2016

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

MENTAL HEALTH AMENDMENT BILL 2016

EXPLANATORY STATEMENT

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Introduction

The *Mental Health Amendment Bill 2016* ('the Bill') proposes amendments to the *Mental Health Act 2015* (ACT) ('the Act'). That Act is the legislation that (from commencement on 1 March 2016) primarily provides for the statutory options, entitlements, and protections of people who use ACT mental health services. It provides for involuntary treatment of mental illnesses and mental disorders where needed. It aims to ensure that where possible people make their own treatment decisions, or participate in decisions to the extent that they can. The Act also imposes certain obligations on mental health service providers and provides for certain offences.

The Act resulted from a comprehensive public review that the ACT Government conducted of the *Mental Health (Treatment and Care) Act 1994* (ACT) between 2006 and 2013.

Since the Act was enacted in September 2015, there have been some additional elements that have been identified that would assist in the functioning of the Act.

The Bill is an outcome of recommendations to clarify and expand on some elements of the Act. It also assists with the arrangements for the Secure Mental Health Unit which is scheduled to open in November 2016. The management of that facility will come under the *Mental Health (Secure Facilities) Act 2016* if that is enacted.

The provisions in the Bill would need to be applied within the principles of the Act, which are contained within section 6 of the Act.

Chapter 6 of the revised explanatory statement for the *Mental Health (Treatment and Care) Amendment Bill 2014* will assist with understanding of the present Bill.

Notes on language in the Explanatory Statement

When reading the Explanatory Statement, please note an example given in the explanatory statement is not exhaustive and does not limit the meaning of the provision that it relates to.

How the Human Rights Act 2004 is engaged

The *Mental Health (Treatment and Care) Amendment Act 2014* provisions were relocated to the *Mental Health Act 2015* when that Act commenced on 1 March 2016. This included Chapter 7 Forensic Mental Health and Chapter 8 Correctional Patients.

Chapter 6 of the Revised Explanatory Statement (the ES) for the *Mental Health (Treatment and Care) Amendment Act 2014* provides a detailed discussion of how the human rights considerations for the current *Mental Health Act 2015* are engaged. Chapter 6 of the ES includes specific parts discussing the human rights considerations regarding Forensic Mental Health and Correctional Patients. The Revised Explanatory Statement for the *Mental Health Act 2015* provides important supplementary commentary on the human rights considerations for the *Mental Health Act 2015* as it commenced on 1 March 2016.

What changes are provided for by the Bill?

The main clauses in the present Bill are designed to provide for the transfer of legal custody from ACT Corrective Services and ACT Child and Youth Protection Services to the ACT Health Directorate for two classes of people:

1. People on mental health orders and forensic mental health orders who are in the custody of ACT Corrective Services or ACT Child and Youth Protection Services - 'Forensic mental health'; and
2. People in the custody of ACT Corrective Services or ACT Child and Youth Protection Services who require treatment for mental illnesses or mental disorders and who voluntarily agree to it – Correctional patients.

It also provides for consequential powers for the apprehension, entry, search and seizure required to re-detain people who have escaped from the custody of the ACT Health Directorate.

It also makes significant amendments to the leave provisions for people detained at approved mental health facilities.

The other set of changes provided for in the Bill are technical amendments to the Act to clarify and improve the functioning of the Act. These are on:

1. Nominated Persons - functions (clause 4);
2. Entering and ending advance agreements and advance consent directions (clauses 5, 6 and 7);
3. Assessment orders and removal orders (clauses 8, 9, 10, 11 and 12);
4. Relevant persons who can apply for a community care order or forensic community care order (clauses 13 and 23);
5. Psychiatric treatment orders (clauses 14, 15 and 16);
6. Review of mental health orders and forensic mental health orders by the ACT Civil and Administrative Tribunal (ACAT) – confirming existing orders (clauses 18, 19, 56 and 57);
7. Including the directors-general of Corrective Services and Children and Young People in information about detainees and young detainees (clauses 26 to 43);
8. Reporting of confinement, restraint, seclusion and the forcible giving of medication (clauses 20, 22, new section 144A (6), new section 144D(5));
9. Psychiatric surgery - approval regime, committee recommendations, and application to the Supreme Court for consent (clauses 87-89);
10. Mental Health Advisory Council membership (clause 95); and
11. Dictionary: amended definition for 'psychiatrist' (clause 99) and new definition for 'secure mental health facility' (clause 101).

Who will these changes affect?

The transfer provisions will affect people detained, corrections, and children and youth protection staff who are working with them, corrections, and children and youth protection managers, senior management of ACT Health, the chief psychiatrist and the care coordinator.

The technical amendments will affect a wider range of people involved in the ACT mental health system. These include people living with mental illnesses or disorders, their carers, their close friends and close relatives, as well as the professionals providing treatment, care and support to them.

The technical amendments are designed to better support the treatment, care and support of people living with mental illnesses or mental disorders. This includes by providing information to people close to people living with mental illnesses or mental disorders to be involved in supporting them, particularly in relation to decisions.

Who and what informed these changes?

The Act as a whole had wide ranging input from people with mental illnesses and/or disorders and their supporters. This was through the Mental Health Review Advisory Group and a series of extensive public consultations.

The changes in the Bill on the transfer of custody were envisaged during the review of the *Mental Health (Treatment and Care) Act 1994*. In particular the changes would need to be made for the full operation of the Mental Health Act, especially around the establishment of the Secure Mental Health Unit. These changes also align with the recommendations of the ACT Health Services Commissioner in their investigation of the mechanical restraint of a prison detainee while being treated in a mental health facility.[1] Recommendation 6, made in the report of the investigation, was for amendments to:[2]

> *[t]he Corrections Management Act and/or the Mental Health Act [...] to enable the transfer of custody from Corrective Services ACT to Mental Health ACT when a detainee is transferred from the AMC to an inpatient mental health facility.*

This would mean the people providing the health care also have custody of the person, and the management of associated use of restraints if necessary.[3] The ACT Government's response to the report agreed in-principle to that recommendation.

Clause notes

Clause 1 Name of Act

Clause 1 says that this Act, once the Bill is enacted, is to be named the *Mental Health Amendment Act 2016*.

Clause 2 Commencement

Clause 2 provides that the Act will commence on the day after its notification, except for:

- Sections 52, and 57 to 59 (amending the *Mental Health Act 2015*), and
- Schedule 1 (Amending the *Children and Young People Act 2008* and the *Corrections Management Act 2007*).

[1] ACT Health Services Commissioner (2014) 'Investigation into the mechanical restraint of a prison detainee while being treated in a mental health facility' (Report, ACT Human Rights Commission) http://www.hrc.act.gov.au/res/Restraint%20report%20FINAL.pdf
[2] Ibid, pages 3 and 32-33.
[3] Ibid, pages 29-33.

These sections and the schedule will commence in line with the commencement of the *Mental Health (Secure Facilities) Act 2016*, after that is enacted.

Clause 3 Legislation Amended

Clause 3 states that the Act will amend the *Mental Health Act 2015*.

The Act will also amend the *Children and Young People Act 2008* and the *Corrections Management Act 2007*. These other Acts amended are provided for in Schedule 1 of the Bill.

Clause 4 Nominated person – functions Section 20 (1)

Clause 4 amends the Act, section 20 (1) to clarify the role of nominated persons. This amendment adds in the additional descriptors of 'views and wishes' in addition to 'interests'. This would make section 20 (1) read as a whole (emphasis added):

> *The main function of a nominated person for a person with a mental disorder or mental illness is to help the person by ensuring that the interests, views and wishes of the person are respected if the person requires treatment, care or support for a mental disorder or mental illness.*

These words are added in to make it clear that the nominated person is to provide information about prior and currently expressed views and wishes of the person requiring treatment, care or support. This is to help ensure that the person can be supported at all times to be involved in decisions that are made about them.

Clause 5 Entering into advance agreement New section 26 (5) (b) (iia) to (iid)

Clause 5 amends the Act, section 26 (5) (ii) to add in additional people and position holders who must be provided with a copy of an advance agreement by the representative of the treating team when each advanced agreement is made.

The intention is to ensure that each person, who an advance agreement involves or who has obligations in relation to it, knows about its existence and can utilise it in supporting the person and in performing the duties of their position. This aligns with the people and position holders who receive a copy of an advance consent direction.

Specifically this clause adds in:

- A person who is likely to provide practical help under the agreement – if the person consents;
- Carers of a person – if the person consents;
- The guardian and the ACAT (if a guardianship order has been made for the person); and
- The attorney if the person has appointed a person with power of attorney.

Without this clause, the only people who would be required to receive a copy of an advance agreement would be the person, the nominated person and any members of the person's treating team who does not have access to the person's record.

The consent requirements were added in for a person who is likely to provide practical help and for carers, to maintain the control and privacy of the person, and so as not to dissuade the person from including the names of these people even if they do not want them to receive a copy of the

document. This consent requirement was added in because knowing about these documents is an inherent legal requirement of some roles that either the person has granted to an attorney, or a tribunal has made a person a guardian. However, carers and practical helpers can be engaged by others to perform their roles under the agreement without *necessarily* needing to know the contents of the rest of the document.

Clause 6 Making advance consent direction New section 27 (6) (b) (iia)

Clause 6 has a similar intention to clause 5; it adds in a requirement for a carer to be provided with a copy of an advance consent direction if the person making the advance consent direction consents to the carer being provided with a copy.

The intention is to ensure that carers who provide care consistently with the consent direction, knows about its existence and can utilise it in supporting the person and in exercising their care.

The consent requirement is to maintain the control and privacy of the person, and so as not to dissuade the person from including the names of carers even if they do not want them to receive a copy of the document.

Clause 7 Ending advance agreement or advance consent direction New section 29 (4) (a) (ii) and (iii)

Clause 7 is similar to clauses 6 and 5; it ensures that people involved with a person who has made an advance agreement or advance consent direction knows about the status of the instrument. This clause ensures that relevant people and position holders are informed when an advance agreement or an advance consent direction is ended. This does not necessarily end their role/s but it impacts the way/s in which they can perform those roles.

This amendment specifically amends section 29 (4) (a) of the Act to add in additional people and position holders who must be told when an advance agreement or an advance consent direction is ended. These are:

- Each person who is likely to provide practical help under the agreement, and the person ending the agreement or direction consents to each relevant person being given notice;
- Each person who is a carer (if the person has a carer/s and the person consents);
- The guardian and the ACAT (if a person has been appointed as guardian); and
- The attorney (if the person has given a person power of attorney).

