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

MENTAL HEALTH (TREATMENT AND CARE) BILL 1994

EXPLANATORY MEMORANDUM

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Minister for Health**

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MENTAL HEALTH (TREATMENT AND CARE) BILL 1994

The Mental Health (Treatment and Care) Bill 1994 (the Bill) has been prepared to implement the Government's response to the recommendations contained in the "Balancing Rights" Report of the ACT Mental Health Review Committee.

The Bill contains many of the provisions of the *Mental Health Act 1983* ('the 1983 Act') which is to be repealed by consequential legislation enacted concurrently with this Bill.

Many provisions of the Bill however, introduce new concepts to the Territory's mental health legislation. Specifically the Bill provides for:

- . a statement of objectives for the Act and for the Territory;
- . a broader definition of "mental dysfunction" than in the 1983 Act;
- . the establishment of a mental health Tribunal to replace the Magistrates Court in making treatment orders for mentally dysfunctional persons;
- . the making of mental health orders by the Tribunal - the types of orders contemplated by the Bill are broader than treatment orders under the 1983 Act;
- . a clear process for dealing with mentally dysfunctional persons referred from the criminal justice system;
- . a clear statement of the rights of mentally dysfunctional persons; and
- . stricter requirements for informed consent to convulsive therapy and psychiatric surgery.

The Bill also takes into account the views of the National Inquiry into the Human Rights of People with Mental Illness and for the Improvement of Mental Health Care, the Australian Health Ministers' Statement of rights and responsibilities, the United Nations Principles for the Protection of Persons with

Mental Illness and for the Improvement of Mental Health Care and the Model Criminal Code Officers Committee.

The Bill also takes into account the submissions received by the Government during the period of public consultation. This revised version of the Bill is based on the recommendations of the Legislative Assembly Standing Committee on Social Policy in its Report on the Inquiry into the Mental Welfare and Crimes (Amendment) Exposure Draft Bills.

Details of the Bill are as follows.

PART I - PRELIMINARY

This Part provides for formal matters and for the interpretation of the Bill.

Clauses 1 and 2 provide for the method of citation of the Bill once enacted and its commencement.

Clause 3 is a sunset clause effective 24 months from the commencement of the legislation with provision for a 24 months' extension by a disallowable instrument from the Minister.

Clause 4 provides definitions for various terms used in the Bill. In particular, "mental dysfunction", the main object of the Bill, is defined to mean "a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion". This definition is broader than the definition of "mental dysfunction" in the 1983 Act which required that the disturbance or defect be of a "severely disabling degree". The word "substantially" has been used instead of "severely" as mentally dysfunctional people may be in need of mental health care notwithstanding that the mental dysfunction is not severely disabling. There is also a definition of "psychiatric illness" which is a subset of mental dysfunction. This definition and provision in clause 28 makes it clear that an order for psychiatric treatment can only be made in relation to a person with a psychiatric illness. These provisions will assist in clarifying the different roles of the Tribunal and distinguish between mental health orders.

Clause 5 provides limits on the definition of mental dysfunction and protects persons from coming within the provisions of the legislation merely because they do not conform with social norms. *Clause 5* provides that a person is not to be regarded as mentally dysfunctional merely because of any of the matters listed in that clause. This provision is intended to limit the grounds on which the definition of mental dysfunction may be used as a justification for the limitation of a person's liberty. *Clause 5* is an expanded version of a similar provision in subsection 4(2) of the 1983 Act.

Clause 6 provides guidance for determining age in Tribunal proceedings relating to children which is consistent with the approach in the Children's Services Act.

PART II - OBJECTIVES

Part II of the Bill is a general statement of the objectives of the Act and is intended to provide guidance to persons performing functions and exercising powers under the Act and also for the Territory generally in providing services and facilities for mentally dysfunctional persons.

Clause 7 sets out the objectives of the Act. Where there is discretion in the exercise of powers or performance of functions under the Act then these objectives may be used as an overriding statement of intent so that discretions are exercised consistently with these objectives.

Clause 8 similarly sets out the objectives of the Territory in providing services and facilities for mentally dysfunctional persons. These objectives are broader than those in *clause 5* as they have an application beyond the Territory's specified role under the Act. These objectives are a formal statement of the Territory's intentions in relation to mentally dysfunctional persons.

Both *clauses 7* and *8* should be read consistently with *clause 140* which provides that nothing in *clauses 7* or *8* are to be taken to create or affect any legal rights.

Clause 9 establishes the rights of mentally dysfunctional persons to be treated in a manner that is least restrictive of their personal freedom and that any derogation from the person's dignity and self-respect is kept to the minimum necessary.

PART III - MENTAL HEALTH TRIBUNAL

The Mental Health Tribunal ('the Tribunal') is a new body that is established by this Bill to replace the Magistrates Court as the relevant determinative body in relation to mentally dysfunctional persons.

Clauses 10 and 11 formally establish the Tribunal and set out its functions.

Clause 12 provides that the Tribunal has powers to do all things necessary or convenient in connection with the performance of its functions.

