



New South Wales

Mental Health Legislation Amendment (Forensic Provisions) Bill 2008

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are to amend the *Mental Health (Criminal Procedure) Act 1990*, the *Mental Health Act 2007* and other legislation for the following purposes:

- (a) to rename the *Mental Health (Criminal Procedure) Act 1990* the *Mental Health (Forensic Provisions) Act 1990*,
 - (b) to confer on the Mental Health Review Tribunal (the **Tribunal**), instead of the Minister for Health, the power to order the release of forensic patients from mental health facilities, the power to grant leave to such patients and the power to make orders as to the care, treatment and detention of such patients,
 - (c) to establish the Forensic Division of the Tribunal to exercise those functions,
 - (d) to provide for appeals from decisions of the Tribunal in exercising those functions,
 - (e) to clarify the responsibility for arrangements for care, treatment, security and release of patients transferred from correctional centres to mental health facilities (**correctional patients**) and forensic patients held in correctional centres,
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- (f) to set out conditions that may be imposed on an order for release and matters that must be considered by the Tribunal in making decisions,
- (g) to require the Tribunal, when making decisions about all patients, to consider whether care arrangements that may be alternatives to involuntary care are consistent with safe and effective care,
- (h) to make various amendments relating to community treatment orders,
- (i) to provide for the recognition of victims of forensic patients and correctional patients,
- (j) to make other minor and consequential amendments,
- (k) to provide for savings and transitional matters consequent on the enactment of the proposed Act.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Mental Health (Criminal Procedure) Act 1990* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Mental Health Act 2007* and other Acts set out in Schedules 2 and 3.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 **Amendment of Mental Health (Criminal Procedure) Act 1990**

Schedule 1 [1] amends the long title to the *Mental Health (Criminal Procedure) Act 1990* (the **Forensic Provisions Act**) to include a reference to the provisions relating to the care, treatment and control of persons affected by mental illness and other mental conditions who are involved in criminal proceedings.

Schedule 1 [2] renames the *Mental Health (Criminal Procedure) Act 1990* the *Mental Health (Forensic Provisions) Act 1990*.

Schedule 1 [3]–[5] make consequential amendments to section 3 of the Forensic Provisions Act as a consequence of the amendment made by **Schedule 1 [14]**.

Schedule 1 [6] amends section 16 of the Forensic Provisions Act to enable the Tribunal to make a recommendation to a court as to the care or treatment of a person when it is notifying the court of its determination about whether a person referred to the Tribunal by the court is fit to be tried for an offence.

Schedule 1 [7] amends section 19 of the Forensic Provisions Act as a consequence of the amendment made by **Schedule 1 [14]**.

Schedule 1 [8] amends section 23 of the Forensic Provisions Act to require a court to notify the Tribunal if the court determines that a limiting term is not to be imposed on a person (who is unfit to be tried for an offence) after a special hearing.

Schedule 1 [9] amends section 30 of the Forensic Provisions Act to require a court to notify the Tribunal if the court determines that a person detained in a mental health facility is fit to be tried for an offence.

Schedule 1 [11] amends section 33 of the Forensic Provisions Act to update a reference to a health care agency.

Schedule 1 [12] amends section 33 of the Forensic Provisions Act to enable persons ordered by a Magistrate to be taken to a mental health facility to be taken by persons authorised under the *Mental Health Act 2007* who are also persons of a kind prescribed by the regulations for that purpose. **Schedule 1 [10]** makes a consequential amendment.

Schedule 1 [13] amends section 35 of the Forensic Provisions Act as a consequence of the amendment made by **Schedule 1 [14]**.