This is in addition to the existing requirements of entering it in the person's record, given to each member of the person's treating team who does not have access to the person's record, and the nominated person.

Clause 8 Assessment Order
Section 37(b)

Clause 8 amends section 37(b) to update the reference to the new title of section 79, that is: "Review of mental health order".

Clause 9 Content and effect of assessment order Section 40 (1) (b) to (d)

Assessment orders (including emergency assessment orders – which do not require the person's consent where a presidential member has a serious concern about the immediate safety of the

person who an assessment order had been applied for) provide the legal basis for the conducting of an assessment on a person without that person's consent.

Section 40 (1) lists the contents that must be in an assessment order.

Clause 9 allows an assessment to be conducted at an approved mental health facility or a stated other place. Since the commencement of the Act, it has become apparent that it is not appropriate in all occasions to refer a person to an approved mental health facility for an assessment, for example the person may have behavioural difficulties in association with an acquired brain injury. The amendment enables the ACAT flexibility as to the stated place for the assessment to be undertaken, such as a psychologist's office. If the person requires to be detained for the assessment, ACAT may still state an approved mental health facility.

Clause 9 does this by adding in "other place" through substituting new sections 40 (1) (b), and (c).

Existing subsection 40(1) (d) becomes new section 40(1) (c) (ii).

Clause 10 Time for conducting assessment New section 42 (1) (c)

The amendment proposed in clause 10 aligns assessment orders with the operable time of removal orders. The amendments make it clear that an assessment under an assessment order can be conducted within a 7 day period after a removal order has been executed. If further time is needed the ACAT may grant an extension of up to an additional 7 days to complete the assessment, which must be based on clinical (medical) evidence provided to the ACAT.

Clause 10 makes this amendment by putting an additional subsection into section 42 (1) which reads:

> *'(c) [If] a removal order is made under section 43 (2) in relation to the assessment— 7 days after the day the removal order is executed.'*

This proposed amendment seeks to avoid the possible detrimental and traumatic event of a person being apprehended under a removal order, but not being able to be assessed and treated if necessary. This change supports people's right to health and not to be arbitrarily detained.

This amendment also retains the intention of section 42 (1) (b) to mean that if an earlier day is stated in the assessment order then that day is the day that the assessment must be conducted by. The past tense nature of word 'conducted' means that the assessment under the order must have *started and completed* by that day. This does not mean that it must be started *on* that day. It must be *completed* by the end of that day, unless an extension is validly sought with clinical evidence from the person who is conducting the assessment about why the assessment cannot be completed within the time frame provided by the assessment order.

Clause 11 Person to be assessed to be told about order Section 47 (1) and (2)

Section 47 provides the requirement that once an order has been made, the person, who is required to be assessed under the assessment order (including an emergency assessment order), must be told about the order, the process of the assessment, and the possible outcome/s of that assessment.

Clause 12 Copy of assessment
Section 48 (1) and (2)

Section 48 creates a time bound obligation upon completing an assessment to provide copies of assessments, or written notice of the assessment, to certain persons and position holders.

Clause 12 amends section 48 (1) and (2) to add in that the requirement to notify certain people extends to where the assessment is done at a place other than an approved mental health facility. This is consequential to the amendments made in clause 8 which allow the assessment to be done in a place 'other' than just at an approved mental health facility.

Clause 12 makes this amendment by inserting the words 'or other place' after each instance of the words 'mental health facility' in section 48 (1) and (2).

Clause 13 Definitions - Chapter 5
Section 50, definition of *relevant person*, paragraph (b)

Clause 13 provides a revised definition of 'relevant person' to apply for a community care order.

Clause 13 makes a relevant person, a person who can make the statement required in section 51 (3) (a).

Clause 23 (outlined below) provides for the same amendment to be made for the definition of a relevant person for a *forensic* community care order.

Clause 14 Psychiatric treatment order
Section 58 (2) (b) (i)

Section 58 provides the requirements of making a psychiatric treatment order. Section 58 (2) provides the pre-requisites that must exist for the ACAT to have the discretion to make a psychiatric treatment order.

Section 58 (2) (b) provides different requirements for (i) if the person does *not* have decision-making capacity to consent and (ii) if the person *does* have decision-making capacity to consent.

Section 58 (2) (b) (i) allows a psychiatric treatment order to be made where the person does not have decision making capacity AND *refuses* to receive the treatment. Where they do not refuse a substitute decision maker including a person with power to make decisions in relation to mental health treatment, including a guardian or a person with power of attorney, may be used to provide that substitute consent.

Clause 13 is to make it clear that the refusal under section 58 (2) (b) (i) is intended to include not just to treatment, but also to include refusal of care or support. If clause 13 is enacted a psychiatric treatment order may be made for a person who does not have decision-making capacity and refuses to receive treatment or care or support that is needed to address their mental illness. To avoid confusion, this includes refusal to receive any combination of treatment and/or care and/or support. Where they are not refusing particular treatment or care or support that is needed for their mental illness, then the consent can be provided (or refused) by a legally empowered substitute decision-maker such as a guardian or attorney.

Clause 13 makes this amendment by omitting the word *and semicolon* punctuation mark 'treatment;' and replacing them with the words and punctuation marks (emphasis added): 'treatment, *care or support*;'.

This does not impact on the first use of the word 'treatment' in section 58 (2) (b) (i).

Clause 15 Role of chief psychiatrist – psychiatric treatment order Section 62(2), new note

The insertion of a note saying that "the power to make an instrument includes the power to amend or repeal the instrument" (see Legislation Act s46) draws the chief psychiatrist's attention that the determination made under S62 is an instrument subject to the Legislation Act and that changes to a person's treatment, care or support would require amendments to the determination or the making of a new determination. For example; changes in the nature of the psychiatric treatment such as starting or stopping the use of medication or psychological therapies for mental health treatment, changes in the location where the treatment, care or support is provided would require the amendment of an existing determination or the making of a new determination. A change in dose or types of medications used or the type of psychological therapy would not require an amendment to the determination. These examples are not exhaustive.

Clause 16 Powers in relation to Psychiatric Treatment Order Section 65(5)(b)

The change from telling the Public Advocate within 12 hours to telling the Public Advocate without a time limit means telling the Public Advocate as soon as possible. This ensures the information provided is both prompt and accurate with the additional time to ensure adequate administrative time.

Clause 17 Powers in relation to community care order Section 73 (5) (b)

Clause 17 amends Section 73(5) (b) to effect the same change for notifications for community care orders as clause 16 does for powers in relation to psychiatric treatment orders. This is because they are mirror provisions.

Clause 18 Section 79 heading

Clause 18 provides a revised heading for section 79. Section 79 is about the process of reviewing mental health orders that are in place for a person. The Act (unamended) currently provides that ACAT may *amend or revoke* existing mental health orders. Clause 19 would add in the explicit ability of the ACAT to confirm existing orders. The heading proposed in clause 18 is intended to reflect this. The substituted heading removes the explicit mention of affirming or revoking which currently exists for section 79.

Clause 54 does the same for the heading in review of forensic mental health orders.

Clause 19 Section 79 (6) (a)

Section 79 provides the process for ACAT to review mental health orders that have been made for a person. Current section 79 (6) provides that once ACAT has reviewed mental health orders, the ACAT is allowed to do any of the following (including more than one, where logical):

- amend or revoke any orders;
- make additional orders; or
- make an assessment order for the person.

Clause 19 amends section 79 (6) (a) to specifically allow the ACAT to *confirm* existing mental health orders. Clause 19 does this by inserting the word and punctuation mark 'confirm,' before the word amend.

Clause 54 (discussed below) does the same substantive amendment for what the ACAT may do upon review of a *forensic* mental health order.

Clause 20 Statement of action taken
New section 83(2) (aa)

Clause 20 inserts a new requirement that the public advocate is told in writing, as soon as possible, of any restraint, involuntary seclusion, or forcible giving of medication that occurred while the person was apprehended and taken to an approved mental health facility. This will bring Section 83(2) in line with the same requirements of similar provisions in the Act, such as Section 65(5).

Clause 21 Initial examination at approved mental health facility
Section 84(4) (b)

The existing section 84(4) says that the chief psychiatrist must conduct an initial examination within 2 hours of being told that a person detained at an approved mental health facility has been at the facility for 4 hours without an initial examination. Clause 21 amends the requirement from the chief psychiatrist "must conduct" to the chief psychiatrist "must arrange for" an initial examination of the subject person to be conducted... This takes into account the practicalities of access to the chief psychiatrist out of ordinary business hours but ensures the responsibility for this initial examination, where an examination has not taken place within 4 hours, remains with the chief psychiatrist.

Clause 22 Authorisation of Involuntary detention
Section 85 (1)

Clause 22 amends Section 85 (1) to include the words "involuntary treatment, care and support" to the authorisations of the doctor, this is in addition to the authorisation of involuntary detention. This amendment clarifies that chapter 5 intends that the emergency apprehension and detention of a person is for the purpose of involuntary treatment, care and support if these are required by the person's mental health presentation during the first 3 days, or during the further period of detention up to 11 days ACAT may order. Section 88 states that the person in charge of the facility must ensure that any treatment, care or support administered to the person is the minimum necessary to prevent any immediate and substantial risk of the person detained causing harm to the person or someone else.

Clause 23 Treatment during detention
New Section 88 (1) (ba)

Clause 23 amends Section 88 (1) to include a new subsection which makes clear that the person in charge of the facility may only subject a person to involuntary seclusion if satisfied it is the only way to prevent the person from causing harm to themself or someone else.

Clause 24 Treatment during detention
New section 88 (4) and (5)

Clause 24(4) provides that if the person is given involuntary treatment in the form of medication, as authorised in the amended Section 85(1), that the doctor must ensure that the giving of the authorised or prescribed medication is by appropriately trained people and that only the force that is necessary and reasonable to give the medication is used. This section ensures that the exercise of this authorisation for involuntary treatment, care or support is coherent with similar

sections in the rest of the Act.

Clause 24 (5) provides the legal requirement for the use of confinement, restraint, involuntary seclusion or forcible giving of medication to be entered in the person's record, written notification given to the public advocate and on the register/s of these practices.