PART IV - MENTAL HEALTH ORDERS

This Part sets out the types of mental health orders the Tribunal is able to make and the power to make such orders. The Tribunal is a determinative body with the flexibility to be able to select from a range of orders or combination of such orders to create a case management scheme specifically designed to meet the needs of a particular individual. The Tribunal conducts an inquiry before making a mental health order and must have regard to a psychiatric or psychological assessment of the person who is the subject of the inquiry before making an order. This Part also gives guidance as to the matters to be taken into account by the Tribunal when making a mental health order. In addition, there is an overlay of principles to be observed wherever any element of involuntariness may be part of the order. Such involuntariness may relate to medication, detention or any other order or part of an order.

Division 1 specifies the manner in which a person becomes the subject of an application or referral to the Tribunal. Once the Tribunal has notice of the person, whether by application or referral, then the Tribunal decides whether an assessment order is warranted. The purpose of the assessment order is to determine whether the person is in fact mentally dysfunctional and the circumstances of the mental dysfunction.

Division 2 sets out the procedures relevant to the making of assessment orders and the conduct of the assessments. This Division contains several provisions

that are designed to ensure that the person concerned is informed of what is happening as much as possible and that there are processes in place to safeguard the interests of the person involved at all times consistently with the principles stated in clause 9 of the Bill.

Division 3 specifies the power of the Tribunal to make mental health orders.

Clause 13 specifically sets out the right of a mentally dysfunctional person to make an application to the Tribunal for a mental health order. The clause further specifies the manner in which the application must be made. The essential elements are that the person believes that, because of mental dysfunction, their health and safety is, or is likely to be, substantially at risk or they are, or are likely to be, a danger to the community. An application must be accompanied by a statement specifying the reasons as to why the person holds that belief.

Clause 14 sets out the manner in which an application for a mental health order may be made in respect of a person. The essential elements for making such an application are the same as under clause 11 except that an applicant under clause 12 must hold that belief on reasonable grounds. In addition, where the applicant believes that appearance before the Tribunal of the person is likely to substantially increase the risk to the person's health and safety or the danger to the community, the application should contain a further statement setting out those grounds.

Clause 15 provides a mechanism by which alleged offenders may be referred to the Tribunal for a mental health order. The term "alleged offender" is defined in subclause 13(4) to mean a person who has been arrested, charged, or a police officer is satisfied that there are sufficient grounds on which to charge, in connection with an offence. The essential elements of risk to the alleged offender's health and safety or danger to the community from clauses 11 and 12 are also required for referrals under this clause. However, there must also be an additional element that, having regard to the nature and circumstances of the offence and the alleged offender's apparent mental condition, it may not be appropriate to prosecute the alleged offender. Statements of grounds similar to those required under clauses 11 and 12 are also required for a referral to the Tribunal under clause 13.

Clause 16 sets out the preconditions for the making of an assessment order and the matters that the order must specify. There are three avenues by which the Tribunal may make an assessment order. Firstly, the Tribunal may be satisfied that there is evidence that a person is mentally dysfunctional and that there is the requisite risk to the person's health or safety or the person may be a danger to the community. Secondly, a person who is ordered to submit to the jurisdiction of the Tribunal under Part XIA of the Crimes Act to enable the Tribunal to determine whether the person is fit to plead to a charge is automatically made the subject of an assessment order. The Tribunal may also make an order for assessment when exercising its review function. Consistently with the principles contained in clause 9 of the Bill, the Tribunal is required to try to gain the consent of the person to the assessment order where the assessment order is given by the first avenue.

Clause 17 provides that assessments are to be conducted as soon as possible and not later than seven days after the person attends the premises specified in the assessment order as the premises at which the assessment is to be conducted.

Clause 18 sets out the circumstances in which the Tribunal may order the removal of a person to mental health facility for the purposes of conducting an assessment. These circumstances are restricted to where the person does not appear before the Tribunal on being summoned, or where no summons is served because of the risk to the person's health or safety or danger to the community, and where the person does not comply voluntarily with the assessment order. A person who is ordered to submit to the Tribunal under Part XIA of the Crimes Act may also be the subject to an order of the Tribunal for removal. Clause 16 also specifies the manner in which an order for removal is to be executed.

Clause 19 ensures that a person who is the subject of a removal order has proper access to facilities and advice or support.

Clause 20 provides that where a person has been admitted to a facility pursuant to an assessment order then the Community Advocate and that person's lawyer are entitled to have access to that person at all times. This provision is intended to ensure that the interests of the person subject to the assessment order are protected consistently with the principles contained in clause 7 of the Bill.

Clause 21 requires the person in charge of a facility to inform a person who is the subject of the assessment order that the Tribunal has ordered that the assessment be conducted.

Clause 22 is a procedural clause that specifies to whom the completed assessments are required to be given.

Clause 23 provides that an assessment is a pre-condition to the making of a mental health order. It will not be necessary in all cases for the Tribunal to order an assessment, particularly if there is already an assessment in respect of a person that the Tribunal considers appropriate.

