

Supplementary Explanatory Statement
Mental Health (Treatment and Care) Amendment
Bill 2014

Outline

The Government's amendments to the Mental Health (Treatment and Care) Amendment Bill 2014 (the Bill) result from consideration of Scrutiny Committee comments and other minor changes identified to finalise the Bill.

Amendments 6, 17, 21, 40 and 41 result from consideration given to the Standing Committee on Justice and Community Safety's Scrutiny Report Number 19 of 27 May 2014. All of the amendments are of a minor and technical nature. Four out of these five amendments flow from a recommendation by the Standing Committee to standardise the grounds and language for decisions taken by entities authorised in the provisions of the Bill.

The government amendments support the human rights proportionality of the Bill. The explanatory statement for the Bill provides a detailed proportionality assessment that is also relevant to the proposed government amendments.

For example amendments that support the human rights proportionality include clarifying the grounds that an authorised entity must consider when making a decision, expanding advance consent directions to people under the age of 18 who have decision making capacity and the expansion of the list of people whom the Chief Psychiatrist or Community Care Coordinator must consult before making a determination in relation to someone subject to a forensic mental health order.

Detail

Amendments 1, 2, 3 and 4: amendments to clause 11

Section 16 sets out the information required to be available at a mental health facility. Amendment 1 creates a requirement to ensure that '*current copies*' of prescribed information is to be made available. These ensure that the information required to be provided in a mental health facility relevant to a person's treatment care and support is up to date.

Subsequent amendments in Government Amendments 2-4 are consequential amendments to ensure consistent language in the Bill.

Amendment 5: amendment to clause 11

Section 16(1)(d) aims to ensure that the contact information for entities which may provide assistance is available to a person receiving treatment in a mental health facility. This amendment replaces a list of these entities in the Act with a list prescribed by regulation. The amendment will mean that the list can be kept current without the possible delay resulting from the need to amend the Act.

Information relevant to amendments 1 to 5 is also provided in the main Explanatory Statement for the Mental Health (Treatment and Care) Amendment Bill 2014 under **Chapter 3 Rights of people with mental disorder or mental illness** (page 100).

Amendment 6: amendment to clause 11

This amendment changes the test to be applied in proposed new section 22(4) from “is satisfied on reasonable grounds” to “believes on reasonable grounds”.

The purpose of the amendment is to ensure the wording used in the Act is consistent throughout.

Amendment 7: amendment to clause 11

Minor grammatical amendment to section 22(5)(b)(iii)

Amendment 8: amendment to clause 11

This amendment removes the requirement in section 27(2)(a) for a person making an advance consent direction to be an adult. The effect of this change is that a person under 18 years old will be able to make an advance consent direction if they are assessed as having decision making capacity, as is the case when the decision about consent to treatment is made at the time treatment is offered.

Amendment 9: amendment to clause 11

This amendment limits the effect of s28(6) to remove the need for a mental health professional to enter reasons for treatment, care or support on a person’s record if ACAT has ordered that the treatment, care or support is given.

Without this amendment, subsection (6) applied also to section 5(b) where the variation in treatment is ordered by the ACAT. Where the ACAT authorises the variation in treatment, a record of the facts and the reasons is provided in the ACAT order. Where the variation is authorised

by a guardian or a power of attorney there is no requirement to make a record is provided by this section.

Amendment 10: amendment to clause 11

Minor grammatical amendment to section 29(3)(a).

Amendment 11: amendment to clause 11

Minor grammatical amendment to section 29(3)(b).

Amendments 12 and 13: amendments to clause 11

Amendments 12 and 13 amend proposed section 36D of the Bill which proscribes the content and effect of an assessment order.

Amendment 12 inserts a requirement for a person to attend an approved mental health facility for assessment under the section. By ensuring that the facility is an approved facility it negates the requirement for ACAT to be satisfied that the assessment can be provided as the mental health facility.

Amendment 13 removes subsection 36D(1)(b) to reflect that ACAT no longer needs to be satisfied that the assessment can be provided at the mental health facility as it must already be an approved facility.

Amendment 14: amendment to clause 11@

Section 36(G)(2) requires that a person subject to an assessment order has been made aware of the order before a removal order may be made. This amendment removes that requirement if the assessment order that has been made for the person is an *emergency* assessment order under section 36C. An emergency assessment order provides for a situation where an assessment order needs to be made without notifying the person because the ACAT has serious concerns that notifying the person (or some other aspect of the application process) will endanger the person, the applicant or another person.