Clause 24 would create a new subsection 88(5), which would require the recording and registering of the use of any confinement, restraint, involuntary seclusion or forcible giving of medication during the detention of a person detained at a mental health facility under section 85 (authorised involuntary detention).

This new subsection would make section 88 consistent with section 83(2) (registering upon apprehension and taking to a mental health facility), section 65(3), (4) and (5) (restraint etc under a psychiatric treatment order), and section 75 (3) (4) and (5) (restraint etc under a community care order). In addition, clause 86 of this Bill, which adds in a new section 144A, contains a subsection (6) which has similar reporting requirements for the director-general responsible for the *Act* after detainees and young detainees are transferred from corrections centres and places of detention to a secure mental health facility. The statement of action in section 144A must be provided by the person transferring the detainee or young detainee (144A (5)).

The record must include both the fact of *and reasons that* they used each confinement, restraint, seclusion or forcibly give medication.

This clause would help to ensure that the use of the restrictive practices of confinement, restraint, seclusion and the forcible giving of medication is properly recorded and reported. This helps to ensure that these restrictive practices are properly monitored.

Clause 25 Definitions-pt 7.1
Section 93, definition of *relevant person*, paragraph (b)

Clause 23 provides a revised definition of 'relevant person' to apply for a forensic community care order.

Clause 23 makes a relevant person, a person who can put together the written statement required in section 94 (3) (a) which addresses the full set of criteria the ACAT must consider and believe on reasonable grounds (with evidence) or be satisfied of (with evidence) in making a forensic community care order in section 108 (2).

Clause 13(outlined above) provides for the same amendment to be made for the definition of a relevant person for a community care order (non-forensic).

Clause 26 Applications for forensic mental health orders – detainees etc
New section 94 (1) (g)

Clause 26 adds people on supervised bail orders (people and young people) to be people who a forensic mental health order can be made about.

This is done by inserting a new subsection (g) into section 94 (1).

Section 94(1) (g) adds in a person covered by a bail order required to accept supervision under the *Bail Act 1992* sections 25 (4) (e), section 25A or section 26 (2).

This addition is to make it clear that forensic mental health orders can be made for those people required to accept supervision under the *Bail Act 1992* and who have a mental illness or mental disorder and where ACAT believes on reasonable grounds that because of the mental illness or

mental disorder the person has, is, or is likely to seriously endanger public safety.

Clause 27 Role of chief psychiatrist – forensic psychiatric treatment order Section 103 (2), new note

Clause 27 adds a new note to mirror the new note included in Clause 14. The Note is to make clear that "the power to make an instrument includes the power to amend or repeal the instrument" (see Legislation Act s46) draws the chief psychiatrist's attention that the determination made under S103 is an instrument subject to the Legislation Act and that changes to a person's treatment, care or support would require amendments to the determination or the making of a new determination.

Clause 28 Role of the chief psychiatrist-forensic psychiatric treatment order New section 103 (8)

Section 103 (8) provides a list of people that the chief psychiatrist *must* provide a copy to of a determination the chief psychiatrist has made under a forensic psychiatric treatment order.

Clause 28 adds in *additional* actors who *must* receive a copy. These are:

(i) the director-general responsible for the supervision of a person required to accept supervision from that director-general under the *Bail Act 1992* (sections 25 (4) (e), 25A or 26 (2)); and

(j) the CYP director-general if the person is a young detainee or young offender serving a community based sentence.

The purpose of (i) is to ensure that the director-general responsible for supervising the bail is aware of the requirements of the person created by the determination and does not breach the person for failure to comply with bail requirements due to requirements under a forensic psychiatric treatment order.

The purpose of (j) is to ensure that the CYP director-general can take into account the requirements of the determination in managing the community based sentence, or while they are in the custody of that director-general as a young detainee.

Clause 29 Action if forensic psychiatric treatment order no longer appropriate—no longer person in relation to whom ACAT could make order New section 105 (2)

Section 105 (2) provides the list of people that '[t]he chief psychiatrist must give written notice to' if 'the chief psychiatrist forms the opinion that the person is no longer a person in relation to whom the ACAT could make a forensic psychiatric treatment order' (section 105 (1)).

Currently this list consists of the carer/s of the person or a nominated person. Clause 29 adds:

(c) the director-general responsible for the supervision of the person under the *Bail Act 1992*, sections 25 (4) (e), section 25A or section 26 (2); and

(d) the CYP director-general, if the person is a young detainee or young offender serving a community based sentence; and

(e) all persons with parental responsibility for the person under the *Children and Young People Act 2008*, division 1.3.2 (Parental Responsibility) – if the person is a child (a person

under the age of 18 years).

These people are included as additional people that the chief psychiatrist should consult with, and who may have relevant information, in deciding whether it is appropriate to continue the forensic psychiatric treatment order or whether the chief psychiatrist should notify the ACAT.

Clause 30 Section 105(3)(b), Clause 33 Section 106(3)(b), Clause 39 Section 112(3)(b) and Clause 42 Section 113(3)(b)

Clauses 30, 33, 39 and 42 amend their respective sections of the Act in the same way and for the same purpose. The sections are amended so that all the notified people are asked, by the chief psychiatrist (Clauses 30 and 33) or care coordinator (Clauses 39 and 42), whether they are aware of any information that may be relevant to the actions the statutory officers are considering. These considerations are particularly whether a forensic mental health order continues to be appropriate (Clauses 30 and 39) or whether the detention under a forensic mental health order continues to be appropriate (Clauses 33 and 42). The notified people are listed in the amended section 105 (2).

Clause 31 Section 105(3)(e), Clause 34 Section 106(3)(e), Clause 40 Section 112(3)(e) and Clause 43 Section 113(3)(e)

Clauses 31, 34, 40 and 43 amend their respective sections for the same purposes. The first purpose is that the chief psychiatrist or the care coordinator tells the notified people that they are entitled to make a submission to the ACAT review of the forensic psychiatrist treatment order (Clause 31) or forensic community care order (Clause 40). The second purpose is that the chief psychiatrist or the care coordinator tell the notified people that they are entitled to make a submission to the ACAT review whether the detention of the person under the forensic psychiatric treatment order is appropriate (Clause 34) or forensic community care order (Clause 43).

Clause 32 Action if forensic psychiatric treatment order no longer appropriate—no longer necessary to detain person New section 106 (2)

Clause 32 provides that the chief psychiatrist must give written notice to these additional people as relevant to the person subject to a forensic mental health order: the director-general responsible for the supervision of the person under the *Bail Act 1992*, the corrections director-general; the CYP director general; the person with parental responsibility under the *Children and Young People Act 2008*. These people are added because of their responsibilities for supervising or detaining the person subject to the forensic mental health order, where the offending or alleged offending behaviour engages the serious endangerment criteria.

Clause 35 Powers in relation to forensic psychiatric treatment order Section 107(5)(b)

Clause 35 amends the requirement to tell the public advocate within 12 hours. The change requires the chief psychiatrist to inform the public advocate as soon as possible and takes into account public holidays and out of hours reporting so that the reporting is as compete as possible.

Clause 36 Content of forensic community care order
Section 109 (1)(e)

Clause 36 adds "another stated place" for a person to be ordered to live at and removes "another stated place" from the places a person can be detained at to remove any impression that ACAT could order the detention of a person subject to a forensic community care order at a correctional centre or detention place.

Clause 37 Role of care coordinator – forensic community care order
Section 110(6)

Clause 37 increases the number of people the care coordinator must provide a copy of a determination to include all people the care coordinator must consult. This includes where relevant, the corrections director-general, the CYP director-general or the director-general responsible for supervising a person covered by a bail order. These directors-general are included because of the information they may require because the person is assessed to meet the criteria of serious endangerment to public safety.

Clause 38 Action if forensic community care order no longer appropriate—no longer a person in relation to whom ACAT could make order
New section 112(2)

Clause 38 increases the number of people the care coordinator must provide a copy of a determination to include all the people the care coordinator must give written notice to. This includes where relevant, the corrections director-general, the CYP director-general or the director-general responsible for supervising a person covered by a bail order. See Clause 37 for rationale.

Clause 41 Action if forensic community care order no longer appropriate—no longer necessary to detain person
New section 113(2)

Clause 41 increases the number of people the care coordinator must provide a copy of a determination to include all the people the care coordinator must give written notice to. This includes where relevant the corrections director-general, the CYP director-general or the director-general responsible for supervising a person covered by a bail order. See Clause 37 for rationale.

Clause 44 Powers in relation to forensic community care order
Section 114(5)(b)

Clause 44 amends the requirement to tell the public advocate within 12 hours. The change requires the chief psychiatrist to inform the public advocate as soon as possible and takes into account public holidays and out of hours reporting so that the reporting is as compete as possible

Clause 45 Grant of leave for person detained by ACAT
Section 119 (3) (a)

Clause 45 provides that where ACAT has detained a person on a forensic mental health order, and leave is sought, then ACAT must get the agreement of or consult with the relevant director-general associated with the corrections order.

The relevant director-general in the case of a detainee, is the corrections director-general. In the case of a young detainee, it is the CYP director-general.

The requirement of agreement for detainees and young detainees is intended to reflect that a person holding the custody ordered by a court needs to be able to maintain that custody, and to agree to the leave from the mental health facility.

Where a person or young person is the subject of another type of corrections order that is not custodial, then the relevant director-general must be consulted. The requirement of *consultation* for other corrections orders reflects that those other corrections orders do not allow the immediate or ongoing physical detention of the person subject to the order. Physical detention is only allowed where there are valid warrants establishing that the person is a detainee (under the *Corrections Management Act 2007*) or young detainee (under the *Children and Young People Act 2008*). In these non-custodial corrections orders, the relevant director-general may have pertinent and relevant information to provide to the ACAT in making their decision as to leave from the mental health facility, however they should not be determinative as to whether leave may occur.

This amendment is to ensure that the person with the legal custody of the person is able to maintain that custody and has the appropriate level of input into all relevant leave decisions.

Clause 45 makes these changes by substituting the current section 119 (3) (a) with a new section 119 (3) (a) containing three subsections (i)-(iii).

NOTE: Particularly in chapters 5 and 7 of the Act, there may be two legal custodies in operation in regards to people who are detainees or young detainees:

1. The custody ordered by a court such as a remand in custody or a custodial sentence; and
2. The custody under the Act such as a person ordered to be detained by ACAT as part of a forensic mental health order.