Clause 24 sets out the power of the Tribunal to make mental health orders. The Tribunal must hold an inquiry prior to making such orders. The inquiry may be based on an application or a referral; or it may be when the Court refers a person to the Tribunal for the making of a mental health order. The purpose of the inquiry is for the Tribunal to be satisfied that the person is mentally dysfunctional and that the person's health or safety is, or is likely to be, at risk or that the person is or is likely to be a danger to the community.

Clause 25 sets out all the matters to be taken into account by the Tribunal when making a mental health order. These matters reflect the role of the Tribunal in protecting the welfare and interests of persons suffering from a mental dysfunction, and balancing them with the needs of others in the community. The Tribunal is to take into account the views of the person who is the subject of an inquiry, the views of mental welfare professionals who are consulted and the views of all persons appearing at the proceeding. There are additional matters to be taken into account in relation to persons who have come into contact with the criminal justice system such as the nature and circumstances of the offence.

Clause 26 provides that the Tribunal cannot make a mental health order without the consent of the person who is the subject of a mental health order unless the principles for involuntariness are observed as set out in the next clause. Consent is not required when the Tribunal is making an order in relation to persons required to submit to the jurisdiction of the Tribunal pursuant to the Crimes Act. This clause should be read in conjunction with clause 142 which provides that a guardian appointed under the Guardianship

and Management of Property Act is not entitled to give any consent for these purposes.

Subclause 27(1) sets out the four principles to be observed by the Tribunal when making an involuntary mental health order. The Tribunal must be satisfied that the person needs to undergo the relevant treatment or program, or be given care or support, or be subject to prohibitions or conditions; that the order is necessary for the person's own protection or the protection of the community; that the person has refused to consent to the order and that the treatment, program, care, prohibitions or conditions cannot be provided or imposed adequately in a less restrictive or intrusive environment. The Tribunal is able to make any order or component of a mental health order involuntary. *Subclause 27(2)* provides the mechanism for the way in which some involuntary orders will in practice be able to be carried out. *Subclause(2)(a)* sets out how custodial orders will operate and *subclause 2(b)* sets out how orders requiring attendance for treatment or other care will operate. *Subclause (2)(c)* vests a discretion in the Director to administer psychiatric treatment in the case of a person who has a psychiatric illness.

Clause 28 sets out the basis of the Tribunal's power to make mental health orders. The Tribunal must have regard to an assessment and hold an inquiry. If the Tribunal is then satisfied that the person is mentally dysfunctional and as to the other criteria in *28(2)(b)* the Tribunal can make a mental health order. This Clause has the additional specification that the Tribunal cannot make an order for psychiatric treatment (ie an order pursuant to *clause 29(a)*) unless satisfied that the person has a psychiatric illness.

Clause 29 sets out the types of mental health orders the Tribunal can make. It can make any of the orders separately or combine orders or parts of orders. The order for psychiatric treatment covers psychiatric treatment as covered by Category A of Recommendation 12 of the "Balancing Rights" Report. It includes any form of medication prescribed by a legally qualified medical practitioner, all forms of psychotherapy, nursing care and training under medical supervision. It is not intended that the Tribunal make an order with respect to clinical detail (refer to *clause 31*) but rather an order that in the case of an involuntary order gives a discretion to the Director to administer such treatment as the Director thinks necessary unless it is likely to cause undue distress or deprivation to the person to whom it is administered (refer to *subclause 27(2)*). Psychiatric

treatment in this part of the Bill does not include electroconvulsive therapy or psychosurgery.

The range of orders that the Tribunal has the power to make reflects the need for care to be available in the community. The types of orders the Tribunal can make reflects the broader definition of "mental dysfunction" of this Bill, for example, a person may not necessarily be detained in a psychiatric institution but be detained in a mental health facility pursuant to an order that they reside in a specified place subject to specified conditions. The orders also would enable the Tribunal to make up a case management scheme in respect of an individual, for example, this may include a component of treatment, for example, medication but also involve counselling and support so that the person is able to live in the community. The Tribunal will also be able to review mental health orders.

Clause 30 provides that a mental health order has effect for a period specified in the order. In all cases other than those which have been referred to the Tribunal pursuant to the Crimes Act the maximum period is 6 months. Although the provision recognises that persons referred from the criminal justice system may be subject to orders for a longer period of time, a limiting term is set.

Clause 31 provides that the Tribunal when making a mental health order is not authorised to make an order in respect of the administration of a particular drug or the way in which a particular clinical procedure is to be carried out.

Clause 32 sets out the powers of custodians where an involuntary mental health order has been made. This clause gives the custodian the necessary legal authority to take the person to specified premises, to arrest the person if necessary, to keep the person in custody and to subject the person to such confinement and restraint as is necessary and reasonable.

Clause 33 provides that the Tribunal may order restrictions on communication between a person and other persons to be imposed by a custodian where that person is the subject of an involuntary custody order notwithstanding the rights of mentally dysfunctional persons set out in Part IX. The Bill recognises that whilst this action may be desirable in some circumstances for the effective treatment of a person, safeguards must still remain to protect the mentally dysfunctional person. Therefore subclause (1) makes it clear that this clause does not restrict communication with the Community Advocate

and the person's lawyer and subclause (3) provides that the restrictions on communication can only be imposed for a seven day period.

