

2005

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

MENTAL HEALTH (TREATMENT AND CARE) AMENDMENT BILL 2005

EXPLANATORY STATEMENT

Outline

The Mental Health (Treatment and Care) Amendment Bill amends the *Mental Health (Treatment and Care) Act 1994* to allow for the Mental Health Tribunal to make an involuntary emergency electroconvulsive therapy (ECT) order. The Bill updates terminology and makes changes consistent with current drafting practices. It also takes into account the new criminal code detailing the elements of offences in this part of the *Mental Health (Treatment and Care) Act 1994*.

Only two classes of people can be administered ECT under the Act as it currently stands, prior to enactment of this Bill. The first class of people are patients who give informed consent to the administration of ECT. In effect, this group comprises persons whose illnesses are being managed outside the auspices of the Mental Health Tribunal. They are not at issue in the Bill.

The second class of people who can be administered ECT under the Act are those subject to a psychiatric treatment order (PTO). The PTO is an order issued under section 28 of the Act and allows for involuntary psychiatric treatment. For those under a PTO, the tribunal must issue a further order for the administration of electroconvulsive therapy (ECT order). Once the doctors lodge an application for involuntary ECT there is a mandatory minimum period of three days notification period before the Tribunal can hear the matter. In a very few number of cases the notification period delays commencement of emergency treatment.

For people subject to a PTO, the tribunal can make an ECT order when the patient provides informed consent to the procedure or, where the patient is incapable of this decision, the tribunal finds that subject to the Act it is necessary (section 55(5)(b)).

There is a further class of person who may require ECT for which there is no current provision under the Act. These are people who are not capable of giving informed consent to the administration of ECT, but are not currently subject to a PTO. Treatment is delayed in these cases while a PTO hearing is conducted.

The importance of properly notifying and hearing an inquiry into an emergency patient's situation is evident but it takes a minimum three days due to a notification period specified under section 94 of the principal legislation. To ensure that treatment is not unnecessarily delayed the Bill provides for limited ECT treatment under an order of the tribunal while the outcome of a hearing is pending.

The amendments proposed in the Bill allow for an application to the tribunal for emergency ECT treatment where treatment is necessary to save a person's life. The need for emergency ECT must be assessed by the treating doctor and have the support of the Chief Psychiatrist. These two psychiatrists both must sign the application. The two psychiatrists may not make an application for an emergency electroconvulsive therapy order for persons below the age of 16. The tribunal must be constituted by a president, psychiatrist and community member before it is empowered to hear an application for an emergency electroconvulsive therapy order. This gives the president the clinical expertise of a psychiatrist and the perspective of a community member on the tribunal when making the order. If the tribunal issues an order it is

limited to a period of no more than seven days or it will lapse within the seven days where a subsequent order is made by the tribunal. The Tribunal is not empowered to make an emergency electroconvulsive therapy order for persons below the age of 16. Ordinarily the Tribunal will make an order for three days to cover the S94 notification period. 7 days is the maximum number of days between Tribunal sitting days taking into account ordinary working days, public holidays and that the S 94 notification period is a minimum period set. Further the order must specify the number of treatments allowed and the maximum number that can be ordered is capped to three occasions.

Clause Notes

Clause 1 – Name of Act – states the title of the Act, which is the *Mental Health (Treatment and Care) Amendment Act 2005*.

Clause 2 – Commencement – states that the Act commences on a day after its notification day.

Clause 3 – Legislation amended – provides that the Act amends the *Mental Health (Treatment and Care) Act 1994* and the legislation in schedule 1 of the Bill.

Clause 4 – Definitions for Act Section 4, definition of *convulsive therapy* – removes the existing definition for *convulsive therapy*. The definition is in Clause 10 of the Bill and will become section 55 of the Act to substitute the expression electroconvulsive therapy.

Clause 5 – Section 4, Definition of *proceeding* - substitutes the present definition with a definition that includes a Note giving examples of proceedings of the tribunal. This includes the hearing of an application for an emergency electroconvulsive therapy order.

Clause 6 – Section 4, definitions (as amended) – relocates the dictionary from the front of the *Mental Health (Treatment and Care) Act 1994* to the end of that Act consistent with current drafting methodology.

Clause 7 – Section 4 remainder – inserts changes that align the dictionary with standard drafting practices. It also explains the legal status of notes.

Clause 8 – Offences against Act – application of Criminal Code etc Section 4A, note 1 – provides that section 4A is updated to reflect criminal penalties in relation to offences against the *Mental Health (Treatment and Care) Act 1994* as provided for in this Bill.

Clause 9 – Treatment during detention Section 44(1), new note – notes that provisions exist for the emergency administration of ECT under subdivision 7.2.4. These are the provisions proposed under this Bill.

Clause 10 – Division 7.2 heading – provides for the new heading

Clause 11 – Section 55 - provides for the removal of section 55 of the Mental Health (Treatment and Care) Act 1994 and the substitution of a number of new provisions. It also contains new subdivisions 7.2.2 and 7.2.3 (sections 55A- 55K).