Chapter 8 Correctional Patients refers to people who are the subject of court ordered custody as detainees or young detainees and for whom a mental health or forensic mental health order cannot be made. For example the detainee has a mental illness, has decision making capacity and agrees to receive the proposed treatment, and the corrections director-general makes a transfer direction for the detainee to be taken to an approved mental health facility. Note a correctional patient cannot be a detainee with a mental illness who ACAT would believe on reasonable grounds meets the criteria regarding seriously endangering public safety.

Clause 46 Section 119 (8) (c)

Section 119 (8) provides the list of position holders that must be provided with written notice by the ACAT that they have granted leave to a person on a forensic mental health order under section 119.

Clause 46 provides *additional* possible office holders. These are for all people who are subject to a corrections order:

- If the person is a *young* detainee, the CYP director-general must be provided with a copy; and
- If the person is not a detainee or a young detainee, the corrections director-general responsible for the corrections must be provided with a copy.

This amendment also retains that the corrections director-general must be provided with written notice where the person is a detainee.

The purpose of this amendment is to ensure that relevant people are aware of the *mental health* custody that a person is under at any particular point.

This amendment is made by substituting a new section 119 (8) (c) containing three subsections (i) to (iii) respectively for detainees, young detainees and other people subject to corrections orders.

Clause 47 Revocation of leave granted by ACAT Section 120 (2) (c)

Section 120 provides the power for ACAT to revoke leave it has granted to people on a forensic mental health order under section 119.

Subsection (2) provides a list of people that must be given written notice that ACAT is *considering* revoking the leave that the ACAT has granted.

Clause 47 amends and clarifies subsection 120 (2) (c) to provide for each relevant director-general responsible for people who are on each type of corrections order.

These depend on whether the person is a young detainee, or a detainee, or a person on a corrections order that is *not* a detainee or young detainee. For a young detainee, it is the CYP director-general. For a detainee, it is the corrections director-general. This amendment specifically includes young people who may be on a forensic mental health order.

Clause 47 makes this amendment by replacing the current subsection 120 (2) (c) with a new subsection 120 (2) (c) with three subsections (i), (ii) and (iii) for detainees, young detainees, and people on other corrections orders.

Clause 48 Section 120 (4) (c)

Section 120 provides the power for ACAT to revoke leave ACAT has granted to people on a forensic mental health order under section 119.

Subsection 120 (4) provides the list of people that ACAT must notify if the ACAT makes the decision to revoke a person's leave from a forensic mental health order.

Subsection 120 (4) (c) provides the people that must be told if the person is under a corrections order.

Clause 48 amends and clarifies subsection 120 (4) (c) to provide for the relevant directors-general responsible for people who are on corrections orders. These depend on which type of corrections order that the person is on and their detention status:

- If the person is a detainee, the relevant director-general is the corrections director-general;
- If the person is a young detainee, the relevant director-general is the CYP director-general;
- If the person is on another type of corrections order, the relevant director-general is the director-general responsible for administering that type of corrections order.

This amendment specifically includes young people who may be on a forensic mental health order.

Clause 48 makes this amendment by replacing the current subsection 120 (4) (c) with a new subsection 120 (2) (c) with three subparts (i) to (iii).

Clause 49 Grant of leave for person detained by relevant official Section 121 (3) (b)

Section 121 of the *Mental Health Act 2015* provides the method for the granting of leave to people detained under a forensic mental health order by a relevant official (the chief psychiatrist or the care coordinator – section 93) at an approved mental health facility or an approved community care facility.

Examples of reasons for the leave include to attend a health or rehabilitation service, to take part in work or work related activities, or for compassionate reasons (for example to attend the funeral of a close relative).

While on a forensic mental health order and in an approved mental health facility or an approved community care facility, the person may also be in the legal custody of the corrections director-general or CYP director-general.

Clause 49 provides clarity that the director-general who has legal custody of the person must *agree* to the granting of the leave.

Clause 49 also clarifies that where a director-general has responsibility for the administration of an order (but not legal custody of the person, for example the person is on bail) then the director-general is to be *consulted*. Non-custodial corrections orders do not allow the physical detention of the person subject to the order. Physical detention is only allowed where there are valid warrants establishing that the person is a detainee (under the *Corrections Management Act 2007* or young detainee (under the *Children and Young People Act 2008*).

Clause 49 makes this amendment by substituting the current section 121 (3) (b) with a new section 121 (3) (b) containing three new subsections (i) (ii) (iii), which include the relevant directors-general for each type of person that they are responsible for.

Section 121 (3), as amended by clause 49, also recognises that where a person remains in the legal custody of the corrections director-general or the CYP director-general, then for a person to take leave within that legal custody, that office holder must also grant leave from the legal custody under the relevant Act (the *Corrections Management Act 2007* or the *Children and Young People's Act 2008*).

Clause 50 Section 121 (8) (b)

Section 121 of the *Act* provides the method for the granting of leave to people detained under a forensic mental health order by a relevant official (the chief psychiatrist or the care coordinator – section 93) at an approved mental health facility or an approved community care facility.

Subsection 121 (8) provides the list of people that the relevant official (the chief psychiatrist or the care coordinator) must notify if a relevant official grants a person leave from a facility that the person is detained at under a forensic mental health order.

Subsection 121 (8) (b) provides the people that must be told if the person is under a corrections order.

Clause 50 amends and clarifies subsection 121 (8) (b) to provide for the requirement to notify the *relevant* director-general responsible for the corrections order, which depends on the particular order the person is under as listed in section 118 which defines 'corrections order'. It also adds in that if the person is a young detainee then the CYP director-general needs to be notified.

Clause 50 makes this amendment by replacing the current subsection 121 (8) (b) with a new subsection 121 (8) (b) containing three new subsections (i) (ii) (iii), which include the relevant directors-general for each type of person that they are responsible for.

Clause 51 Leave in Emergency or special circumstances New section 122 (2A)

Section 122 provides the framework for the provision of leave under a forensic mental health order in emergency or special circumstances.

Emergency or special circumstances include (but are not limited to) medical emergencies or situations where compassion is to be exercised such as the death of a close friend or family member.

Clause 51 provides that where emergency leave is being sought, agreement needs to be provided by the relevant director-general if the person is a detainee or young detainee.

The relevant director-general in the case of a detainee is the corrective services director-general. In the case of a young detainee, it is the CYP director-general.

This amendment is to ensure that the person with the legal custody of the person is able to maintain that custody and that all relevant directors-general have appropriate input into leave decisions.

Clause 51 also adds a requirement to consult another director-general before granting leave, if the person is not a detainee or young detainee, but subject to a corrections order.

Clause 51 makes this amendment by inserting a new section 122 (2A) after the current section 122 (2). The new section 122 (2A) provides the agreement requirements for a young detainee or a detainee, and consultation requirements for people on other corrections orders, in three subsections.

Section 122, as amended by clause 51, also recognises that where a person remains in the legal custody of the corrections director-general or the CYP director-general, then for a person to take emergency leave within that legal custody, that office holder must also grant emergency leave from the *legal* custody under the relevant Act (the *Corrections Management Act 2007* or the *Children and Young People Act 2008*).

Further, all relevant directors-general for the corrections orders will need to be *notified* of the decision to grant the leave under section 122 (4) – as amended by clause. The difference is that where it is not a custodial corrections order, the relevant director-general will not need to *agree* to the leave from the approved mental health facility or approved community care facility.

Clause 52 Section 122 (4) (b) except note

Section 122 provides the framework for the provision of leave under a forensic mental health order in emergency or special circumstances. Emergency or special circumstances include (but are not limited to) medical emergencies or situations where compassion is to be exercised such as the death of a close friend or family member.

The leave decision is made by the relevant official who is, as per section 93 of the Act, the chief psychiatrist for forensic psychiatric treatment orders and the care coordinator for forensic community care orders.

Subsection 122 (4) provides the list of people that the relevant official must give written notice of their decision to grant leave under this section (in emergency or special circumstances).

Subsection 122 (4) (b) provides who must be told if the person is subject to a corrections order.

Clause 52 allows for all relevant/responsible directors-general to be notified including the CYP director-general for young detainees. It does this by replacing the current subsection 122 (4) (b) with a new subsection containing three sub parts – (i) for detainees – the corrections director-general; (ii) for young detainees – the CYP director-general; and for people who are on corrections orders, but who are not detainees or young detainees – the relevant director-general responsible for the corrections order.

Clause 53 Revocation of leave granted by relevant official Section 123 (2) (b),

Section 123 of the Act provides the framework for the revocation of leave granted by a relevant official under a forensic mental health order. This is for both standard leave where the person was detained by the relevant official (section 121), and in emergency or special circumstances (section 122).

Subsection 123 (2) provides that the relevant official must give notice to particular people and office holders that they are considering revoking the leave.

Subsection 123 (2) (b) provides who must be notified if the person is subject to a corrections order.

Clause 53 allows for the relevant director-general for a corrections order to be notified, including the CYP director-general for young detainees. It does this by replacing the current subsection 123 (2) (b) with a new subsection containing three sub parts – (i) for detainees – the corrections director-general; (ii) for young detainees – the CYP director-general; and for people who are on corrections orders, but who are not detainees or young detainees – the relevant director-general responsible for the corrections order. This replaces the more narrow mention of only the corrections director-general if the person is a detainee.

Clause 54 Section 123 (4) (b)

Section 123 of the Act provides the framework for the revocation of leave granted by a relevant official under a forensic mental health order. This is for both standard leave where the person was detained by the relevant official (section 121), and in emergency or special circumstances (section 122).

Subsection 123 (4) provides the list of people and office holders that must be notified in writing if the relevant official *decides* to revoke the leave they have granted.

Subsection 123 (4) (b) provides who must be notified if the person is subject to a corrections order.

Clause 54 allows for the relevant director-general for a corrections order to be notified, including the CYP director-general for young detainees. It does this by replacing the current subsection 123 (4) (b) with a new subsection stating ‘if the person is subject to a corrections order-

(i) If the person is a detainee – the corrections director-general; or
(ii) If the person is a young detainee – the CYP director-general; or
(iii) If the person is not a detainee or a young detainee the relevant director-general responsible for that order’.

This replaces the more narrow mention of only the corrections director-general if the person is a detainee (which is in the unamended subsection).