Clause 34 provides that a person who is the subject of an involuntary custody order is able to communicate with the Community Advocate and their lawyer and the Community Advocate and the person's lawyer are able to have access to the person during any period of restricted communication as set out in the previous clause.

Clause 35 requires that in the case of any involuntary psychiatric treatment the Director is to explain the nature and effects of the treatment to the person before it is administered.

Clause 36 provides the mechanism whereby the Tribunal reviews and varies mental health orders of its own motion or on application. If following a review, the Tribunal is satisfied that a person is no longer mentally dysfunctional, the Tribunal has the power to revoke all orders. The Tribunal also has the power to revoke orders if a person is mentally dysfunctional but the essential elements of risk to the person's health or safety or danger to the community no longer exist. This clause also gives the Tribunal the power to vary mental health orders.

PART V - EMERGENCY DETENTION AND CARE

This Part sets the procedures that are to be followed for the emergency detention of persons who may be mentally dysfunctional. The provisions of this Part are very similar to those provided in Part IV of the 1983 Act with the addition of notification requirements. The period of time for which a person may be detained under this Part and the time within which actions must be taken in respect of such a person are strictly controlled. The intention is that a person who is the subject of detention and care under this Part should only be dealt with under this Part as an emergency measure until due processes are applied.

Clause 37 sets out the power of police officers, doctors and mental health officers to exercise the power to apprehend a person who is apparently mentally dysfunctional and on what grounds the power may be exercised. The essential elements are that the police officer, doctor or mental health officer believes on

reasonable grounds that the person is mentally dysfunctional and that they require immediate treatment or care as a consequence, that the person has refused to voluntarily receive treatment or care and detention is necessary for the person's own health or safety or for the protection of the public. If a doctor or a mental health officer is apprehending the person they must be additionally satisfied that mental health care cannot be provided in a less restrictive environment.

Clause 38 provides that where a person is apprehended under clause 37 and taken to an approved health facility then the person in charge of that facility may take certain actions to keep the person in custody and confine or restrain them. An approved health facility is any health facility that the Minister has approved as a facility to which persons apprehended may be taken.

Clause 39 requires a person who exercises the power to apprehend a person under clause 37 to provide to the person in charge of the approved health facility a written statement of the actions taken under that clause.

Clause 40 provides that a person who is taken to an approved health facility must be examined by a doctor within 4 hours of arrival at the facility. This provision is intended to operate in conjunction with clause 41 to ensure that persons are not detained unnecessarily.

Clause 41 provides that where the doctor who conducts the examination under clause 40 has reasonable grounds for believing that the grounds on which the person was apprehended under clause 37 are correct then the doctor may authorise the involuntary detention of the person at an approved mental health facility for a period of not more than three days. The Tribunal may order a further period of detention of not more than seven days.

Clause 42 requires the doctor who examines a person and authorises the involuntary detention of that person to provide the Community Advocate and the Tribunal with details of that authorisation.

Clause 43 specifies that a doctor must conduct a physical and psychiatric examination of a person detained at an approved mental health facility within 24 hours of the detention.

Clause 44 provides that any action taken in respect of a person who is detained under this Part is the minimum necessary to prevent any immediate and substantial risk to the person or any other person.

Clause 45 requires the person in charge of an approved mental health facility to ensure that a person who is detained at that facility under this Part has adequate access to facilities and the Community Advocate.

Clause 46 provides for orders to release a person detained under this Part where the involuntary detention is no longer necessary.

Clause 47 places a duty on the person in charge of an approved mental health facility to release a person who is involuntarily detained either on an order being made under clause 46 or on the expiration of the period of detention authorised under clause 41.

Clause 48 provides for the approval of facilities by the Minister for the purposes of the Part.

PART VI - RIGHTS OF MENTALLY DYSFUNCTIONAL PERSONS

This Part sets out the duties of persons with the management responsibility for mental health facilities to provide persons who are admitted to those facilities with certain information and to accord them certain rights.

Clause 49 is an interpretative provision to ascertain the "responsible person" in relation to a given mental health facility or psychiatric institution.

Clause 50 requires the responsible person to provide persons admitted to, or receiving treatment at, a mental health facility with information on their rights under the Act and any other information as the Minister considers relevant. The responsible person is also required to take steps to ensure that the person can understand the information provided and, if the person appears not to understand, to inform the Community Advocate accordingly.

Clause 51 places an additional obligation on the responsible person to provide information relating to certain Territory legislation that is concerned with the

affairs of mentally dysfunctional persons and information on bodies that such persons may wish to contact for assistance.

Clause 52 protects the rights of mentally dysfunctional persons to reasonable means of communication with other persons of their choice.

Clause 53 provides the means by which the Part is to be enforced.

PART VII - CONVULSIVE THERAPY AND PSYCHIATRIC SURGERY

The provisions of this Part are very similar to the provisions of Parts VI and VII of the 1983 Act with the addition of more stringent requirements for the consent of the person receiving the convulsive therapy or psychiatric surgery.

