclusion the person is constantly monitored by staff dedicated to the person in seclusion. The seclusion is time limited and the person is formally assessed for release from seclusion. If a person is acting aggressively against themselves or other people they may require being **restrained**, this is to physically hold them to prevent further such behaviour. The reasons for the seclusion or restraint and the time period of the seclusion or restraint are entered in the clinical records, reported to the community advocate and also entered in a separate register. It is recognised that a person may be admitted to a psychiatric facility in such circumstances that the staff are required to immediately restrain and seclude the person to protect them from harm to themselves or from harming other people .

Division 4.5 Community Care Orders

This new division clarifies the original intent in the Act for the position of the Care Coordinator and the function of community care orders. The role of the Care Coordinator is clearly to coordinate the care and support of a person subject to community care orders, with or without a restriction order, as is required for the implementation of the order.

New Section 36. Criteria for making community care order replaces section 26(2). Subsection 36(b)(ii) has been inserted so the tribunal can include in its assessment that the persons condition is likely to seriously deteriorate without that involuntary treatment, care or support. Subsection 36(c) is inserted and in making an order the tribunal needs to be satisfied that involuntary treatment, care and support will reduce harm or likelihood of harm.

New Section 36A Content of community care order replaces Sections 28(4)(b) and 28(5). Subsection 36A(1)(b) is inserted to give the care coordinator the authority to require a person on a community care order to take such medication as is lawfully prescribed by a doctor for the treatment or amelioration of their mental dysfunction. For example a person with a mental dysfunction may be prescribed a medication to assist stabilise their mood and impulsivity. Subsection 36A(1)(d) refers to new division 4.6 “Limits on communication” and the short term limits on communication the tribunal can apply to someone. Subsection 36A(3)(a) is an addition to the existing section 28(5) and includes the position where a person has capacity to consent to an order and does so. This is consistent with section 13(1) where a person can make an application for a mental health order on their own behalf. A person may acknowledge the benefit of a mental health order in the treatment, care and support of their mental dysfunction.

New Section 36B Criteria for making restriction order replaces Section 27(1) as it applies to mental dysfunction and the Tribunal review of the intention to discharge from the order is dealt with by new section 36F. Otherwise the intent of the replacement section remains the same as the existing section.

New Section 36C Content of restriction order replaces Section 27(2) as it applies to a person with a mental dysfunction. Subsection36C(a) and (b) are inserted to clarify that the tribunal may order a person to either (a) live at a stated community care facility or (b) be detained at a stated community care facility.

New Section 36D Role of Care Coordinator replaces Sections 28(3) and 29(1)(a) and 29(2). Because the Care Coordinator coordinates and plans the treatment, care and support but does not determine the nature of these interventions, as distinct from the Chief Psychiatrist who is responsible under the Act for the nature of the involuntary treatment, the Care Coordinator shall consult with the range of treatment professionals and other service providers before making a written determination. New subsections 36D(3), (4), (5)and (6) describe who shall be consulted and who will be given written copies of the subsequent determinations. It is expected that community care orders are the last resort for the care and support of a person with a mental dysfunction and therefore the treatment, care and

support plan would be substantially prepared when application for an involuntary mental health order is made.

New Section 36E Treatment and care to be explained is a new section and requires the Care Coordinator to ensure that a person on community care order is provided with an explanation of the nature of the involuntary treatment, care and support in terms the person can understand. The appropriate person to provide this explanation will usually be the provider of the service. This parallels the requirements for the chief psychiatrist under new section 33.

New Section 36F Action if community care order no longer appropriate replaces Sections 28(8),(9) and (10) and 29(5),(6) and (7). The tribunal must revoke an order formally before the involuntary nature of the order ceases if the care coordinator is satisfied that the person is no longer a person to whom the tribunal could make an order and the time limit of the order has not expired.

New Section 36G Powers in relation to detention, restraint etc is inserted to provide the Care Coordinator with the authority to implement a Tribunal decision to detain a person at a stated community care facility (new section 36C(b)) or if it is determined by the Care Coordinator that the person has contravened section 36 or by the Tribunal that the person has contravened section 36B. The power to confine, seclude or restrain gives the service provider a graduated range of interventions for incidents, or significant risk of incidents, of harm to self or others. As the measures to care for someone become more restrictive, the time to which someone would be subject to the restriction would decrease and the accountability and transparency for this treatment and care to the Community Advocate and Tribunal increases. Subsection36G(3) requires that only appropriately trained persons can authorised by the Care Coordinator to give medication prescribed by a doctor in accordance with a tribunal order under subsection 36A(1)(b).

Division 4.6 Limitations on communication

New Section 36H Limitations on communication replaces section 33. The word “restriction” has been replaced by the word ”limitation” to clarify that this is not a formal restriction order but additional to the content of new section 29 or new section 36A, the limitation is time limited. The language has been simplified, otherwise the intent of the updated section remains the same as the existing section.

New Section 36I Communication with community advocate and person’s lawyer replaces section 34. The language has been simplified, otherwise the intent of the updated section remains the same as the existing section.

Division 4.7 Duration, contravention and review of orders

New Section 36J Duration of orders replaces sections28(7) and 30. The new subsection 36J brings together both the duration periods for psychiatric and community care orders as well as restriction orders.

New Section 36K Contravention of orders replaces section 32A. The term “relevant official” replaces the use of “chief psychiatrist or care coordinator (as the case requires)” in line with current drafting principles and to simplify the language. Subsection36L(4) is inserted to clarify that if the tribunal is notified by the relevant official under section 36K (1)(c) that a person subject to a restriction order has contravened that order and the tribunal may then authorise the implementation of 36K. Otherwise the language has been simplified and the intent of the replacement section remains the same as the existing section.