Clause 55 Contravention of forensic mental health order – absconding from facility

New section 125(1A)

If a forensic mental health order is in place and it requires the person to be detained at an approved mental health or approved community care facility and the person absconds from the facility clause 55 requires the person in charge of the approved mental health facility or approved community care facility to immediately inform the police that the person has absconded. This is because a forensic mental health order is only made if the ACAT believes on reasonable grounds that the person meets the criteria regarding seriously endangering public safety. Providing this immediate information to the police will assist the protection of public safety.

Clause 56 Section 126 heading

Clause 56 provides a revised heading for section 126. Section 126 is about the process of reviewing forensic mental health orders that are in place for a person. The Act (unamended) currently provides that ACAT may amend or revoke existing forensic mental health orders.

Clause 57 (the next clause outlined below) would add in the explicit ability of the ACAT to *confirm* existing orders. The heading proposed in clause 56 is intended to reflect this. The substituted heading removes the explicit mention of affirming or revoking which currently exists for section 126.

Clause 57 Section 126 (8) (a)

Section 126 provides the process for the ACAT to review forensic mental health orders that have been made for a person. Current section 126 (8) provides that once ACAT has reviewed forensic mental health orders the ACAT is allowed to do any of the following (including more than one, where logical):

- amend or revoke any orders;
- make additional forensic mental health orders;
- make a mental health order (that is not forensic); or
- make an assessment order for the person.

Clause 57 amends section 126 (8) (a) to specifically allow the ACAT to *confirm* existing forensic mental health orders. Clause 55 does this by inserting the word and punctuation mark ‘confirm,’ before the word ‘amend’.

This amendment is intended to provide clarity to the review regime, which provides important oversight to the restrictions that mental health orders place on human rights.

Clauses 58, 59 and 60 Disclosures to registered affected people Section 134 (4)

Section 134 provides for the disclosure of certain information about a forensic patient to people who suffered harm because of an offence committed, or alleged to have been committed, by a forensic patient (see sections 127 and 128).

Subsection 134 (4) confines the set of people who can receive that information, where the forensic patient is a child (a person under 18 years of age) or was a child at the time of the offence or alleged offence.

The amendments in clauses 58 and 59 make it clear on the face of the Act that the confining is to include people who were a child (a person under 18 years of age) at the time of the offence or alleged offence, but who are no longer a child.

Clause 58 makes this clarification by inserting the following words and punctuation after the first mention of the word 'child' in section 134 (4):

> , or a person who was a child when the offence was committed or alleged to have been committed,

Subsection 134 (7) provides the requirements for the written notice disclosing certain information to an affected person under section 134. Subsection 134 (7) (c) is to remind the receiver of the information that if the forensic patient is a child or young person then publishing the information disclosed to them is an offence under the Criminal Code, section 712A.

Clause 59 makes the same clarification, and refers back to the amendment in clause 57 by inserting the words 'or person' after the *second* mention of the word 'child' in section 134 (4).

Clause 60 also makes the same clarification by inserting "or was a child or a young person when the offence was committed or alleged to have been committed" into section 134(7) (c).

These are technical amendments to make explicit prior policy intention. The intention is that a person should not be stigmatised for life for something that they did before they are deemed to have full responsibility for their actions. This is also balanced with the rights of victims of offences or alleged offences who need information from which to protect themselves or to heal from the trauma of personal violence.

Clause 61 Section 135, new note

Clause 61 adds a new note under the meaning of correctional patient to clarify that transfer directions for correctional patients can only be made for people for whom a mental health or forensic mental health order cannot be made. This draws to attention that only the court ordered custody applies to the person and hence they are under the supervision of the corrections or CYP directors-general.

Clause 62 Transfer to mental health facility Section 136 (1) (a)

Clause 62 provides that young detainees are to be included in the provisions for correctional patients. Clause 62 does this by inserting the words 'or young detainee' into section 136 (1) (a) after the word 'detainee'. If this clause is enacted, section 136 (1) will read (emphasis added):

This section [136] applies if—

(a) the chief psychiatrist is satisfied that a detainee or young detainee *has a mental illness for which treatment, care or support is available in an approved mental health facility; and*

(b) a mental health order or forensic mental health order cannot be made in relation to the person.

This clause is intended to include young people in the provisions to allow the transfer of correctional patients to a mental health facility to provide mental health care to the person. Correctional patients are to receive the treatment voluntarily, rather than involuntarily under a mental health order or forensic mental health order. As a voluntary patient the young person is

better able to engage in the health decisions about their treatment, care or support.

This is intended to make the provisions consistent with human rights, including the right to health and the principle that people detained are to be afforded the same standard of healthcare as those who are not detained. For more detail on these rights, see the revised Explanatory Statement to the *Mental Health (Treatment and Care) Amendment Bill 2014.*

Clause 63 Section 136 (2) to (4)

Section 136 (2) to (4) are intended to connect the provisions of the Act and the *Corrections Management Act 2007* that relate to the transfer of people between correctional facilities and mental health facilities. Clause 63 amends these to:

a) Include the transfer of young people; and
b) To clarify the use of the word 'must'.

The main inclusion of the transfer of young people is intended to connect the Act to the *Children and Young People Act 2008.*

The technical amendment makes it clear that if a detainee is transferred to an approved mental health facility at the request of the chief psychiatrist, then for:

- a detainee - the direction for the transfer needs to be done under the *Corrections Management Act 2007,* section 54 (Transfers to health facilities) by the corrections director-general.
- a young detainee - the direction for the transfer needs to be done under the *Children and Young People Act 2008,* section 109 (Transfers to health facilities) by the CYP director-general.

It is a discretionary power of the corrections director-general or CYP director-general whether or not they make the direction once the request has been made by the chief psychiatrist. This discretion is enhanced by the operation of section 136 (5) (substituting the current section 136 (4)), which provides that the corrections director-general or the CYP director-general may revoke the direction to transfer:

- before the direction has been performed through the transfer; or
- at the request of the chief psychiatrist.

Clause 64 Section 137 heading

Clause 64 includes young people in the provision by including the relevant description of the place young people would be detained 'detention place' in the heading for section 137. It does this by substituting a new heading which includes the words 'or detention place'. The heading as a whole with the additional words would read (emphasis added):

137 Return to correctional centre *or detention place* unless direction to remain

Clauses, 65, 66, 67, 68, and 69 New Section 137 (1) *and* Section 137 (2) (b) and Section 137 (3) and (3)(b) and Section 137(3), note

Section 137 provides a time based (7 days) mechanism for action to be taken to return a person to a correctional centre if the chief psychiatrist has not directed that the correctional patient remain at an approved mental health facility.

Clauses 65 and 66 have the intention of including young people in this mechanism by adding in a relevant legal description for them (young detainee) and the relevant location (a detention place) to which they should be taken if the chief psychiatrist does not order that they remain.

This amendment also has the effect of adding in that the person may have been admitted to an approved mental health facility, not having come from a correctional centre or a detention place. As such, the substituted section 137 (1) (in clause 63) adds in the words 'or transferred' in addition to 'be returned.'

Clause 65 includes young people by substituting a new section 137 (1) which includes 'a young detainee' and 'a detention place'.

Clause 66 includes young people in the provision by including the relevant description of the place young people would be detained 'or detention place' in the provision. It does this by inserting the words 'or detention place' after each instance of the words 'correctional centre'.

Clause 67 includes young people by including 'detention place' after correctional centre in section 137(3) and clause 68 does likewise in section 137(3)(b).

Clause 69 adds a note that the corrections director-general or CYP director-general may give a direction for the removal and return of the person at any time under their respective acts.

Clause 70 Release etc on change of status of correctional patient Section 138 (1) (a)

Section 138 provides the regime for the things that must happen if a person's legal custody changes at any point while they are detained in an approved mental health facility for treatment, care or support for a mental illness.

Section 138 (1) sets up each of the circumstances that certain information may come to the attention of the health director-general, who is responsible for correctional patients while they are detained at approved mental health facilities.

Clause 70 includes young people in section 138 (1) (a) by including the relevant director-general responsible for young people in the provision. It does this by inserting the words 'or CYP director-general' after the words 'corrections director-general'.

Section 138 (1) (a) with the amendment by clause 70 would read (emphasis added):

(1)This section applies if—

(a) the director-general is told by the corrections director-general *or CYP director-general* otherwise becomes aware, of any of the following in relation to a person who is a correctional patient:

Clause 71 Section 138 (1), note

Clause 71 substitutes the existing note to include that the corrections director-general *and the CYP director-general* must tell in writing the director-general responsible for the Act about any change in the detainee's status as a detainee. This supports the activation of section 138 (2) requiring action for the person after being released from legal custody, to, for example, continue mental health treatment, care or support if the person requests it. The note refers to section 54A in *Corrections Management Act 2007* and Section 109A of the *Children and Young People Act 2008.*

Clause 72 ACAT may return people to correctional centre Section 139

Clause 72 includes young people in the provision by including the relevant description of the place young people would be detained 'detention place' in the provision. It does this by inserting the words 'or detention place' after each instance of the words 'correctional centre.'

Clause 73 Review of correctional patient awaiting transfer to mental health facility Section 140 (4)

Section 140 provides a regime to review situations where a transfer direction has been made to transfer a person from a correctional centre to an approved mental health facility for mental health treatment and delay has occurred in doing that transfer.

Clause 73 deletes reference to correctional centre in section 140 (4) to make clear that ACAT cannot make an order in relation to the detention of "the person" in a correctional centre.

Clauses 74 Review of correctional patient transferred to mental health facility Section 141 (3) (a)(iii)

Section 141 provides the regime to review the transfer of a correctional patient who has been transferred to an approved mental health facility from a correctional centre (or detention place if amended). This review is to be done 'as soon as practicable after the correctional patient has been transferred'.

Clauses 74 includes young people who are correctional patients in the review regime by inserting the words 'or detention place' after both instances of the words 'correctional centre' in section 141 (3) (a) (iii).

Clause 75 Section 141 (3) (b)

Clause 75 omits the words '*or correctional centre'*, to clarify that ACAT cannot make an order for a person's detention at a correctional centre. People are detained in a correctional centre as a result of a court order.

Clause 76 Review of correctional patient detained at mental health facility New section 142 (2) (b) (iv a)

Section 142 provides the review regime for the ongoing detention at a mental health facility of a correctional patient who has been at the approved mental health facility for 6 months or more.

Section 142 (2) (b) lists the position holders who may request a review at any time. Currently this contains the Minister, the Attorney-General, the [health] director-general, the corrections director-general, and the person in charge of the approved mental health facility at which the person is detained.