Clause 54 specifies the requirements for informed consent under this Part. For a person to give informed consent to a procedure under this Part the person must be given all relevant information and the opportunity to ask and obtain answers to any questions about the procedure. Additionally, the person must be given a full disclosure of any relevant financial relationship and a notice advising the person of their rights to independent advice and to refuse or withdraw consent to the procedure. Informed consent must be given in writing and independently witnessed.

Clause 55 places strict controls on the circumstances in which a person may administer convulsive therapy to another person. Convulsive therapy may only be administered by a doctor or on the authorisation of a doctor and with the informed consent of the person or on an order of the Tribunal. The Tribunal may only make an order authorising the administration of convulsive therapy where the person is incapable of making a proper decision and the Tribunal is satisfied that the administration of therapy is likely to result in substantial benefit and that it is the most appropriate form of treatment available. A person who is subject to a mental health order cannot consent to convulsive therapy and convulsive therapy cannot be administered to that person without an order of the Tribunal.

Clause 56 provides that, notwithstanding anything that a person may have done in the way of giving informed consent to convulsive therapy, if the person

subsequently withdraws the consent then a person who administers convulsive therapy to that person after the withdrawal of consent commits an offence. No consent to convulsive therapy is final.

Clause 57 requires the keeping of records by a doctor who administers or authorises the administration of convulsive therapy.

Clause 58 requires the records referred to in clause 58 to be kept for a period of 5 years.

Clause 59 provides that psychiatric surgery may be performed on a person notwithstanding that the person is the subject of an order of the Tribunal. This provision is necessary because, under clause 26, the Tribunal is specifically excluded from making a order in respect of psychiatric surgery. This provision ensures that, notwithstanding that a treatment order of the Tribunal does not contemplate psychiatric surgery, this form of treatment may be performed if the provisions of this Part are complied with.

Clause 60 provides that a doctor must have the approval of the Director of Mental Health to perform psychiatric surgery on a person. The person must also have not refused to have the surgery under clause 66.

Clause 61 provides the means by which a doctor may make an application for the requisite approval of the Director. The application must be accompanied by a copy of the informed consent of the person who is to have the surgery or a copy of a Supreme Court order consenting to the surgery.

Clause 62 requires the Director to submit any application for approval received under clause 61 to a committee of relevant professionals for expert consideration. The function of the committee is to make recommendations to the Director to either approve or reject an application for approval to perform psychiatric surgery. The committee may only recommend that the Director grant approval in quite specific circumstances. The requirement to have the committee recommend approval is intended to ensure that psychiatric surgery is only performed when no alternative is available and the surgery will result in substantial benefit.

Clause 63 facilitates the provision of further information by the doctor proposing to perform the psychiatric surgery for the committee. Such information would be required to assist the committee in reaching a decision.

Clause 64 requires the Director to give effect to the committee's recommendations.

Clause 65 is the provision under which the Supreme Court may consent to the performance of psychiatric surgery on a person. The situations in which the Supreme Court may do this are limited. The consent of the Supreme Court is a precondition for the making of an application by the doctor under clause 68 where the person has not given informed consent and has not refused to give such consent.

Clause 66 facilitates the notification of relevant persons where a person who has given informed consent, or in respect of whom the Supreme Court has made an order under clause 62, subsequently refuses to have the psychiatric surgery performed. This refusal negatives any action taken to obtain the requisite approvals under this Part in respect of psychiatric surgery.

Clause 67 provides for the appointment of committees by the Minister for the purposes of considering applications to perform psychiatric surgery.

PART VIII - REFERRALS BY COURTS UNDER PART XIA OF THE CRIMES ACT AND CHILDREN'S SERVICES ACT

This Part covers the role of the Tribunal in relation to persons who have been charged with an indictable offence and in respect of whom a question arises as to fitness to plead and persons who, following a trial, are found not guilty by reason of mental illness. This includes making mental health orders where appropriate and a review function. The Part also covers the situation where the Magistrates Court may refer a person to the Tribunal for a determination as to whether or not a person is mentally dysfunctional. The Part also covers the situation where the Children's Court refers a child to the Tribunal for a determination as to whether or not the child is mentally dysfunctional and for referral to the Tribunal for the making of mental health orders where it is appropriate.

The Part also covers the role of the Tribunal in assisting the Supreme Court, Magistrates Court and Children's Court by providing advice in relation to the sentencing of an individual, and by making mental health orders where appropriate in relation to mentally dysfunctional persons convicted of a criminal offence.

Clause 68 sets out the Tribunal's function of determining fitness to plead in relation to a person who is ordered by the Supreme Court under Part XIA of the Crimes Act to submit to the jurisdiction of the Tribunal.

In making its determination, the Tribunal is to hold an inquiry and determine on the balance of probabilities whether a person is fit to plead to the charge. Subclause (3) sets out the matters that the Court must be satisfied of before making a determination that a person is fit to plead and incorporates the test from R v Presser [1958] VR 45. If a person is unfit to plead to the charge, the Tribunal shall determine whether or not the person is likely to become fit within 12 months after the determination is made. When notifying the court of its determination, the Tribunal may make recommendations to the Court as to how the person should be dealt with.