New Section 36L Review, variation and revocation of orders replaces section 36. New subsection 36L(1) remains substantially the same. New subsection 36L(2) responds to the new provisions that the Tribunal is responsible for revoking or reviewing all mental health orders when notified by the Chief Psychiatrist under new section 34 or Care Coordinator under new section 36F, that they, as the relevant officials, are satisfied that the person subject to a mental health order is no longer a person in relation to whom the tribunal could make an order. New subsection 36L(2) also

requires the tribunal to review within 72 hours notification by the relevant official that a person has contravened a restriction order.

New subsection 36L (3) clarifies that section 94 requiring that “at least 3 days” before the tribunal holds an inquiry or review the registrar gives written notice does not apply where the tribunal is reviewing orders under new subsection 36L (2).

New subsections 36L (4) and (5) replace subsections 36 (2), 3(a) and 4, the language has been simplified and the intent of the replacement section remains the same as the existing section.

Clause 12. **Section 48(1)(a) Approved Facilities** updates the reference to the new section number for psychiatric treatment order**.**

Clause 13. **Section 48(1)(b) Approved Facilities** updates the reference to the new section number for contravention of mental health orders.

Clause 14. **Definitions for pt 5A Section 48B** definition of *custodial order* updates the reference to “psychiatric treatment order” from the reference to the old section number.

Clause 15. **Section 49,** definition of responsible person paragraph (c) ‘or community care facility’ is inserted after ‘other mental health institution’

Clause 16. **Section 50(1) Statement of rights** *after* mental health facility *insert* community care facility.

Clause 17. **Section 51 Information to be provided** *after* mental health facility *insert* community care facility.

Clause 18. **New Section 51(d)(va) Services of Orders -** the care coordinator *is inserted*, to the list of names and addresses that the responsible person shall have accessible to all persons admitted to a facility

Clause 19. **Section 51 (d)** provides for subparagraphs to be renumbered when the Act is next republished

Clause 20. **Section 52 Communication** *after* mental health facility *insert* community care facility.

Clause 21. **Section 55(2) and (3) Restriction on use** updates the reference to “psychiatric treatment order” from the reference to the old section number.

Clause 22. **Section 81(3)(f) Duration of Appointment** updates the reference to “psychiatric treatment order or community treatment order” from the reference to the old section number.

Clause 23. **Section 83(2)(b) Constitution for exercise of powers** updates the reference to the new section number for review ,variation and revocation of orders from the reference to the old section number.

Clause 24. **Section 94(ga) Notice of proceedings.** the care coordinator *is inserted* to the list of persons the registrar will give written notice to before the tribunal holds an inquiry or review

Clause 25. **Section 94** provides for subparagraphs to be renumbered when the Act is next republished

Clause 26. **New Section 105** Service of orders (fa) and (fb) the chief psychiatrist and care coordinator are included on the list of persons to whom the registrar will serve copies of orders of the tribunal.

Clause 27. **Section 105** provides for paragraphs to be renumbered when the Act is next republished

Clause 28. **New Part 10A is inserted.**

Part 10A Care Coordinator

New Part 10A replaces existing Division 4.4 and is inserted to include the description and functions of the care coordinator. The existing division 4.4 does not adequately describe the functions and responsibilities of the care coordinator.

New Section 120A **Care Coordinator** replaces section 36A. The new section includes reference to the requirements of the Legislation Act. Subsection (3) requires the Minister to only appoint persons who have the requisite qualifications, skills and training to coordinate the involuntary treatment, care and support for persons with a mental dysfunction who are subject to a mental health order.

New Section 120B **Functions,** is a new section and describes clearly the functions of the care coordinator, including:
(a) the coordination of involuntary treatment, care and support,
(b) ensuring that appropriately trained staff deliver the treatment, care and support in the manner of the order of the tribunal,
(c) ensuring the facilities are appropriate for the implementation of section 36C tribunal restriction orders,
(d) coordinating the provision of medication given involuntarily under community care orders is accomplished safely and professionally, and
(e) the care coordinator is required to make reports and recommendations to the Minister.

New Section 120C **Termination of appointment is a new section** and parallels section 116 for the chief psychiatrist.

New Section 120D **Delegation by care coordinator** replaces section 36B. New section 120D is updated to include reference to the requirements of the *Legislation Act*. The care coordinator is also required to ensure that delegates have the training, experience and personal qualities to exercise the functions delegated.

Clause 29 Sections 142 and 143 *substitute*

New Section 142 **Relationship with Guardianship and Management of Property Act 1994** replaces existing section 142. New subsection 142 1(b) is inserted to clarify that where there is a disagreement between a guardian and the care coordinator, about the treatment care or support of a person who is subject to a community care order, the care coordinators determinations will take precedence. A guardian may request a review of the community care order by the Mental Health Tribunal. A guardian may also appeal the community care order to the Supreme Court. The rest of section has been reformatted, language has been simplified and the intent of the replacement section remains the same as the existing section.

New Section 143 **Relationship with Powers of Attorney Act 1956** replaces existing section 143. New subsection 143 (b) is inserted to clarify that where there is a disagreement between an attorney of a person and the care coordinator, about the treatment, care or support of a person who is subject to a community care order, the care coordinators determinations will take precedence. An attorney may request a review of the community care order by the Mental Health Tribunal. An attorney may also appeal the community care order to the Supreme Court. The rest of section has been reformatted, language has been simplified and the intent of the replacement section remains the same as the existing section.