Schedule 1 [14] substitutes Part 5 of the Forensic Provisions Act. The new Part re-enacts the provisions of the current Part 5 of the Act with the following changes:

- (a) new objects of the proposed Part have been included relating to protecting the safety of members of the public and the care, treatment and control of persons subject to criminal proceedings who are suffering from a mental illness or mental condition (proposed section 40),
- (b) persons who are transferred to a mental health facility while serving a sentence of imprisonment will now be classified as correctional patients (proposed section 41) rather than as forensic patients,
- (c) persons who are remanded in custody for a short period after the question of a person's fitness to be tried is raised and before an inquiry into the person's fitness is held, or who are released on bail after a court inquiry finds them unfit to be tried for an offence or the Tribunal determines that they are likely to become fit to be tried within 12 months, will no longer be forensic patients subject to review by the Tribunal (proposed section 42),
- (d) the Tribunal will be empowered to make orders for the release of forensic patients (other than patients who have been remanded pending their return to court) after reviewing their cases, rather than making recommendations for an order for release to be made by the Governor or the Minister (see proposed sections 44 and 47). Before making an order for release, the Tribunal must be satisfied that the safety of the patient or any member of the public will not be seriously endangered by the person's release and that other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate

- and reasonably available to the person (proposed section 43). The Tribunal may make an order for release despite any other Act or any order of a court under the Forensic Provisions Act (proposed section 47),
- (e) the provisions enabling the Attorney General to object to the release of a forensic patient on the ground that the person has served insufficient time in custody or that criminal charges are to be proceeded with have been removed, but the Attorney General and Minister for Health may make submissions to the Tribunal in relation to the possible release or grant of leave of absence to a forensic patient (proposed section 76A),
 - (f) the Tribunal will be empowered to make orders granting leave of absence to forensic patients in mental health facilities, on application of the patient or on its own motion, and the power of the Director-General of the Department of Health to grant leave has been generalised to apply in special circumstances, rather than being limited to specified circumstances (proposed sections 49 and 50),
 - (g) the provisions relating to termination of status as a forensic patient have been revised to remove duplications, to provide for termination on being found not guilty after a special hearing or if a limiting term is not imposed after a special hearing finding of guilt on the limited evidence available, to provide for termination on being found fit to be tried for an offence, to provide for termination if relevant charges are dismissed or are not to be proceeded with and to enable regulations to be made specifying other circumstances in which the Tribunal may terminate a person's status as a forensic patient (proposed sections 51 and 52),
 - (h) limited reviews will be held of persons pending transfer to mental health facilities (proposed section 58),
 - (i) it is made clear that a person transferred to a mental health facility while serving a sentence of imprisonment may be granted parole (see proposed section 60),
 - (j) the Tribunal must conduct 6 monthly reviews of correctional patients and may make orders as to their continued detention and their care or treatment in a mental health facility, correctional centre or other place (proposed section 61),
 - (k) the Commissioner of Corrective Services may grant leave of absence to correctional patients but the Tribunal may make recommendations as to leave to the Commissioner (proposed section 62). The Director-General may grant leave of absence to correctional patients detained in mental health facilities in special circumstances (proposed section 63),
 - (l) provisions relating to termination of status as a correctional patient include, in addition to transfer to a correctional centre, expiry of prison sentence, release on parole, other orders for release and relevant charges not being proceeded with (proposed section 64),

Explanatory note

- (m) correctional patients may be classified as involuntary patients by the Tribunal if they are within 6 months of ceasing to be correctional patients (proposed section 65),
- (n) a Forensic Division of the Tribunal is established to exercise the functions of the Tribunal under the Forensic Provisions Act (proposed section 73), it will consist of 3 members but may be constituted differently for limited reviews,
- (o) matters that the Tribunal must consider when exercising functions under the Forensic Provisions Act are set out, including whether the person concerned is suffering from a mental illness or mental condition and whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm (proposed section 74),
- (p) conditions that may be imposed by the Tribunal on an order for release or leave of absence are set out, including orders as to case managers, drug testing and medical tests, accommodation and living conditions and association or non association with victims or members of victims' families (proposed section 75),
- (q) victims may apply to the Tribunal for the imposition or variation of association or non association conditions, or place restriction conditions, on release orders or orders granting leave of absence (proposed section 76),
- (r) various other provisions are made as to the Tribunal's procedures and orders (proposed section 76A),
- (s) provisions of the *Mental Health Act 2007* (the ***Mental Health Act***) relating to principles for care and treatment, interpreters and information about medication are expressly applied to forensic and correctional patients, subject to the Forensic Provisions Act and any other Act or law (proposed section 76B),
- (t) the Commissioner of Corrective Services and the Director-General of the Department of Juvenile Justice may exercise functions in relation to forensic patients or correctional patients who are detained in correctional centres or detention centres for the security, good order or safety of a correctional centre or detention centre or inmates, despite the provisions of the Forensic Provisions Act or any order made under that Act (proposed section 76C),
- (u) security for forensic patients who are not in correctional facilities is to be the responsibility of the Director-General of the Department of Health while security for correctional patients, and for forensic patients who are in correctional facilities, is to be subject to a protocol agreed between the Director-General of the Department of Health and the Commissioner of Corrective Services or the Director-General of the Department of Juvenile Justice, as the case requires (proposed section 76D),
- (v) provision is made for the transfer and transport of forensic patients and correctional patients by officers of the Departments of Corrective Services and Juvenile Justice (proposed section 76E),