Amendments 15 and 31: amendments to clauses 11 and 43

Amendments 15 and 31 are similar amendments; amendment 15 amends section 36T and amendment 31 amends section 48Y. Both these sections set out what the ACAT must take into account when considering making a mental health order (section 36T) and a forensic mental health order (section 48Y).

These amendments retain the requirement to take into account the *views* of the people providing day-to-day care of the person, but remove the

requirement to take their *wishes* into account. This requirement is set out in section 36T(d) for a mental health order and section 48Y(e) for a forensic mental health order.

It is appropriate that ACAT is not required to take the carer's wishes into account in the same way that they take into account the wishes of the person who will be subject to the order.

Amendment 16: amendment to clause 11

This amendment to section 36T (What ACAT must take into account – mental health order) enables the ACAT to satisfy itself that the treatment care or support for which the order is made can be provided at the facility, without the need for advice in writing.

The ACAT may also ask the applicant for the order for further information about suitable options for treatment care and support under a proposed mental health order. The applicant is required to respond within 7 days.

The amendment aligns the section with a similar section (section 48Y) about making forensic mental health orders.

Amendment 17: amendment to clause 11

This amendment alters the test to be applied in proposed new section 36X from “is satisfied on reasonable grounds” to “believes on reasonable grounds”.

It is appropriate that where a decision is being made about circumstances as they apply to an individual, that the decision-maker, whether a person or other entity, should apply a test that contains an objective element in weighing up those circumstances.

Amendments 18, 25, 33 and 37: amendments to clauses 11 and 43

Amendments 18, 25, 33 and 37 are similar amendments which add to the list of people whom the Chief Psychiatrist or Community Care Coordinator must consult before making a determination, relevant people in the justice system who may, in certain circumstances, also have a responsibility for the person who is subject to the mental health order.

The Amendments create additional guidelines for the Chief Psychiatrist or Community Care Coordinator to consult (if applicable):

- the corrections director-general;
- the director-general responsible for the supervision of a person under the *Bail Act 1992*;
- the Child and Young People director-general if:
 - a young person is on bail; or

- o a young person who is a detainee or serving a community based sentence

The amendments apply to the official who determines the person's treatment who is the Chief Psychiatrist in the case of a Psychiatric Treatment Order (see Section 36Z), or the Community Care Coordinator in the case of a Community Care Order (see Section 36ZH).

These Amendments apply in the following way:

- Amendment 18 applies to section 36Z(5) which relates to a psychiatric treatment order;
- Amendment 25 applies to section 36ZH(3) which relates to a community care order;
- Amendment 33 applies to section 48ZC(6) which relates to a forensic psychiatric treatment order; and
- Amendment 37 applies to section 48ZJ(4) which relates to a forensic community care order.

Amendments 19, 26, 34, 35, 38 and 39: amendments to clauses 11 and 43

Amendments 19, 26, 34, 35, 38 and 39 are similar amendments and relate to when the Chief Psychiatrist or Care Coordinator must consult a carer of the person, if there is one, and include the carer's view when advising the ACAT.

Section 36ZB, 36ZJ, 48ZE, 48ZF, 48ZL and 48ZM provide for the Chief Psychiatrist or Care Coordinator to advise the ACAT when they are satisfied that a person is no longer a person in relation to whom the ACAT could make an order. . The official must advise the carer that they can make a submission to the ACAT about the matter. This amendment to the sections listed requires that the carer be advised that they may also apply to the ACAT to attend a hearing about the matter.

Amendment 20: amendment to clause 11

Amendment 20 amends Section 36ZD(2)(g) to replace the term 'forensic community care order' with 'forensic mental health order' when prescribing the ways that ACAT may make a community care order.

The term 'forensic mental health order' covers both forensic psychiatric treatment orders and forensic community care orders. The intent of section 36ZD(2)(g) is to allow the ACAT to make a less restrictive order (a mental health order) where an application is made for a forensic order. It may emerge in the process of considering an application that while an application was submitted for a forensic psychiatric treatment order, a

community care order is more appropriate and so should be granted instead.

Using the term forensic mental health order in section 36ZD(2)(g) enables the ACAT to consider making the less restrictive community care order, regardless of whether an application was submitted for a forensic psychiatric treatment order or a forensic community care order.

Amendment 21: amendment to clause 11

This amendment alters the test to be applied in new section 36ZF from “is satisfied” to “believes on reasonable grounds”.

The reason for this amendment is the same as for amendments 6 and 17 above.

