AUSTRALIAN CAPITAL TERRITORY

MENTAL HEALTH ORDINANCE

EXPLANATORY STATEMENT

No.52 of 1983

The Mental Health Ordinance replaces existing legislation on mental health in the Australian Capital Territory to the extent that that legislation provides for the treatment in the Territory of persons suffering from mental dysfunction. The Ordinance also provides for the control of private mental health facilities in the Territory. The Lunacy Act of 1898 of New South Wales in part ceases to be in force by the operation of this Ordinance leaving in operation those parts which deal with the management of the property of the "insane" and "Hospitals for the Criminal Insane".

The Inebriates Act, 1900 of New South Wales and the Inebriates (Amendment) Act 1909 of New South Wales cease to be in force in the Territory by the operation of this Ordinance. It is considered that there is no justification for separate legislation on this aspect of mental health. The Inebriates Ordinance 1938 is a minor amendment of the Inebriates Act and being no longer required is repealed.

The Ordinance provides for the appointment of a Director of Mental Health Services by the Capital Territory Health Commission and also for the appointment of Mental Health Officers by the Minister for Health.

Part III of the Ordinance provides for a Mental Health Advisory Council appointed by the Chairman of the Commission. The functions of the Council are to advise the Chairman with respect to mental dysfunction in the Territory and to consider and keep under review the provision of mental health services.

Part IV of the Ordinance makes provision for emergency situations in which a person suffering from mental dysfunction whose condition gives rise to an immediate and substantial risk of actual bodily harm to that person or another person will not accept appropriate treatment or is found wandering at large. This Part provides for the immediate situation only with continuing situations being provided for under Part V.

Part V of the Ordinance enables the Court of Petty Sessions and the Supreme Court to make orders for the compulsory treatment of persons suffering from mental dysfunction who do not accept treatment on a voluntary basis. A court will only be able to make orders where a person's behaviour is dangerous to himself or others or where the person is in a state of social breakdown. Provision has been made for the presence at the hearing for a treatment order of the person in respect of whom the order is to be made. A person will also be entitled to be represented at the hearing. The period of an order made by a Court of Petty sessions will be a maximum of 28 days but the Supreme Court will able to make second or subsequent orders of' not more than 3 months or not more than 12 months respectively.

Part VI of the Ordinance places restrictions on convulsive therapy whether administered to voluntary patients or to persons subject to treatment orders. Whether a voluntary patient or not, a person's consent will be required before he can be given convulsive therapy unless, in respect of a person subject to a treatment order, that person is by reason of mental dysfunction incapable of weighing for himself the considerations involved in a decision to consent to the therapy.

Part VII of the Ordinance places controls on psychiatric surgery which is defined as surgery on the brain of a person, other than neurosurgery. The controls apply irrespective of whether a person is subject to a treatment order and require the consent of the person on whom the surgery is to be performed and also require an application to be submitted to a committee consisting of a psychiatrist, a neurosurgeon, a barrister and solicitor, a clinical ·psychologist and a social worker. Consent to an application to a committee may be given on behalf of a person by the-Supreme Court where, amongst other things, the Court is satisfied that the person is suffering from mental dysfunction and the person has neither consented or refused to consent. The psychiatric surgery may only be performed if the committee so recommends and the Director of Mental Health Services accordingly approves the performance of the psychiatric surgery. A person who has consented or on whose behalf the Supreme Court has consented to the surgery may at any time before the performance of the surgery refuse to permit the surgery.

Part VIII of the Ordinance requires persons conducting. private mental health facilities to be licensed. Licenses will be for a period of twelve months and will be granted subject to conditions designed to ensure that appropriate standards are maintained. The holder of a licence will be guilty of an offence if treatment for mental dysfunction is given to a· person after the holder of the licence has received notice that the person is subject to a treatment order.

Part. IX of the Ordinance deals with miscellaneous matters and for example requires the Director of Mental Health Services to submit an annual report to the Minister for Health on the administration of this Ordinance. It also sets out who may be present at a hearing and provides that minors may be separately represented.