Clause 69 sets out the review function of the Tribunal in relation to persons found unfit to plead but likely to become fit to plead within 12 months.

Clause 70 sets out the Tribunal's role in making recommendations to the Courts about appropriate disposition options. This may occur following a finding of an acquittal on the grounds of mental illness in the Supreme Court; following a conviction of a person of an offence in the Supreme Court or Magistrates Court where the Court is satisfied that the person is mentally dysfunctional; or in proceedings before the Magistrates Court where the court is satisfied that a person charged with an offence is mentally dysfunctional. In relation to the last two situations, the Tribunal shall determine whether the person is mentally dysfunctional. In all three situations, the Tribunal shall make recommendations as to how the person should be dealt with. Such recommendations could include whether the person needs psychiatric treatment or other forms of care as provided for in the range of mental health orders. All of the above options are available to children who have the same rights as adults in these situations. Unfitness to plead or acquittal on the

grounds of mental illness are covered by the Crimes (Amendment) Bill and Children's Services Act. Amendments to the Children's Services Act give the Children's Court the power to refer child offenders to the Tribunal before conviction or following conviction; the Children's Court may also use the expertise of the Tribunal in care proceedings.

Clause 71 provides that determinations and recommendations made in respect of persons referred to the Tribunal by the courts be served on the person, their legal representative, the Community Advocate and the Director of Public Prosecutions.

Clause 72 provides for periodic review at 6 monthly intervals of mentally dysfunctional offenders who have been detained at a mental health facility pursuant to a mental health order; who have been detained in custody by an order of the Supreme Court; or have been detained by the Tribunal when they have breached conditions of their release under this clause.

The Tribunal when reviewing these people may order their release unconditionally or subject to conditions. The essential elements in deciding whether to release a person are whether if released the person's health or safety would be, or would be likely to be substantially impaired or whether the person would be, or would be likely to be, a danger to the community. The Tribunal also needs to look at the nature and extent of the person's mental dysfunction and the nature and circumstances of the offence with which the person was charged. If the Tribunal decides not to release the person, the Tribunal may vary any current mental health order in relation to the person.

Clause 73 gives the Tribunal the power to review and vary or revoke conditions of release. This may include imposing new conditions.

Clause 74 gives the Tribunal the power to order a person to be detained in custody if a person reviewed and released under clause 72 breaches a condition of release.

Clause 75 provides for a limit on detention, so that when the Tribunal is exercising its powers under clause 72 (review and release) or 74 (breach of conditions) the Tribunal has to take into account the amount of time the person has already been detained (whether in prison or in a mental health facility).

This period of detention cannot be greater than the maximum period of imprisonment to which the person, if convicted of the relevant offence in normal criminal proceedings, could have been sentenced. This provision is designed to ensure that mentally dysfunctional offenders or persons diverted from the criminal justice system cannot be subjected to periods of indeterminate detention.

PART IX - TRIBUNAL MEMBERSHIP AND PROCEDURE

This Part sets out the manner in which the Tribunal is to be constituted, provides for terms and conditions affecting the members of the Tribunal and the manner in which it is to conduct its proceedings. The provisions of this Part ensure that the procedures of the Tribunal are as informal as possible whilst maintaining the integrity of the Tribunal and its decisions.

Clause 76 provides for the membership of the Tribunal. The membership of the Tribunal has been constituted so as to provide a body that will make appropriately balanced decisions. The balance is achieved by having the legally qualified member, the health professional member and an ordinary community member.

Clause 77 sets out the manner in which the Tribunal is to be constituted. Subclause 77(1) provides that for certain purposes the Tribunal may be constituted by the President sitting alone. The circumstances in which this may occur are limited to where the Tribunal is required to make a decision on more procedural matters. Subclause 77(2) provides that in other circumstances the Tribunal must be constituted by the President in conjunction with other members as appropriate. The particular matter to be decided will determine whether a psychiatrist or a psychologist should be the third member of the Tribunal. The remainder of the clause provides for action to be taken where a member of the Tribunal ceases to be available before the completion of proceedings.

Clauses 78 to 83 are standard provisions relating to appointment of members of the Tribunal, the terms and conditions that are applicable to those appointments, expenses, resignation of members, the appointment of acting members and the provision of staff to assist the Tribunal.

Clause 84 provides that no action lies against a member where the member has acted in good faith in performing a function or exercising a power under the Act.

Clause 85 provides that members of the Tribunal are under a duty not to disclose information obtained as a result of the performance of the functions of the Tribunal under the Act except in specified circumstances. This provision is intended to protect the right to privacy of mentally dysfunctional persons who are the subject of Tribunal proceedings.

Clause 86 is a standard provision requiring the Tribunal to furnish an annual report.

Clause 87 provides that applications and accompanying statements are to be lodged with the Registrar of the Magistrates Court who is required to forward copies to the President of the Tribunal and the Community Advocate and where a child is the subject of an application to the Director of Family Services.