- (w) provision is made for release planning, in similar terms to that provided for involuntary patients under the Mental Health Act (proposed section 76G),
- (x) provision is made as to the effect on sentences of imprisonment or limiting terms of leave of absence (proposed section 76I),
- (y) provision is made for the Department of Health, the Department of Corrective Services and the Department of Juvenile Justice to enter information sharing arrangements (proposed section 76J),
- (z) a duty is imposed on the Director-General of the Department of Health, the Commissioner of Corrective Services and the Director-General of the Department of Juvenile Justice and other government Departments and agencies responsible for the detention or care of forensic patients or correctional patients to comply with requests of the Tribunal (proposed section 76K),
- (aa) a duty is imposed on a court or the Director of Public Prosecutions to notify the Tribunal if relevant charges against a forensic patient or correctional patient are dismissed or are not being proceeded with (proposed section 76K).

Schedule 1 [15] inserts proposed sections 77A–77C into the Forensic Provisions Act. Proposed section 77A enables appeals as of right on questions of law or, by leave, on other questions to the Supreme Court against determinations of the Tribunal. In the case of a determination relating to the release of a person, an appeal is to be made to the Court of Appeal and may be made by the person, the Minister for Health or the Attorney General. Proposed section 77B is a machinery provision providing for proceedings for offences under the Forensic Provisions Act. Proposed section 77C makes it clear that the Commissioner of Corrective Services or Director-General of the Department of Juvenile Justice may cause a patient to be detained in any correctional centre or detention centre even if an order is made under the Forensic Provisions Act that the patient be detained in a specified correctional centre or detention centre.

Schedule 1 [17] amends Schedule 1 to the Forensic Provisions Act to enable regulations to be made containing savings or transitional provisions as a result of the proposed Act.

Schedule 1 [19] amends Schedule 1 to the Forensic Provisions Act to insert savings and transitional provisions consequential on the proposed Act. **Schedule 1 [16] and [18]** make consequential amendments.

Schedule 1 [20] amends Schedule 2 to the Forensic Provisions Act as a consequence of the amendment made by **Schedule 1 [14]**.

Schedule 2 Amendment of Mental Health Act 2007

Schedule 2 [1] and [2] amend section 4 of the Mental Health Act to insert a definition and to substitute a definition as a result of the amendments made by Schedule 1 to the proposed Act.

Schedule 2 [3] amends section 12 of the Mental Health Act to modify the requirement that a person not be admitted to involuntary care unless the authorised medical officer is satisfied that no other care of a less restrictive kind is appropriate and reasonably available to the person so that it is a requirement to be satisfied that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available. The same change is also made in respect of the following:

- (a) the matters about which a person must be satisfied before a person can be detained as a mentally disordered person (see **Schedule 2 [5]**),
- (b) the matters about which a Magistrate must be satisfied before ordering the continued detention of a person after a mental health inquiry (see **Schedule 2 [7]**),
- (c) the matters about which the Tribunal must be satisfied before ordering the detention of a person after a review (see **Schedule 2 [8]**),
- (d) the matters about which a Magistrate or Tribunal must be satisfied before making a community treatment order (see **Schedule 2 [11]**),
- (e) the matters about which a medical superintendent or authorised medical officer must be satisfied before a person who has breached a community treatment order can be detained or discharged (see **Schedule 2 [13] and [15]**),
- (f) the matters about which the Tribunal must be satisfied before a person who has breached a community treatment order can be detained or a further community treatment order can be made about the person (see **Schedule 2 [17]**),
- (g) the matters which the Supreme Court must be satisfied of before it decides to order a person to be brought before it to determine whether the person should be released from a mental health facility and the matters it must be satisfied of if it decides not to order the discharge of a detained person (see **Schedule 2 [43]**).