Amendments 22, 23 and 24: amendments to clause 11

‘Approved’ is added to ‘stated mental health facility’ in Sections 36ZG(1)(a)(ii), 36ZG(2) and 36ZG(3) to match the correct term used in Section 36ZG(1)(a)(i). ‘Approved’ means that the facility is approved by the Minister for the purpose set out in the section

Amendments 25: see amendment 18 above.

Amendments 26: see amendment 19 above.

Amendments 27 and 28: amendments to clause 12

Amendments 27 and 28 make amendments to section 41AA which governs medical examinations of detained people. Section 41AA has two purposes.

Firstly Section 41AA aims to ensure that a person detained for involuntary mental health treatment has a thorough physical and a thorough psychiatric examination.

The thorough physical examination is needed to identify or eliminate the likelihood of physical conditions that may be contributing to the person’s presentation and to identify any other physical conditions that are of concern, in part because of the recognised higher levels of physical health problems among people with mental illness.

A thorough physical examination for this purpose is one which: records the person’s medical history in so far as it is reasonably available; identifies any indications of physical conditions likely to contribute to or explain the person’s presenting signs and symptoms; identifies any

indications of physical conditions of concern; recommends or initiates further investigations as appropriate; sets out the doctor's formulation to explain the results of the examination and provides a plan for any indicated treatment. A thorough physical examination is distinguished from a comprehensive physical examination intended to identify any and all physical illnesses or their precursors that the person may have.

The phrase 'as far as reasonably practicable' is inserted in section 41AA(2) recognising that the person's condition (for example extreme agitation) may occasionally prevent a thorough examination within 24 hours, and that as much of the examination as can be achieved in those circumstances should be done, with the remainder delayed to the earliest practicable time.

A thorough psychiatric examination for this purpose is one that: records the person's psychiatric history in so far as it is reasonably available, and their current signs and symptoms; recommends or initiates further investigations as appropriate; sets out the doctor's formulation to explain the results of the examination and provides a plan for any indicated treatment.

Secondly, section 41AA works with the examination requirements in sections 40 and 41 to ensure compliance with the spirit of UN Principles requiring the agreement of two mental health practitioners for admission or detention to occur¹.

Amendment 27 removes the restriction at section 41AA(3)(b) that (if the person was apprehended under section 37 by a relevant doctor) the thorough psychiatric examination cannot be conducted by that doctor. It also provides that if a thorough psychiatric examination was conducted by a relevant doctor under section 37 (apprehension) or section 41(1)(b) (second examination for emergency detention) a further thorough psychiatric examination is not required.

Amendment 28 clarifies section 41AA(4) to ensure that if the Chief Psychiatrist is satisfied that an examination recently conducted by a doctor or psychiatrist (not restricted to a doctor or psychiatrist employed at the facility) meets the criteria for an examination in section 41AA(1)(a) or (b) a further examination under those sections is not required.

¹ United Nations General Assembly (1991), *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (1991), Principle 16(1)

Together these amendments enable the purposes of the section to be met without the provisions being unduly restrictive.

Amendment 29: amendment to clause 16

Amendment 29 relates to section 42 which sets out the people who must be notified if a person is involuntarily detained under Section 41.

The addition of section 42(2A) and 42AA provides that the person's potential supports are notified after the initial detention and again if the detention is extended by ACAT, and that if none of these people can be contacted, the Public Advocate is made aware of that fact as well as the detention itself.

Amendment 30: amendment to clause 16

The words, 'and assistance' are added after 'opportunity' in section 42(3) to ensure that a person detained has assistance if they wish to notify a friend or relative of their detention and need assistance to do so.

Amendment 31: see amendment 11 above.

Amendment 32: amendment to clause 16

This amendment to section 48Y(2) removes the need for a certificate in order for the ACAT to satisfy itself that the treatment, care or support for which the order is made can be provided at the facility, similar to the removal of the need for advice 'in writing' in the similar section 36T(2).

Amendment 33: see amendment 18 above.

Amendment 34: see amendment 19 above.

Amendment 35: see amendment 19 above.

Amendment 36: amendment to clause 43

This amendment deletes sub-section 48ZI(2) and proposes a new sub-section.

Decision making capacity is not a criterion ACAT has to consider when making a forensic mental health order. The amendment deletes sub-section 48ZI(2) as it requires that the order includes a statement about whether the person has decision making capacity to consent to the treatment and whether they consent. This information is not required for these orders and should not be included on the statement.

New subsection 48ZI(2) ensures that a forensic community care order is consistent with forensic psychiatric treatment order.