Clause 88 provides that the sittings of the Tribunal shall be conducted at such times and in such places as the President of the Tribunal determines. These provisions give the Tribunal flexibility to conduct proceedings in the manner which is most appropriate in the circumstances.

Clause 89 specifies those persons who may appear before the Tribunal. The person who is the subject of the proceedings and those other persons listed in subclause 83(1) may appear as of right. Other persons may appear only with the leave of the Tribunal. This clause also has special provisions for a child to be separately represented when the Tribunal thinks it is necessary which are consistent with the provisions of the Children's Services Act. This clause also covers the provision of interpreters.

Clause 90 requires the person who is the subject of the proceedings to be summoned to appear in person unless the appearance of the person is likely to increase substantially the risk to the person's health or safety or any danger to the community. The Tribunal may summon a person notwithstanding this if the Tribunal is satisfied that it is necessary to do so. Notwithstanding anything in clause 90, a person who is the subject of the proceedings has a right, under clause 89 of the Bill, to appear before the Tribunal.

Clause 91 provides that the Tribunal may make an order directing another person who has custody of a person who is the subject of proceedings to ensure that the person appears.

Clause 92 provides for the arrest of persons who fail to appear before the Tribunal on being summoned. The purpose of the arrest is to bring the person before the Tribunal.

Clause 93 gives the President of the Tribunal the power to give directions to the Registrar of the Court after an assessment and before holding an inquiry or review. The directions will allow the Registrar to take necessary steps to ensure that the inquiry proceeds expeditiously. Such a power in the legislation itself was added because it was thought that this would give all parties an opportunity to consider the consequences of an application as well as an opportunity to call upon additional advice. This will be particularly useful given the broad range of orders and will allow the Registrar to save Tribunal time by making inquiries as to what services and professionals may be able to be resourced by the Tribunal. The Tribunal will then make the appropriate mental health order.

Clause 94 requires the Registrar to give at least 3 days written notice of proceedings to the persons specified in clause 88.

Clause 95 provides that proceedings of the Tribunal are to be held in private unless the person who is the subject of the proceedings requests otherwise or if the Tribunal orders otherwise. This requirement is to preserve the privacy of the person who is the subject of the proceedings as much as possible. Only certain persons are entitled to be present at proceedings held in private. The Tribunal may give leave for other persons to be present only after endeavouring to ascertain the wishes of the person who is the subject of the proceedings. A proceeding in relation to a child shall always be held in private.

Clause 96 is an express statement that the Tribunal is explicitly bound by the rules of natural justice.

Clause 97 provides that the Tribunal is not bound by the rules of evidence for the purposes of its functions in hearing and determining applications for mental health orders or in ordering assessments under the Act and may inform itself in

such manner as it thinks fit. In all other cases (for example, in proceedings under Part XIA of the Crimes Act) the Tribunal is bound by the rules of evidence which was thought to be a necessary protection where the Tribunal is dealing with persons who have been charged with a criminal offence.

Clause 98 provides that information obtained or statements made in the course of proceedings may not be used as evidence in any civil or criminal proceeding except for the specific purposes of the Act or in proceedings under Part XIA of the Crimes Act. This provision is intended to ensure that persons giving information or evidence to the Tribunal are encouraged to be full and frank.

Clause 99 provides a means for resolving questions that may arise during proceedings of the Tribunal. Questions of law will be decided by the President of the Tribunal and any other questions will be resolved by a majority unless the Tribunal is constituted by two members in which case the President has the deciding opinion.

Clause 100 provides the Tribunal with the power to appoint persons with appropriate expertise to assist in relation to a proceeding.

Clause 101 is a standard provision giving the President of the Tribunal the power to obtain information and documents where that information may be relevant to the proceedings of the Tribunal.

Clause 102 is a complementary provision to clauses 91 and 95. This clause is a standard provision specifying the things that the President may do with the documents obtained.

Clause 103 requires the Tribunal to consult with the persons who are most likely to provide the relevant services or facilities to the person in respect of whom an order of the Tribunal is made. This consultation requirement is to ensure the order is not going to conflict with the professional opinion of a person who may be required to provide treatment and/or care and also to ensure that facilities are available to give effect to the orders of the Tribunal. This provision also recognises the need to consult with the Director of Family Services in relation to a child. The Community Advocate already has been given functions under the Bill to allow the Advocate to perform a watchdog role in relation to children.

Clauses 104 and 105 are formal provisions that specify the form that the orders of the Tribunal should take and the persons on whom a copy of the order should be served.

Clause 106 establishes the evidentiary value of an order signed in accordance with the provisions of clause 98.

Clause 107 sets out the power of the Tribunal to take steps to enforce its own orders where there are reasonable grounds for believing that an order may have been breached.

Clause 108 provides that where a person makes a request to the President of the Tribunal for a statement of reasons for a decision of the Tribunal then the President must provide the statement within 28 days from the date of the request. The persons who may request a statement of reasons for a decision are the same persons who may appeal against a decision. This provision is consistent with the right to obtain a statement of reasons against administrative decisions taken under other Territory legislation.