New section 55 (What is electroconvulsive therapy?) changes the term *convulsive therapy* under the current Act to *electroconvulsive therapy*, an updated term, and contains the definition of ECT. *Electroconvulsive therapy* is a procedure for the induction of an epileptiform convulsion in a person.

Subdivisions 7.2.2 and 7.2.3 do not change the current intention of the principal legislation with regard to ECT and patients providing informed consent or where the Tribunal has provided an ECT order to a patient under a psychiatric treatment order.

Provisions have however been expanded and detail provided to meet the requirements of the Criminal Code by outlining the elements of an offence along with the obligations thus imposed on a person. Changes to the provisions also reflect current drafting practices and make reference where appropriate to emergency ECT orders.

It also provides that an ECT order must now include the basis for the order. That is, whether the Tribunal gave the order on the basis of consent or that the person did not have the capacity to consent (s55G).

Clause 12 – New subdivision 7.2.4 – provides for emergency ECT orders.

The clause provides for an emergency ECT order on the application of the ACT Chief Psychiatrist and a doctor (s55M). The Chief Psychiatrist and doctor must believe on reasonable grounds that the person is at least 16 years old, has a mental illness and that ECT is necessary to save the person's life. The application must be accompanied by an application for an ECT order if the person has a PTO in force or an application for both a PTO and ECT order where there is no PTO in force. This provision ensures that a hearing will take place under provisions which allow for the proper notification of parties but still allows for the commencement of emergency treatment.

The Tribunal must be satisfied that the person is at least 16 years old, has a mental illness, and that the person is incapable of giving informed consent to the ECT prior to issuing an emergency ECT order. This means that an emergency order cannot be made in relation to a person below the age of 16 or a person who has the capacity to give informed consent. The Tribunal must also be satisfied that ECT is necessary to save the person's life (s55N). It is also required that the Tribunal ascertains that all other reasonable forms of treatment available have been tried but have not been successful; or that the treatment is the most appropriate treatment reasonably available.

The people to be notified of the application and are entitled to appear at an emergency ECT proceeding of the Tribunal are the same people who are referred to in Section 89 of the Principle Act.

The order must state the number of occasions ECT may be administered and the tribunal is limited in making the order to a maximum of three occasions. The order must also state the number of days before the order expires being no more than seven days. This is to allow time for a hearing into a PTO and an ECT order to occur (s55O) but remain in the nature of an emergency provision.

The emergency order ceases to be in force when the Tribunal makes another order in relation to the person. (55P)

Clause 13 – Section 56 to 58 – provides that sections 56 to 58 of the principal legislation are to be removed and a new subdivision 7.2.5 substituted. The clause provides that it is an offence for a person who is not a doctor and is not authorised by a doctor to administer ECT on a person (s56). It also prescribes the records that must be kept on ECT including whether the administration was the result of an order of the tribunal or the result of a person's voluntary consent, and the penalties if these are not kept (S57). The records must be kept for at least five years after the day the record is given and it is an offence not to do this (s58).

Clause 14 – Section 83 – provides a new section 83 and new provisions 83A –83D. Original section 83 has been redrafted for clarity and divided into a number of separate provisions consistent with simplification of the legislation. It does not change existing provisions but does include allowance for emergency ECT orders. The Tribunal must be constituted by a three person panel for the purpose of making an emergency electroconvulsive therapy order (S83A (2)(d)).

Clause 15 – Deciding questions Section 85(2) – removes reference to provisions under the existing section 83 which are no longer relevant.

Clause 16 – Section 105 – removes the existing section 105 and replaces with a provision detailing who should be given a copy of an order made by the Tribunal under the *Mental Health (Treatment and Care) Act 1994*. The persons to whom an order must be given include the person who is the subject of the order, the person's representative, the parent of a child if the person is a child, the person's guardian, and the donee/grantee under a power of attorney made by the person. It also provides that a copy of an emergency ECT order must be given to the relevant people within 24 hours of the order being made. The reference in subsection (1) (g) to the public advocate includes a reference to the community advocate, this subsection will expire on the day the *Public Advocate Act 2005* commences.

Clause 17 – New dictionary – inserts the dictionary at the end of the Act and updates the dictionary consistent with current drafting practices.

Clause 18 – Further amendments – provides for changing the term convulsive therapy to electroconvulsive therapy through out the *Mental Health (Treatment and Care) Act 1994*.

Schedule 1 – Consequential amendments – provides for consequential amendments to other legislation. The amendments give effect to the Mental Health (Treatment and Care) Bill 2005 by updating terminology used in other legislation. The affected legislation is as follows:

Children and Young People Act 1999
Crimes Act 1900
Guardianship and Management of Property Act 1991
Health Professionals Legislation Amendment Act 2004
Powers of Attorney Act 1956.