Subsection 48ZB(2)(a) requires that a forensic psychiatric treatment order state that the person must comply with a determination under section 48ZC setting out the person's involuntary treatment. This requirement makes the determination part of the order, clarifying that a breach of the determination is a breach of the order.

Section 48ZB(2)(b) also requires that the order be accompanied by a statement about how the person meets the criteria set out in section 48ZA(2) for a forensic psychiatric treatment order.

The two requirements above also need to apply to a forensic community care order. This amendment provides that the two requirements also appear at section 48ZI(2). The person will be required to comply with a determination under section 48ZJ(2). The order will be required to be accompanied by a statement about how the person meets the criteria set out in section 48ZH(2).

This statement will inform the people receiving a copy of the order including the subject person about the rationale for the involuntary order.

Amendment 37: see amendment 18 above.

Amendment 38: see amendment 19 above.

Amendment 39: see amendment 19 above.

Amendment 40: amendment to clause 43

New section 48ZZF(5)(b) is amended by substituting "any other entity" for "anyone else" and inserting at (5)(b)(iv) a reference to a court dealing with a related matter.

This amendment ensures that the director-general may disclose information on the register that relates to a registered affected person if it is, or may be relevant to a matter before the court.

It is appropriate to expand the provision so that a court can lawfully obtain information that may be important and relevant to a matter before it.

Amendment 41: amendment to clause 46

This amendment alters the test to be applied in proposed new section 62(3)(a) from "is satisfied" to "believes on reasonable grounds".

The reason for this amendment is the same as for amendments 6, 17 and 21 above.

Amendment 42: amendment to clause 56

The amendment to section 72(2)(b) clarifies that the person's detention will be reviewed at least once each month after the initial ACAT review if they continue to be detained in corrections custody.

Section 72(2)(a) provides that the detention of the subject person for this section must be reviewed as soon as possible and no later than seven days after the court order in section 72(1).

(Alternatively new section 72(5) provides that if a person is released on conditions they must be reviewed every six months, see amendment 45 below).

The maximum period of one month between reviews for a person detained in corrections custody ensures that the person is detained in corrections custody for the shortest practicable time.

The maximum period of six months before review is proportionate where the person is under fewer restrictions when released into the community on conditions.

Amendment 43: amendment to clause 56

This amendment to section 72(5) clarifies that ACAT may also make forensic orders including additional orders. in relation to the person.

Amendment 44: amendment to clause 56

The amendment to section 74(1) requires that, where a person has been detained in corrections custody and referred to the ACAT by a court and the ACAT then orders the release of a person on conditions, the ACAT must review the conditions at least 6 monthly.

Amendment 45: amendment to clause 119

Amendment 46 requires the Minister to consult with another Minister where appropriate before approving a community care facility.

Section 139E provides for the Minister to approve a facility as a community care facility for purposes as set out in the Act. Community

care facilities are provided for people with mental disorder and therefore may be operated under the portfolio of another Minister.

Amendment 46: amendment to clause 156

Amendment 47 amends the definition of 'treatment care or support.'

This amendment to the definition of 'treatment care or support', a standard term used throughout the Bill, removes paragraph (c). Paragraph (c) excluded electroconvulsive therapy (ECT) from the definition, and is removed because ECT is appropriately included or excluded where 'treatment care or support' is addressed throughout the Bill.

Amendments 47, 48, 49 and 50: amendments to schedule 1, amendments 1:9, 1:12, 1:16 and 1:19

These amendments provide that the court must consider, when setting a nominated term, whether there is another nominated term applying to the person and decide whether the new nominated term is to be served consecutively, partly consecutively, concurrently or partly concurrently with the other nominated term.

Amendment 51: amendment to schedule 1, part 1.7 amendment 1:49

New section 32JA of the the *Guardianship and Management of Property Act, 1991* makes provisions about notice and duration of consent to mental health treatment care and support under the Act.

Subsections 32JA(4) and (5) give the ACAT power to extend an initial health attorney consent to mental health treatment under section 32JA(3) for up to eight weeks. The intent of subsections (4) and (5) is to allow time, if needed, for an application for guardianship to proceed. This amendment aims to ensure that an application for guardianship is made with the application for an extension of the authority to consent.

Amendment 52: amendment to schedule 1, part 1:9

Section 16 of the *Powers of Attorney Act, 2006* sets out when and how the power under a power of attorney is exercised. This amendment to section 16(1) adds the example of a period of incapacity under the Mental Health Act, to clarify that if the person making a power of attorney so specifies, an Attorney may make decisions for a person in those circumstances (other than decisions regarding electroconvulsive therapy or psychiatric surgery).