

1994

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

MENTAL HEALTH (CONSEQUENTIAL PROVISIONS) BILL 1994

EXPLANATORY MEMORANDUM

**Circulated by the authority of the Attorney-General
and Minister for Health**

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MENTAL HEALTH (CONSEQUENTIAL PROVISIONS) BILL 1994

OUTLINE

The Mental Health (Consequential Provisions) Bill 1994 is part of a package of Bills which implement the "Balancing Rights" Report of the ACT Mental Health Review Committee.

The Bill contains provisions consequential to the Crimes (Amendment) Bill 1994 and the Mental Health (Treatment and Care) Bill 1994. These provisions:

- repeal the *Mental Health Act 1983* and provide transitional provisions for the transfer of matters to the new arrangements in the new *Mental Health (Treatment and Care) Act 1994*;
- consequentially amend the *Children's Services Act 1986* so that the Children's Court may refer children and young persons to the Mental Health Tribunal where this is appropriate;
- consequentially amend the *Community Advocate Act 1991* to reflect the role of the Community Advocate under the new *Mental Health (Treatment and Care) Act 1994*;
- provide for the transition of persons presently held in custody as either unfit to plead or not guilty by reason of insanity to come under the new legislation and so be amenable for review and release by the Mental Health Tribunal and also provide for the translation of any orders of release currently applying to such persons to become orders of the Tribunal; and
- make minor consequential amendments to other Territory legislation.

Details of the Bill are as follows.

MENTAL HEALTH (CONSEQUENTIAL PROVISIONS) BILL 1994

PART I - PRELIMINARY

Clauses 1, 2 and 3 are formal clauses dealing respectively with the citation of the Bill once enacted, the commencement and interpretation of the Act.

PART II - MENTAL HEALTH ACT 1983

Clause 4 repeals the *Mental Health Act 1983* as a consequence of the new *Mental Health (Treatment and Care) Act 1994*, which will replace the provisions of the *Mental Health Act 1983*.

Clauses 5, 6, 7 and 8 preserve appointments and delegations made under the *Mental Health Act 1983* as if they were appointments and delegations made under the corresponding provisions of the *Mental Health (Treatment and Care) Act 1994*.

Clauses 9, 10, 11 and 12 preserve certain actions which have been taken under the *Mental Health Act 1983* as if those actions had been instituted under the new *Mental Health (Treatment and Care) Act 1994*. The new provisions of the *Mental Health (Treatment and Care) Act 1994* will apply to those actions from the date of commencement of that Act.

Clause 13 preserves the licensing of any private mental health facilities as if those facilities had been licensed under the *Mental Health (Treatment and Care) Act 1994*. Any action taken in respect of a licence will continue to have effect as if it were action taken under the new Act.

Clause 14 preserves any fee determinations made under the repealed *Mental Health Act 1983*. These fees relate to the licensing of private mental health facilities.

Clause 15 is a transitional provision requiring the annual report under the new *Mental Health (Treatment and Care) Act 1994* to include details of the operations of the Director of Mental Health Services under the old Act during the financial year in which the new Act commences. This provision ensures that there is no gap in reporting.

PART III - CHILDREN' S SERVICES ACT 1986

This Part is intended to give children the same rights as adults to be diverted from the criminal justice system where it is appropriate to do so, and for the Children's Court to be able to use the expertise of the Tribunal when it is necessary. This part should be read in conjunction with Part VIII of the Mental Health (Treatment and Care) Bill.

Clause 16 refers to the Children's Services Act as the Act referred to in this part.

Clause 17 provides for definitions to be included in the Act which refer to the Mental Health (Treatment and Care) Bill and the Mental Health Tribunal. The definition of "mental dysfunction" and "mental health order" also correspond to the Mental Health (Treatment and Care) Bill.

Clause 18 amends s33(3) of the Act. This section already requires an authorised officer to have regard to a range of matters when deciding whether he or she should consent to the prosecution of of a child. The new clause directs an authorised officer to consider any apparent mental dysfunction of the child and whether it would be appropriate to refer the child to the Mental Health Tribunal. This provides a link to the power already given to the police to refer persons to the Tribunal under Clause 15 Mental Health (Treatment and Care) Bill.

Clause 19 provides for a new section 46A to be inserted in Division 2, Part IV of the Act.