Clause 76 includes the relevant director-general responsible for young people. Clause 76 does this by inserting a new subsection (iv a) which adds the words 'CYP director-general' to the list.

Clause 77 Section 142 (4) (b)

Clause 77 amends Section 142(4) (b) to delete the words 'or other facility or place' to make clear that the chief psychiatrist can only report on the capacity of any approved mental health facility.

The corrections director- general has the responsibility of the custody of correctional patients unless they have been admitted to a secure mental health facility. Hence only the corrections director-general decides whether any other facility or place is appropriate for the detention or transfer to of a correctional patient.

Clause 78 Section 142 (5)

Section 142 provides the review regime for the ongoing detention at a mental health facility of a correctional patient who has been at the approved mental health facility for 6 months or more.

Section 142 (5) provides the action that the ACAT may take after having reviewed the detention of corrections patient.

Clause 78 includes the relevant location that a young person may otherwise be detained at. It does this by inserting the punctuation mark and words ‘,detention place’ after the words ‘correctional centre’ in section 142 (5). Section 142 (5) would read (emphasis added):

> On review, the ACAT may, as it considers appropriate, make an order in relation to the person’s continued detention at, treatment, care or support in, or transfer to, an approved mental health facility, correctional centre, *detention place* or other place.

Clause 79 New section 142 (6) (c)

Section 142 provides the review regime for the ongoing detention at a mental health facility of a correctional patient who has been at the approved mental health facility for 6 months or more.

Section 142 (6) provides the position holders that the ACAT must tell in writing about the review. The list currently contains the (health)
director-general and the corrections director-general.

Clause 79 includes the relevant director-general responsible for young people. Clause 79 does this by inserting a new subsection (c) which adds the words ‘CYP director-general’ to the list.

Clause 80 New Section 142A

Clause 80 inserts a new section that defines for Part 8.4 the health director-general to mean the director-general responsible for this Act. The clause introduces the term of the “relevant director-general” and defines it to be the director-general with the custody of the person. This is done to clarify that only the director-general with the custody of the person may grant a correctional patient leave or revoke that leave.

Clause 81 Grant of Leave for correctional patients Section 143(1)

Clause 81 substitutes the words ‘the relevant director-general’ for ‘the director-general’ to clarify the intention that only the director-general who is responsible for the custody of the correctional patient may grant the person leave.

Clause 82 New Section 143 (1A)

Clause 82 directs the relevant director-general to consult with the chief psychiatrist before granting the person leave, this is because the chief psychiatrist is responsible for the person’s treatment, care or support while they are a patient in an approved mental health facility. The clause also says that if the person is in the custody of the health director-general then the corrections director-general or CYP director-general must be consulted before leave is granted.

This is important as the person will be a detainee or young detainee and the corrections director-general or CYP director-general may have information that has bearing on the leave decision.

Clause 83 Section 143(4)

Clause 83 deletes section 143(4) as being redundant because of the amendments by Clause 81 and Clause 82.

Clause 84 Revocation of Leave for Correctional Patients Section 144(1)

Clause 84 substitutes the words 'the relevant director-general' for the words 'the director-general' to clarify the intention that only the director-general who is responsible for the custody of the correctional patient may revoke the person's leave.

Clause 85 New Section 144 (1A)

Clause 85 inserts 'directs the relevant director-general to consult with the chief psychiatrist before revoking the person's leave.' This is because the chief psychiatrist is responsible for the person treatment, care or support while they are a patient in an approved mental health facility. The clause also says that if the person is in the custody of the health director-general then the corrections director-general or CYP director-general must be consulted before leave is revoked (refer to Clause 82).

Clause 86 New Chapter 8A

Clause 86 provides the mechanism and regime in the Act for the official handover of legal custody of detainees from ACT Corrective Services and ACT Community Services Directorate (Child and Youth Protection Services) to the ACT Health Directorate. This transfer provision is for people requiring mental health treatment that cannot be provided while in the custody of another area of the ACT Government. This includes people on mental health orders and forensic mental health orders, and people held by ACT Corrective Services or the ACT Community Services Directorate (Child and Youth Protection Services) who are not being held in relation to mental health matters. This includes people held on remand, and people who have been sentenced.

Transfer of custody is intended to support the health outcomes for people in the custody of the ACT Government. This aligns with the other provisions around transfer of people to ACT Health facilities, which are currently in the Act, the *Corrections Management Act 2007* and the *Children and Young People Act 2008*. This supports the right to health, which must not discriminate between detainees and non-detainees.

This also works on the acceptance in-principle by the ACT Government of the sixth recommendation of the ACT Health Services Commissioner to make amendments to:[4]

> *'[t]he Corrections Management Act and/or the Mental Health Act [...] to enable the transfer of custody from Corrective Services ACT to Mental Health ACT when a detainee is transferred from the AMC to an inpatient mental health facility'*

This amendment acknowledges the practicalities of maintaining custody within the Adult Mental Health Unit and other approved mental health facilities that are not a secure mental health

[4] Ibid, pages 3 and 32-33.

facility.

Clause 86 inserts 6 new sections into the *Mental Health Act 2015*:

- Section 144A – Transfer of legal custody if person admitted to secure mental health facility.
- Section 144B – Taking person to appear before court.
- Section 144C – Release etc on change of status of person.
- Section 144D – Power to apprehend if person escapes from secure mental health facility.
- Section 144E – Transfers to health facilities.
- Section 144F – Escort officers.
- Section 144G – Crimes Act escape provisions

Section 144A Transfer of custody if person admitted to secure mental health facility

Section 144A (1) provides the point at which the director-general responsible for the Act obtains the custody of a person who is transferred to a secure mental health facility from a detention place (young detainee) or correctional centre (detainee).

This includes people who are on a forensic mental health order or a mental health order or are a correction patient (voluntary).

Subsection (1) says that the director-general obtains custody of the person from the point at which they are admitted to the secure mental health facility.

The custody does not transfer until *the point of admission* to the secure mental health facility. Custody is not transferred where the person attends a hospital (including the Emergency Department) or is admitted to an approved mental health facility or an approved community care facility that is *not* the *secure* mental health facility.

At the point of admission:

- If the person is a detainee under the *Corrections Management Act 2007*, section 217 provides that the detainee ceases to be in the custody of the director-general for corrective services.
- If the person is a young detainee under the *Children and Young People Act 2008*, section 245 provides that the young detainee then ceases to be in the custody of the CYP director-general.

Custody ceases at discharge

Section 144A (2) provides that the person stops being in the custody of the director-general at the point that they are discharged from the secure mental health facility.

Written notice of transfer of legal custody Section 144A (3) provides that the director-general must give immediate written notice that the custody has been transferred to the director-general to:

- the corrections director-general (if the person is a detainee, which includes correctional patients); and
- the CYP director-general (if the person is a young detainee, which includes young correctional patients).

The immediate written notification to corrections director-general and the CYP director-general of the transfer of the custody to the director-general of Health ensures that it is clear as to who has the responsibility for the custody of the person at any point in time. The director-general must give written notice that the custody has been transferred to the director-general as soon as

practicable to a range of entities. These entities are:

- the ACAT;
- the public advocate;
- the person;
- a nominated person (if the person has a nominated person); and
- if the person is a child each person with parental responsibility for the child under the *Children and Young People Act 2008*.

This is to ensure that relevant people are aware of who holds the custody of a person at any particular point in time. This allows appropriate oversight of the custody and decisions to transfer people.

Section 144A (4) – written notice of intention to discharge

Section 144A (4) is designed to ensure that the relevant director-general is provided with written notice that the detainee or young detainee is likely to be discharged from a secure mental health facility. This is if the director-general for the Act becomes aware that the person responsible for their mental health care (generally the chief psychiatrist) forms an intention that they will discharge the person.

This subsection has two functions:

1. It allows the relevant director-general (corrections or CYP) to prepare to transfer the person to a corrections centre or detention place; and
2. It allows the relevant director-general to take action if they believe that the person may continue to require mental health (or other health care) elsewhere than the secure mental health facility. This action might (for example) include applying for an assessment order or suggesting to the chief psychiatrist that they not discharge the person at this point.

Section 144A (5) – written statement of relevant information during transfer

Section 83 of the Act provides that where a person is apprehended under the *emergency detention* powers and takes the person to an approved mental health facility, they must give the person in charge of the facility a written statement contained a description of the action taken under the section giving them power to apprehend and transfer (section 80). This includes the nature and extent of the force or assistance used to enter any premises, or to apprehend the person and take the person to the facility, the nature and extent of any restraint, involuntary seclusion or forcible giving of medication used when apprehending the person or taking them to the facility, and anything else that happened when the person was being apprehended and taken to the facility that may have an effect on the person's physical or mental health. That section also requires that a register be kept of any use of restraint, involuntary seclusion, or forcible giving of medication.

Section 144A (5) would provide this same level of recording and reporting requirement to the transfer of a person from the custody of the corrective services director-general or the CYP director-general to the director-general responsible for the Act.

This might for example include that:

- the person was in an agitated state and hit their head against the side of the transport vehicle on the way between the prison and the secure mental health facility; and/or
- the person was subject to a threat of violence from another person (which may lead to concern if that person is also transferred to the facility or the person is returned to the correction centre

or detention place); and/or

- physical force and/or restraint (including handcuffs) were used to collect the person from a cell or a common area of the prison, in the lead up to them being transported to a mental health facility.

This written statement includes (but is not limited to) events that occurred in the lead up to, the transport to, and entry to a secure mental health facility.

This provision would help to ensure that those holding the custody and providing treatment are aware of anything that may be impacting on the person or presenting a danger to that person or to others.

Section 144A(6) provides that the director-general must enter the written statement (144A(5)) in the person's records, keep a register of any restraint, involuntary seclusion or forcible giving of medication included in the statement; and tell the public advocate, in writing, of any restraint, involuntary seclusion or forcible giving of medication included in the statement.

Section 144A (7) provides that the person may be transferred from another unit to a secure mental health facility of the Canberra Hospital, for example the Adult Mental Health Unit.

Section 144B– Taking person to appear before court

Section 144B transfers the custody from director-general responsible for the Act when the detainee (including a correctional patient) or young detainee (including a correctional patient) is required to appear before a court. This is for any appearance before any court at any point.

Subsection (1) provides the context to the section, that section 144B applies to a person who is in the custody of the director-general responsible for the Act (as a result of section 144A).