Clause 109 is a formal clause providing for the withdrawal of applications to the Tribunal.

Clause 110 provides that the Tribunal may order an applicant to pay costs in certain circumstances. This clause is intended to discourage frivolous or vexatious applications.

Clause 111 creates offences in relation to obstructing, hindering or disrupting the Tribunal or members of the Tribunal.

PART X - DIRECTOR OF MENTAL HEALTH AND MENTAL HEALTH OFFICERS

This Part establishes the office of Director of Mental Health and provides for the appointment of Mental Health Officers. The Director has functions under the Bill in relation to mental illness. Mental Health Officers have powers in relation to emergency detention and care under Part VIII of the Bill. These provisions are substantially the same as those in the 1983 Act.

Clause 112 provides for the appointment of the Director by the Minister.

Clause 113 sets out the functions of the Director under the Act.

Clauses 114 to 118 are formal clauses dealing with the terms of appointment, resignation, termination and acting appointments of the Director and with the delegation of powers by the Director. Because of the restriction of the Director's functions to matters to do with mental illness (as opposed to the broader category of mental dysfunction) the Director, and any person who performs the functions of the Director in either an acting or delegated capacity, must be a psychiatrist.

Clause 119 provides for the appointment, qualifications and duties of Mental Health Officers for the purposes of the Act.

Clause 120 requires the Director to produce an annual report on the activities of the Director's office for each financial year.

PART XI - MENTAL HEALTH COUNCIL

This Part provides for the setting up of a Mental Health Council and also provides for the functions of the Mental Welfare Council. This Council has very similar functions to the Mental Health Advisory Council that is provided for in Part III of the 1983 Act. The administrative details of how the Mental Health Council is to be constituted are simpler than that provided for the Council under the 1983 Act in recognition of the purely advisory role of the Mental Health Council.

Clause 121 provides for the appointment of the Mental Health Council.

Clause 122 specifies the functions of the Council. These functions are the same as the functions of the council under the 1983 Act with the exception that clause 116 does not provide for advice on "the diagnosis and treatment of mental dysfunction" as was included in the 1983 Act as this is not a matter that is appropriate for such an advisory body.

PART XII - PRIVATE PSYCHIATRIC INSTITUTIONS

This Part provides a licensing scheme for private psychiatric institutions. The licensing system is carried over from the 1983 Act and is intended to ensure that these facilities are of a certain standard.

Clause 123 defines terms used in the Part.

Clause 124 establishes the offence of conducting a private psychiatric institution without a licence.

Clause 125 provides the process for application and issue of licence. The Minister is constrained from issuing a licence unless satisfied of certain matters. There is also provision for the Minister to issue licences subject to conditions.

Clause 126 provides that licences remain in force for 12 months and provides a mechanism to facilitate renewal.

Clause 127 provides a mechanism for the variation and revocation of licence conditions.

Clause 128 provides for the surrender of licences.

Clause 129 provides for cancellation of licences where the licensee has failed to comply with the conditions to which the licence is subject.

Clause 130 allows for the immediate cancellation of licences in situations where there is an immediate risk of danger to the health or safety of patients or residents on the licensed premises.

Clause 131 specifies the effect of the cancellation.

Clauses 132 and 133 are standard provisions for the appointment of inspectors and the issue of identity cards for the purposes of this Part.

Clauses 134 and 135 are standard provisions giving inspectors powers of inspection in respect of premises and establishing the offence of obstructing an inspector.

Clauses 136 and 137 make provision for the appeal to the Administrative Appeals Tribunal of decisions of the Minister made under this Part and requiring the Minister to give notice of the reasons for those decisions.

Clause 138 provides a link between orders of the Tribunal and private psychiatric institutions. It is an offence for a licensee of these premises to allow treatment at the facility to a person who is subject to a mental health order if the order does not authorise the giving of that treatment.

Clause 139 specifies the manner in which documents may be served under the Part.

PART XII - MISCELLANEOUS

Clause 140 provides that the statement of objectives of the Act and objectives of the Territory do not create or otherwise affect any legal rights. The statement of these objectives is not intended to create individual rights. The objectives are intended as a statement of the Government's commitment to those particular principles in the provision of mental health services.

Clause 141 provides for appeals to the Supreme Court from decisions of the Tribunal. An appeal may be brought as of right.

Clause 142 specifically prohibits the operation of the *Guardianship and Management of Property Act 1991* so as to allow a guardian to give consent for a person whose consent is required by this Act.

Clause 143 is very similar to clause 142 in providing that notwithstanding anything in the *Powers of Attorney Act 1956* an attorney appointed by virtue of a power of attorney under that Act is not entitled to consent for a person whose consent is required by this Act.

Clause 144 specifically provides that, unless a person is subject to a treatment order, the right to refuse particular treatment at a mental health facility or for a person to discharge herself or himself from such a facility is not affected by this Act.

Clause 145 allows the Minister to determine fees for the purposes of the Bill.

Clause 146 is a regulation making power.