New section 46A provides for the transfer of child offenders to the Tribunal prior to conviction where the Children's Court is satisfied that the child is mentally dysfunctional. This provision corresponds to the new section 428W of the Crimes (Amendment) Bill. It allows the Children's Court to also refer a child to the Tribunal for a determination as to whether a child is mentally dysfunctional. This provision allows the Court to dismiss charges unconditionally once they are satisfied that the child is mentally dysfunctional or to refer the child to the Tribunal for the making of a mental health order.

Clause 20 provides for a new subsection 47(1)(m) which provides for orders to be made in accordance with new section 49A. Section 47 of the Act deals with the disposition of a child who has been convicted of a criminal offence.

Clause 21 provides for the insertion of new section 49A.

New section 49A provides for referral to the Mental Health Tribunal where a child has been convicted of a criminal offence and the court is satisfied that the child is mentally dysfunctional. This section gives the Children's Court the flexibility to make what orders it considers appropriate, including to refer the child to the Tribunal so that the Tribunal can make a mental health order.

Clause 22 provides for section 83 of the Act (which deals with care orders) to be amended by allowing the Children's Court to make orders in accordance with section 83A and other necessary references.

Clause 23 provides for the insertion of new section 83A into the Act.

New section 83A provides for referral to the Mental Health Tribunal where the Court has made a declaration that a child is in need of care and that the child is mentally dysfunctional. The Court may refer the child to the Tribunal so that the Tribunal can assess whether or not the child is mentally dysfunctional and make recommendations to the Court. The Court then makes whatever orders it considers appropriate.

PART IV - COMMUNITY ADVOCATE ACT 1991

Clause 25 refers to the Community Advocate Act as the Act to be amended.

Clause 25 provides for additional definitions to be inserted into the Act so that the Act now has corresponding definitions to link it to the Mental Health (Treatment and Care) Bill and Crimes (Amendment) Bill.

Clause 26 provides for the functions given to the Community Advocate under the Mental Health (Treatment and Care) Bill to be added to the list of functions. These functions are concerned with the protection of the rights of mentally dysfunctional persons. This clause also allows for definitional

clarity so that the Guardianship Tribunal is distinct from the Mental Health Tribunal.

Clause 27, 28 and 29 once again gives definitional clarity to the Guardianship Tribunal.

PART V - AMENDMENT OF OTHER ACTS

Clauses 30 to 33 provide for the amendment Acts where the provisions are no longer necessary upon the commencement of the legislative scheme.

PART VI - TRANSITIONAL ARRANGEMENTS FOR FORENSIC DETAINEES

Clause 34 provides that section 20B of the *Crimes Act 1914* (Commonwealth) ceases to apply to the Territory on the commencement of the new legislation. This section was repealed in 1989 but the combination of section 33G of the *Interpretation Act 1967* (ACT) and section 27 of the *Crimes Legislation (Amendment) Act (No. 2) 1989* (Commonwealth) continued to apply it in the ACT. Section 20B dealt with the detention and release of persons found unfit to be tried by reason of unsoundness of mind and persons acquitted of an offence by reason of unsoundness of mind at the time of the commission of the offence.

Subclause 35(1) provides for the transition of persons who have been found unfit to be tried and detained pursuant to either section 20B of the Commonwealth Crimes Act as applied in the ACT or the provisions of the Lunacy Act 1898 (NSW) to become persons who have been determined by the Tribunal to be unfit to plead to a charge under *Clause 65* of the new Act, but are likely to become fit within 12 months. This determination will be deemed to have come into effect on the day that the Court ordered the person to be kept in strict custody because of the original finding and so operate to bring such persons within *Clause 66* of the new Act and the consequent review mechanism to determine whether they become fit to plead.

Subclause 35(2) provides for the transition of persons who have been acquitted on the ground on mental illness and ordered to be detained in custody pursuant to either the provisions of section 20B of the Crimes Act

or the Lunacy Act to become persons who have been detained by an order of the Supreme Court under Part XIA of the Crimes Act and so be amenable to the review and release powers of the Mental Health Tribunal, found in the new Act, in respect of such persons.

Subclause 35(3) provides for an immediate review by the Tribunal of persons who have been held in custody for a period of 6 months or longer.

Clause 36 provides that for persons who had been acquitted on the grounds of mental illness and detained and thereafter released on conditions, their release and the conditions imposed are to be taken as release by the Tribunal subject to conditions imposed by the Tribunal under *clause 72* of the new Act. This will enable the Tribunal to review, vary or revoke those conditions or impose other conditions under *clause 73* of the new Act or order a person to be detained in custody for breach of those conditions under *clause 74* of the new Act.