Subsection (2) provides that the CYP director-general or the corrections director-general must tell the director-general about the requirement for a person to be at court as soon as practical after becoming aware of it.

Subsection (3) directs where the legal custody is transferred to for the purpose of the person attending court. Subsection (a) provides that it is to the CYP director-general if the person is a young detainee. Subsection (b) provides that it is to the corrections director-general if the person is a detainee or a correctional patient.

Subsection (4) provides that the person returns to the legal custody of the director-general responsible for the Act at the point where they are physically returned to the secure mental health facility after a court appearance.

Section 144A (3) will apply when the person is returned to the secure mental health facility.

Section 144C – Release etc on change of status of person

Section 144C provides for the circumstances where a person is no longer able to be legally detained at the secure mental health facility or detained under any court order.

Reasons that the person may no longer be required to be detained are provided for in subsection (1) These include that the person's sentence of imprisonment ends, the person is released on parole, the person is released on the order of a court, the relevant charge against a person is dismissed or the director of public prosecutions notifies ACAT or a court that the relevant charge against the person will not proceed; and the person is not required to be detained under another court order. This is the case for correctional patients, detainees and young detainees.

Subsection (2) provides the actions that the director-general responsible for the Act must make if any of the circumstances in subsection (1) arise. The director-general must take one of four actions which are provided for in subsections (2) (a), (2) (b), (2) (c) or 2(d). These actions are: to continue to provide treatment, care or support to the person in an approved mental health facility if the person requests that to happen, release the person from the secure mental health facility, make any other decision that they are allowed to make in relation to the person under the Mental Health Act (those decisions might include for examples: applying for a mental health order or an emergency apprehension), or if the person is a child without decision-making capacity to make the request, continue the treatment of the child in an approved mental health facility at the request of a person with parental responsibility for the child.

Subsection (3) provides a notice requirement for the outcome of the decision under subsection (2) about what happens if a person is no longer required to be detained. This provides some accountability and oversight of that decision and helps to ensure the right to health is maintained during the change of status. It also includes the person in the decision that is made. The notice must be given to each of the following entities and people (where they exist for the person): the ACAT, the public advocate, the person, the nominated person, if a child – each person with parental responsibility, the guardian and the attorney.

Section 144D Power to apprehend if person escapes from secure mental health facility

Apprehension is the process of legally taking (or re-taking) a person into custody. A person cannot be apprehended by anyone without a lawful process. In the event that someone escapes from the legal and physical custody of the director-general responsible for the Act, while lawfully detained by the ACT Government, there needs to be a legal power for the director-general to regain that legal and physical custody. This includes a power for police or other officials to apprehend that person or those persons. Other officials are authorised ambulance paramedics, mental health officers or doctors.

The ACT common law and human rights systems protect people from imposition on their private property and privacy. Lawful permission is required for a person to enter private property. Where that permission is overridden for a legally valid reason, this needs to be clearly prescribed in law.

Clause 84 creating section 144D provides the legal power for the apprehension of people who are in the custody of the director-general responsible for the Act and who escape from the secure mental health facility.

Section 144D (2) provides that the director-general must immediately inform the police that a person who is a detainee or young detainee, and who is in the custody of the director-general at the secure mental health facility, has escaped. While the custody of the person has transferred to the director-general of Health and the CMA or CYP Act does not apply to the person, the person is still subject to the court ordered custody and escaping from that custody may be criminal offence. The director-general of Health is responsible for administering that court ordered custody and its consequences (refer to Section 144G).

Clause 84, section 144D provides the legal power for officials to enter private premises to apprehend a person who has absconded from the custody of the ACT Health Directorate (the chief psychiatrist or health director-general).

Combined with section 263– apprehension and entry

Section 144D would combine with the detailed apprehension and entry mechanism provided for in section 263 of the *Mental Health Act 2015*. It also provides for the use of the minimum force and assistance to be used in the process of apprehending the person (S 264 of the Act). This includes entering any premises (place).

Searching property and person encroaches on the common law and human rights to privacy and protection of private property. The taking or the use of the property of a person also encroaches on the common law and human rights to protection of private property.

Combined with section 264 – search and seizure

Section 144D would combine with section 264 (if also amended) to provide the legal power for ACT Health Directorate officials (chief psychiatrist, health director-general - or other officials acting on their behalf) to search a premises or a person in the process of apprehending someone who has absconded from the custody of the ACT Health Directorate. Sections 144D and 264 would also provide the legal power for the ACT Health Directorate (chief psychiatrist, health director-general - or officials acting on their behalf) to seize property of another which they reasonably believe is involved in the process of absconding, or which they believe may cause harm to the person or to others.

Notice of person absconding

Subsection (3) provides that written notice must be given to a range of persons and position holders in the event that a person escapes from the secure mental health facility *while their legal custody is held* by the director-general for the Act.

This notice requirement is to ensure that relevant people are informed and may take action where necessary to provide for the health needs of the person and the person is apprehended.

Recording and reporting of relevant information about apprehension

Section 144D (4) and (5) would provide a level of recording and reporting requirement to the process of apprehending a person who has escaped from the legal custody of the director-general responsible for Act.

This might for example include that:

- physical force and/or restraint (including handcuffs) was used to apprehend the person; and/or
- the person was in an agitated state and hit their head against the side of the transport vehicle on the way to the secure mental health facility; and/or
- a package of white powder fell out of the person's pocket.

This written statement includes (but is not limited to) events that occurred in the lead up to, the physical apprehension, the transport to, and entry to the secure mental health facility.

This provision would help to ensure that those holding the custody and providing treatment are aware of anything that may be impacting on the person or presenting a danger to that person or to others.

<u>Section 144E – Transfers to health facilities</u>

Clause 86 creating section 144E provides the legal mechanism for the director-general responsible for the Act to transfer a person to another health facility for treatment. This is an

equivalent power to that in the *Corrections Management Act 2007*, section 54 and the *Children and Young People Act 2008*, section 109. As such, it should be interpreted in similar ways.

Subsection (1) provides that the director-general may direct that the person be transferred to a health facility on certain grounds.

Subsection (2) provides that in making the decision in (1), the director-general is required to have regard to the advice of the person's treating doctor in making that decision. This is to ensure that the decision is made consistently with the medical needs of the person, and thereby consistent with their right to health, and their right to health equal to that of a person who is not detained.

Subsection (3) provides the power for the director-general to direct that a person be escorted to or from a health facility or while at a health facility. This escort is to be consistent with the more detailed provisions in section 144F.

Subsection (4) provides the mechanism for what happens if a person is no longer requiring treatment at the other health facility, or they require more urgent treatment at another location. (4) provides that the decision to discharge them must be made by either the health practitioner in charge of the person's care at the other facility (where they have been taken to under the direction in (1)) or by the director-general responsible for the Act- who retains their legal custody. The decision in (4) must be made consistently with the objects and principles of the Act.

Subsection (5) explicitly states that the person's health must be considered in a decision under (4). Health is intended to be a primary consideration, which is also in the best interests of the person if they are a child.

Subsection (6) provides that the director-general may give a direction for ensuring that a person discharged from a health facility under subsection (4) is returned to a secure mental health facility.

Section 144F – Escort officer

Clause 52 creating section 144F provides the legal basis for escort officers to accompany a person while they are not at a secure mental health facility (see specifically (1)). It also provides the explicit intention that the person can be in the custody of the director-general for the Act and the custody of the escort officer at the same time (2).

Subsection (3) provides the definitions of who can be escort officers for the purpose of escorting the person. Escort officers include authorised health practitioners, an authorised person (under the *Mental Health (Secure Facilities) Act 2016*, section 67), police officers, corrections officers and youth detention officers (whose functions include escorting the person).

Regarding corrections officers and youth detention officers, this will only occur with the prior agreement of the corrections director-general or the CYP director-general. It is to be used where corrections officers or youth detention officers have the required expertise to safely escort a person while on leave or to another health facility (section 144E).

Section 144G - Crimes Act escape provisions

A person taken to be in the custody of the director-general of health for this part is in custody for the treatment, care or support of their mental illness, Section 144G makes it clear that they are also taken to be in lawful custody in relation to the offence for which they are a detainee or

young detainee. This means that the *Crimes Act 1900*, part 7 provisions may apply if the person escapes from the custody of the health director-general.

Clause 87 Application for approval Section 169 (1) and (2)

The provisions of the Act provide for an approval regime for the provision of psychiatric surgery under certain conditions set out in Part 9.3. The Act currently says that a doctor who is a psychiatrist (as the person who would perform the surgery) is the person who applies for the psychiatric surgery approval.

However, due to the particular medical expertise required, the person who *performs* the surgery should be *a neurosurgeon* and not a psychiatrist as currently described.

The application is made by a psychiatrist to the chief psychiatrist. Upon the application, the chief psychiatrist takes the application to a committee which has been appointed by the health minister under the Act, section 175.

Clause 87 would make this change and clarification to section 169. It does this through substituting replacement subsections 169 (1) and (2).

Section 169 if amended by clause 87 would read (amended text is emphasised in italics and bold):

169 Application for approval

(1) A doctor may apply to the chief psychiatrist for approval ***for a stated neurosurgeon*** to perform ***psychiatric*** surgery ***on a person***.

(2) The doctor ***who makes the application*** must be a psychiatrist.

(3) The application must be in writing and be accompanied by—

(a) a copy of the consent of the person; or

(b) if the consent is in an advance consent direction—a copy of the advance consent direction; or

(c) a copy of an order of the Supreme Court under section 173.

(4) The doctor must, as soon as practicable after giving the application to the chief psychiatrist, give a copy of the application to the person on whom the surgery is proposed to be performed.

Clause 88 Application to be considered by committee Section 170 (2) (c) (ii)

The amendment is designed to ensure that appropriate expertise is required to get approval to perform psychiatric surgery. Clause 88 combined with clause 89 (on requiring a joint application to the Supreme Court) would help to ensure that psychiatric surgery is only performed where it is medically appropriate, by a team of people working collaboratively together which is constituted by people who are properly qualified and experienced.

Clause 88 is an additional component to the amendment proposed in Clause 87.

Section 170 provides the process for the psychiatric surgery committee (appointed under section 175 by the health minister) to consider an application (under section 169) made by a psychiatrist

to the chief psychiatrist for a particular neurosurgeon to perform the proposed surgery.