Schedule 2 [4], [6], [32], [34] and [39] amend various provisions of the Mental Health Act as a consequence of the renaming of the Forensic Provisions Act.

Schedule 2 [9] amends section 46 of the Mental Health Act to make it clear that the leave provisions under that Act do not apply to patients under the Forensic Provisions Act.

Schedule 2 [10] amends section 52 of the Mental Health Act to provide that the required 14 days notice of an application before a community treatment order may be made does not apply to an affected person who is the subject of a community treatment order.

Schedule 2 [12] amends section 53 of the Mental Health Act to remove the requirement that a person have a previous history of accepting appropriate treatment before a community treatment order may be renewed. Instead the Magistrate or Tribunal must be satisfied that the person is likely to continue in or to relapse into an active phase of mental illness if the order is not granted.

Schedule 2 [14] inserts proposed section 61A into the Mental Health Act, which requires the medical superintendent of a mental health facility to examine a person who is detained after a breach of a community treatment order at least every 3 months.

Schedule 2 [16] amends section 63 of the Mental Health Act to require a person who is detained after a breach of a community treatment order to be brought before the Tribunal at least every 3 months.

Schedule 2 [18] amends section 64 of the Mental Health Act to clarify that the Tribunal may classify a person as an involuntary patient after the person has been detained after breaching a community treatment order.

Schedule 2 [19] amends section 65 of the Mental Health Act to enable the Tribunal to revoke a community treatment order on its own motion.

Schedule 2 [20] amends section 69 of the Mental Health Act to make it clear that the offence of ill-treating patients in a mental health facility applies to patients detained under the Mental Health Act or any other Act.

Schedule 2 [21] amends section 77 of the Mental Health Act to require a statement about appeal rights to be given to a person who has breached a community treatment order and is detained in a mental health facility on the order of the Tribunal.

Schedule 2 [22] amends section 82 of the Mental Health Act to extend the application of provisions relating to treatment of patients to correctional patients in mental health facilities. **Schedule 2 [25]** makes a consequential amendment.

Schedule 2 [23] extends the operation of section 84 of the Mental Health Act so as to authorise authorised medical officers to give or authorise the giving of treatment (including medication) to persons detained under the Forensic Provisions Act. **Schedule 2 [24]** makes a consequential amendment.

Schedule 2 [26] amends section 98 of the Mental Health Act to clarify that provisions relating to medical treatments (other than mental health treatments) extend to forensic patients and correctional patients in mental health facilities. **Schedule 2 [27]** makes a consequential amendment.

Schedule 2 [28] amends section 107 of the Mental Health Act to enable the Director-General to delegate functions conferred on the Director-General under the Forensic Provisions Act.

Schedule 2 [29] amends section 141 of the Mental Health Act to exclude the positions of President and Deputy President from provisions relating to qualifications for membership of the Tribunal. Qualifications for those positions are dealt with in clause 1 of Schedule 5 to the Mental Health Act (see **Schedule 2 [60]**).

Schedule 2 [30] and [31] amend section 150 of the Mental Health Act as a consequence of the insertion in the Forensic Provisions Act by the proposed Act of provisions relating to the composition of the Tribunal for matters under the Forensic Provisions Act.

Schedule 2 [33], [35] and [44] amend sections 151, 154 and 166 of the Mental Health Act to insert references to correctional patients in provisions currently applicable to forensic patients (a reference to forensic patients currently includes the category of patients who will be correctional patients as a result of the amendments made by the proposed Act).