The Ordinance does not provide for the situations where persons are transferred from the Territory for treatment for mental dysfunction. The Ordinance also does not provide for the control of the property of persons suffering from mental dysfunction or change the relationship of insanity to the criminal law as these matters are within the jurisdiction of the Attorney-General. As a result the Ordinance does not repeal the Insane Persons and Inebriates (Committal and Detention) Ordinance 1936 and the Mental Health Ordinance 1962 which together, amongst other things, give statutory force to agreements between New South Wales and the Commonwealth for the transfer of Territory residents to New South Wales institutions for treatment for mental dysfunction. It is intended that arrangements for this purpose will be retained as there is considered to be a continuing need to make use of New South Wales facilities. It is not practical to provide in the Territory all the types of facilities that may be required for the treatment of Territory residents suffering from mental dysfunction. However it is considered that more contemporary legislation is required and therefore this requirement is currently under consideration.

The Ordinance has been submitted to the A.C.T. House of Assembly for its consideration and has also been considered by the Human Rights Commission. It has not been possible or practical to include all the alterations suggested by both bodies or at least not in the terms in which they were made.

The House of Assembly recommended that the definition of "prescribed relative" include de facto relationships and other persons with a permanent social habitation relationship. The definition in the Ordinance include "spouse" which has been defined to include de facto relationships but the rest of the recommendation has not been carried out. There would be great difficulty in drafting such an uncertain phrase as "permanent social habitation relationship" so as to give it a reasonably precise meaning.

The Assembly also recommended that where emergency action has been taken the Director of Mental Health Services should be required to "inform a relative, friend, solicitor or other appropriate person of the detention of the person". Provision has been made for the appointment of prescribed representatives to whom the Director is required to give written and oral explanations.

The Assembly recommended "that appropriate legal aid should be made available irrespective of a persons means." and that this be added to a section permitting representation by a barister and solicitor or by any other person. This section has been deleted as a result of strong opposition from judges of the A.C.T. Supreme Court and the A.C.T. magistrates. The recommendation on legal aid has policy implications which it is intended to investigate with a view to amendment of the Ordinance at a later date.

The Assembly recommended that the section on conditions of a licence for a private mental health facility have added to it a requirement that "... the preceding sub-clauses shall not be operative until Regulations prescribing licencing requirements have been gazetted". This has not been included in the Ordinance as the relevant. Part of' the Ordinance has been extensively redrafted and it is not intended that there should be regulations on licencing requirements.

Previous drafts of the Ordinance have given inspectors a power to enter licenced private mental health facilities "at any reasonable hour of the day". In accordance with a recommendation of' the Assembly the word "reasonable" has been deleted. The way in which a facility is conducted at night may be very different from what is done in "reasonable hours" and standards should be maintained 24 hours a day.

The Ordinance provides for the appointment of a next friend of minor if a court thinks it to be in the interest of the minor. The Assembly recommended the deletion of what is now section 76(3) which permits an order for costs to be made against a next friend but it is considered that normal procedures should be followed and that the sub-section should be retained.

The Human Rights Commission in its report on the proposed Ordinance made 14 recommendations and these have been implemented subject to the following comments.

Recommendation 2(a) required that a treatment order should only be made where there was a high degree of probability that the person would engage in the relevant behaviour. This recommendation was not implemented as it did not appear that the phrase had any precise meaning and it was not known how a court would be likely to deal with the concept. Recommendation 2(b) under which "death or serious harm" was to be substituted for harm in the criteria for making treatment orders was not implemented as the reference to "death" was redundant and there is real doubt as to what the courts would make of "serious harm". It was accepted that something more than "harm" was required and after consideration it was decided to substitute "actual bodily harm" for "harm".

The problem of "high degree of probability" recurred in recommendation 4 on the definition of "social breakdown" and it was not apparent how "being in a state of severe distress" differed from "severe· distress". The reference to "death" was again considered redundant. Nevertheless an attempt has been made to implement the recommendation as far as possible.

The proposed Ordinance has not been altered in response to recommendation 10 as it is not necessary to specify that a court in determining whether surgery is for the benefit of the individual should· not take into account the interests of the broader community.

Recommendation 11 has been implemented by the introduction of a “prescribed representative”.