Clause 88 amends section 170 (2) (c) (ii). In particular it amends the recommendations of the psychiatric surgery committee. The subsection if amended by clause 88 will read (emphasis added):

(2) The chairperson must as soon as practicable after receiving the application—

[...]

(c) give a written report to the chief psychiatrist that includes the following:

(i) the committee's recommendation about whether or not the chief psychiatrist should approve the performance of the psychiatric surgery;

(ii) if the committee recommends approval for the surgery—
(A) the conditions (if any) to which the approval should be subject; and

(B) a statement that the committee is satisfied that the neurosurgeon has the necessary qualifications and experience to perform the surgery;

(iii) the committee's reasons for making the recommendations in the report.

This amendment is to make sure that the outcomes of the approval process through the psychiatric surgery committee ensure that a properly qualified team of people are collaboratively conducting medically appropriate procedures.

Clause 89 Consent of Supreme Court Section 173 (1) and (2), except note

Section 173 provides the regime for the ACT Supreme Court to provide consent to psychiatric surgery on a person who does not have decision making capacity or an advance consent direction consenting to the surgery. The amendment makes the application a *joint* application to the Supreme Court between a psychiatrist and a neurosurgeon.

Subsection (1) describes who can apply and subsection (2) provides who can apply for the consent order.

Clause 89 is an additional component to the amendments in clauses 87 and 88, which change the application to be a doctor (who is a psychiatrist) applying for approval for a particular neurosurgeon to perform particular psychiatric surgery.

Clause 89 makes the application for consent of the ACT Supreme Court a joint application for the consent between:

a) the psychiatrist who made the application to the chief psychiatrist; and
b) the particular neurosurgeon stated in the application.

Clause 89 is intended to ensure that if approved a properly qualified team of people are collaboratively conducting medically appropriate procedures.

Clause 89 makes this amendment by substituting a replacement subsection (1) and a replacement subsection (2) in place of the current sub section (1), subsection (2), and except note. This replacement would read (emphasis added):

(1) This section applies if a ***doctor*** proposes ***that*** psychiatric surgery ***be performed*** on a

person but the person does not have decision-making capacity to consent or an advance consent direction consenting to the surgery.

(2) The ~~psychiatrist~~ ***doctor and the neurosurgeon who is to perform the surgery*** may apply to the Supreme Court for an order consenting to the performance of psychiatric surgery on the person.

Clause 90 When ACAT may be constituted by presidential member New Section 185 (1) (ca)

Clause 90 inserts a new subsection (ca) to include a review of involuntary detention under section 85(5) as a proceeding when ACAT may be constituted by only a presidential member. Section 85(4) says a person may apply to ACAT for the review of involuntary detention under section 85. Section 85(5) says ACAT must conduct the review within 2 working days and subsection (6) says ACAT may consider such an application for a review without holding a hearing. Neither Section 185 nor Section 186 refer to a review under section 85(5). Clause 90 clarifies the intentions implicit in Section 85(4), (5) and (6).

Clauses 91 When ACAT must be constituted by more members Section 186 (1) (b)

Clause 91 updates the reference to the title of section 79

Clause 92 Section 186 (1) (f)

Clause 92 updates the reference to the title of section 126

Clause 93 Notice of hearing Section 188 (3) (b)

Clause 93 updates the reference to the title of section 79 in reference to section 79(3)

Clause 94 Section 188 (3) (d)

Clause 94 updates the reference to the title of section 126 in reference to Section 126 (5)

Clause 95 Membership of mental health advisory council Section 240 (2) (c)

The Act currently provides for the establishment of a mental health advisory council to advise the Minister about emerging or urgent mental health issues; mental health service reforms; mental health policy; mental health legislative change; and anything else in relation to mental health requested by the Minister (section 241).

A range of different people with lived experience of, or professional expertise in, mental illness or mental disorder are to constitute the council. These include “someone with experience or expertise in mental health” (section 240(2) (c)).

The policy intention was that this person was intended to include the expertise of general practitioners or other people working in the *primary* health sector to contribute as part of the mental health advisory council. To make this explicit in the Act clause 95 would amend section 240(2) (c) to add in the word ‘primary’, so that it would read “someone with experience or expertise in ***primary*** mental health” (emphasis added).

Clause 96 Powers of entry and apprehension New section 263 (1) (ia)

Clause 96 is consequential to the sections in clause 86 (creating section 144D) which provide for entry and apprehension if a person who escapes from a secure mental health facility while they are under the legal custody of the ACT Health Directorate (chief psychiatrist or health director-general).

Clause 96 creates a new subsection 263(1)(ia). The insertion of this subsection would provide the regime for how the entry and apprehension of a person is to be conducted and reported on.

Clause 97 Powers of search and seizure New section 264 (1) (na)

Clause 97 supports the section in clause 86 section 144D which provides for the apprehension of people who escape from the custody of the director-general responsible for the Act, while at a secure mental health facility or while being escorted during a health transfer or while on leave.

Section 264 (if amended) would provide the required explicit legal power for a person authorised under the relevant section of the Act (section 144D for the purposes of clause 97 – section 264 (1) (na)) to search a premises, or a person, in the process of apprehending someone who has escaped from the custody of the director-general responsible for the Act.

Section 264(1)(na) if used with section 144D would also provide the legal power for a person (authorised under section 144D) to seize property of another which they reasonably believe is involved in the process of absconding, or which they believe may cause harm to the person or to others.

For further discussion on this clause, see the explanatory material above for clause 86, which discusses the creation of section 144D.

Clause 98 Dictionary, new definition of *health director-general*

Clause 98 inserts the new definition ***health director-general***, for part 8.4 (Leave for correctional patients) – see section 142A.

Clause 99 Dictionary, definition of *psychiatrist*, paragraph (b)

Clause 99 substitutes (b) meets the requirements prescribed by regulation, for the existing (b) holds limited registration under that law to practise in the speciality of psychiatry, as this definition is no longer current. The ability to change the definition by regulation will enable the Governments ability to be responsive to changes made by the Australian Health Practitioner Regulation Authority.

Clause 100 Dictionary, new definition of *relevant director-general*

Clause 100 insert the new definition ***relevant director-general***, for part 8.4 (Leave for correctional patients)—see section 142A.

Clause 101 Dictionary, new definition of *secure mental health facility*

Clause 101 inserts the new definition ***secure mental health facility***—see the *Mental Health (Secure Facilities) Act 2016*, section 7. This definition is needed for the provisions on the transfer of legal custody (Sections 144A – 144G, created by clause 86)

Schedule 1 Consequential amendments
Part 1.1 Children and Young People Act 2008

Clauses [1.1]-[1.3] amend the Children and Young People Act 2008.

Clause [1.1] Section 109 (3)

Clause [1.1] amends the *Children and Young People Act 2008*, section 109 (3) to make it clear that the CYP director-general can use escort officers to take young detainees to and from health facilities (including mental health facilities, but not a secure mental health facility) and accompany the young detainee while they are there.

Clause [1.2] New Section 109A

Section 109A provides that if the director-general has made a direction under section 109 for the transfer of a young detainee from a detention place to an approved mental health facility or an approved community care facility, then the director-general must tell the director-general responsible for the Act in writing about any change to the detainee's status as a young detainee.

Clause [1.3] Section 245(3) and note

Clause [1.3] provides for when a young detainee is transferred to a correctional centre under a direction under section 111 (Transfers to correction centres – under 21 years old), the young detainee is taken to be in the director-general's custody *only* until the young detainee is admitted to the corrections centre.

Clause [1.3] also amends the *Children and Young People Act 2008*, section 245 (3) to clarify that where the young detainee is taken to a secure mental health facility and admitted to a secure mental health facility that at this point the custody transfers to the director-general responsible for the Act. The receiving of the custody would be provided for in the Act, section 144A if amended by clause 52 of this Bill.

This section also provides the substantive provision that a young detainee is taken to be in the custody of the CYP director-general while they are taken to and from court. For more on transfers to court see section 144B created by clause 45 of this Bill, and the associated explanatory information above.

Clause [1.3] does this amendment by substituting section 245 (3) with a new section 245 (3) with two subsections (a) and (b). Subsection (a) retains the existing content of section 245 (3). Subsection (b)(i) adds in a provision that the young detainee is in the custody of the CYP director-general until they are admitted to a secure mental health facility. Subsection (b)(ii) adds a provision that the young detainee is in the custody of the CYP director general while they are transferred to court and until they are returned to the secure mental health facility unless the court removes the custodial order

Clause [1.4] Dictionary, new definition of secure mental health facility

Clause [1.3] amends the dictionary of the *Children and Young People Act 2008* to insert a definition of a secure mental health facility. This definition provides that the definition will be from the *Mental Health (Secure Facilities) Act 2016*, section 7.

Part 1.2 Corrections Management Act 2007

Clauses [1.4]-[1.6] amend the *Corrections Management Act 2007*.

Clause [1.5]Section 54(3)

Clause [1.5] amends the *Corrections Management Act 2007* section 54(3) to make it clear that the corrections director-general can use escort officers to take detainees to and from health facilities (including mental health facilities, and accompany the detainee while they are there, but not accompany the detainee while they are at a secure mental health facility.

Clause [1.6] Section 54A heading

Clause [1.6] substitutes a new heading for section 54A to be 'Transfer to a mental health facility and notice of change in status.

Clause [1.7]New section 217 (3) and (4)

Clause [1.7] inserts into section 217 – Lawful temporary absence from correction centre – a new section in relation to change of status of custody when a detainee is transferred to and from a secure mental health facility.

Clause [1.7] amends the *Corrections Management Act 2007* to clarify that the corrective services director-general has the legal custody of a detainee taken to a secure mental health facility until the detainee is admitted to the secure mental health facility. This can be for detainees on mental health orders, forensic mental health orders or as a correctional patient.

The clause sets up the operation of the Act, Chapter 8A which provides that at the point of admission to a secure mental health facility, the custody of detainee transfers to the director-general responsible for the Act.

This section 217 (3) (b) also provides the substantive provision that a detainee is taken to be in the custody of the corrections director-general while they are taken to and from court while admitted to a secure mental health facility.

Clause [1.8] Dictionary, new definition of secure mental health facility

Clause [1.8] amends the dictionary of the *Corrections Management Act 2007* to insert a definition of a secure mental health facility. This definition provides that the definition will be from the *Mental Health (Secure Facilities) Act 2016*, section 7