Schedule 2 [36] amends section 155 of the Mental Health Act to make it clear that the provisions relating to detaining patients during Tribunal adjournments also apply to patients under the Forensic Provisions Act.

Schedule 2 [37] amends section 160 of the Mental Health Act to enable regulations to be made about various matters relating to the Tribunal, including the establishment and use of a victims' register and notifications to victims of Tribunal decisions and termination of status of persons as forensic patients.

Schedule 2 [38] amends section 160 of the Mental Health Act to enable the President of the Tribunal to issue practice directions.

Schedule 2 [40] amends section 162 of the Mental Health Act to increase the penalties for offences relating to publication of names of persons involved in Tribunal proceedings.

Schedule 2 [41] inserts proposed section 162A into the Mental Health Act to enable the Tribunal to request information from the Departments of Health, Corrective Services and Juvenile Justice and area health services about actions taken in relation to Tribunal orders.

Schedule 2 [42] amends section 165 of the Mental Health Act to enable assessors to be appointed for matters dealt with by the Supreme Court on appeal under the Forensic Provisions Act.

Schedule 2 [45] and [46] amend section 170 of the Mental Health Act as a consequence of amendments made by this Schedule to include the Forensic Provisions Act (and corresponding provisions of other jurisdictions) in the scheme for the interstate application of mental health laws that is given effect to by Chapter 8 of the Mental Health Act.

Schedule 2 [47] and [48] amend various provisions of Chapter 8 of the Mental Health Act to enable laws of other jurisdictions that correspond to the Forensic Provisions Act to be declared for the purposes of interstate application, to enable persons who may be detained in a mental health facility under the Forensic Provisions Act to be taken to mental health facilities in other jurisdictions if permitted by corresponding laws of those States, to enable persons who may be detained in a mental health facility of another jurisdiction under such corresponding laws to be detained in this State and to provide for the interstate application of community treatment orders made under the Forensic Provisions Act or any such corresponding laws. The amendments also extend provisions of the Mental Health Act relating to disclosure of information, the effect of the Act on other powers and

liability of police officers and health care professionals to information obtained or things done under the Forensic Provisions Act. **Schedule 2 [49]–[56]** make consequential amendments.

Schedule 2 [57] amends section 189 of the Mental Health Act to permit information obtained in connection with the administration or execution of that Act to be disclosed for research purposes referred to in health privacy principles under the *Health Records and Information Privacy Act 2002*.

Schedule 2 [58] amends section 193 of the Mental Health Act to make it clear that provisions enabling the correction of admission documents apply to documents under other Acts under which people are admitted to mental health facilities.

Schedule 2 [59] amends section 196 of the Mental Health Act to update references to provisions of the Forensic Provisions Act as a result of the amendments made by the proposed Act.

Schedule 2 [60] amends Schedule 5 to the Mental Health Act to provide that the qualifications for appointment as President or Deputy President of the Tribunal are holding office as a judge of the Supreme Court, District Court, Federal Court or High Court (or an interstate equivalent) or being a former judge of any such court or being qualified for appointment as such a judge.

Schedule 2 [61] amends Schedule 6 to the Mental Health Act to enable regulations to be made containing savings or transitional provisions as a result of the proposed Act.

Schedule 2 [62] amends Schedule 6 to the Mental Health Act to insert savings and transitional provisions consequential on the proposed Act.

Schedule 3 Amendment of other Acts

Schedule 3.1, 3.3–3.8 and 3.10 amend the *Child Protection (Offenders Registration) Act 2000*, *Costs in Criminal Cases Act 1967*, *Crimes (Administration of Sentences) Act 1999*, *Crimes (Appeal and Review) Act 2001*, *Crimes (Sentencing Procedure) Act 1999*, *Criminal Appeal Act 1912*, *Drug and Alcohol Treatment Act 2007* and the *Protected Estates Act 1983* to change references to the old name of the Forensic Provisions Act to the new name.

Schedule 3.2 amends the *Civil Procedure Act 2005* to include becoming a correctional patient in the definition of **a person under legal incapacity**.

Schedule 3.9 amends the *Interpretation Act 1987* to include becoming a correctional patient in the definition of a **mentally incapacitated person**.