

Agreement in Principle

Mr PAUL LYNCH (Liverpool—Minister for Local Government, Minister for Aboriginal Affairs, and Minister Assisting the Minister for Health (Mental Health)) [10.33 a.m.]: I move:

That this bill be now agreed to in principle.

I am delighted to bring before the House the Mental Health Legislation Amendment (Forensic Provisions) Bill 2008, which represents a culmination of the extensive review of New South Wales mental health legislation that began in 2004. It will introduce laws relevant to the twenty-first century, not the eighteenth century. In 2004 this Government commenced a review of mental health legislation that resulted in a new Mental Health Act in 2007. It was, however, recognised during the course of the review that changes in the law applying to forensic patients raised a range of issues that required careful consideration. To this end, the Government convened a separate review of the Forensic Provisions of the Mental Health Act 1990 and the Mental Health (Criminal Procedure) Act 1990, and appointed the President of the Mental Health Review Tribunal, and former Supreme Court Judge the Hon. Greg James, QC, to conduct it. I note the presence of Mr James in the Chamber today.

The review was undertaken over a 12-month period and involved extensive consultation with key stakeholders such as victims groups and health professionals and agencies involved in the provision of services. The consultation process involved a 25-member reference group, chaired by Mr James, made up of representatives of a number of agencies and organisations. After preliminary consultations, a consultation paper was issued in December 2006. The paper outlined current law and practice and options for reform. Some 50 formal submissions were received in response to the paper. Additional consultation meetings were then undertaken with doctors, staff, patients and others involved in all aspects of the forensic mental health systems in New South Wales and elsewhere. The Government takes this opportunity to thank all those who contributed so much to assist with the review. Mr James's report has been accepted by the Government and was released in April 2008. The vast majority of its recommendations have been adopted.

The report made 34 separate recommendations, including a substantial number of recommendations for amendments to the forensic provisions of the mental legislation. One of the unusual features of the current New South Wales system is that it makes use of what is known as the "executive discretion" to determine release of forensic patients. The term "forensic patient" generally covers persons who have been found not guilty by reason of mental illness of committing a crime, as well as people who are found to be unfit to stand trial. Under current law the term also covers correctional inmates subject to a term of imprisonment who have been transferred for mental health care.

The executive discretion is a concept that dates back centuries. It is a concept that has been abandoned in most Australian jurisdictions and in equivalent jurisdictions around the world, including in England and in Canada. In his review the former Supreme Court judge identified a range of problems with the reliance on executive discretion. These included that the system is cumbersome, overly bureaucratic and operates without transparency or accountability. It is not in accord with other systems for care and treatment of forensic patients in Australia and elsewhere. It results in the detention of unconvicted patients in jail so long that in many cases that detention extends longer than public safety would require and also longer than any sentence that would have been imposed had the patient been convicted and sentenced.

The system presents difficulties for patients, families, carers and victims who need a formal transparent process in which to express their views and concerns. The report concluded that for these reasons important decisions on release and leave for forensic patients should be transferred to the Mental Health Review Tribunal. Mr James also recommended a range of other changes to ensure the system is more robust and accountable, and provides formal recognition of victims of crime. The main features of the new system for decision making established in this amending legislation is as follows. Orders for care, treatment leave and release of forensic patients will be made by a Forensic Division of the Tribunal using a specially constituted panel which, under the legislation on matters of release, must be presided over by a sitting or former judge. Providing for this degree of senior legal oversight will ensure an appropriate degree of regard for the law, legal processes and the public interest.

Before making an order for release, the special panel will be required to consider a number of statutory considerations, which are set out in clause 74 of schedule 1 to the bill. These include matters such as whether the person is mentally ill, whether care, treatment or control is necessary to protect the person or others from serious harm, the possibility of the person's condition deteriorating over time and the likely impact should this occur. Most importantly, where release is proposed, the panel will also be required to consider independent safety reports from a psychiatrist not involved in the care of the person. Where a forensic patient has been made subject to a limiting term under the Mental Health (Criminal Procedure) Act, the panel will also need to have regard to the length of that term and consider whether the person has spent a sufficient time in custody.

I would also like to emphasise that the tribunal will only be able to release a forensic patient if the tribunal is satisfied that the safety of the patient and any member of the public will not be seriously endangered by the patient's release. The tribunal will have the power to grant either conditional or unconditional release of a forensic patient. If a patient is granted conditional release, the patient will remain a forensic patient and will be subject to six monthly reviews by the tribunal. In his review, Mr James recognised that these are important decisions in which the Government will maintain an interest. To this end, he also recommended that the system provide both the Minister for Health and the Attorney General with a right to make submissions to the panel, where leave or release of a patient is under consideration. This right has been provided for under clause 76A. Further, under clause 77A of the bill, the Minister for Health has a right of appeal on questions of fact and law from decisions of the tribunal and the Attorney General has a right of appeal on questions of law.

The Government's terms of reference for the James review specifically asked Mr James to consider the role of victims and, in particular, the means by which their views and concerns can be addressed in the forensic review process. Mr James made a number of recommendations to ensure the recognition of victims. I am pleased to advise the House that all these recommendations have been adopted and are provided for in the current bill by a power to make regulations for a range of provisions expressly recognising the role of victims in the forensic decision-making process. The tribunal has already taken initial steps in this important area.

Amendments to section 160 of the Mental Health Act 2007 in schedule 2 to the bill will allow further regulations to be made to provide for the establishment and use of a victims register, the notification of victims of tribunal decisions in proceedings relating to forensic patients or correctional patients, and notification of victims of the termination of status of persons as forensic patients. These changes will allow the Government to establish and make use of a victims register and will allow the tribunal to notify victims of key information affecting them, including tribunal decisions, prospective releases and when a forensic patient's status is terminated. These regulations will, in turn, further enhance the current processes recently put in place by the Mental Health Review Tribunal, which allow victims of crime to make submissions to the tribunal on release issues.

Under new section 76, the tribunal will be given specific powers to include in its orders restrictions to prevent a patient from associating with a victim, as well as a power to prohibit or restrict a patient from visiting certain places. These non-association orders and place restriction orders can be made at the tribunal's own motion or, importantly, after an application by the victim. A victim will also have a right of appeal, with leave, from a decision regarding an application for a non-association order or place restriction order. Mr James consulted extensively with groups representing victims of crime during the course of his review. The groups consulted include the Homicide Victims Support Group, Enough is Enough and the Victims of Crime Assistance League, all of which also participated as part of the review task force. I am advised that these groups have indicated their support for the recommendations of the report, including the transfer of decision making to the tribunal. They see the move to a specially constituted forensic panel, presided over by a judge or former judge, along with the formal recognition of victims in the legislation, as a major improvement to the current system.

The James report also recommended creating a new category of patients treated under mental health legislation to cover persons who are transferred into a mental health facility for mental health care while on remand or serving a sentence of imprisonment in a correctional centre. The current legislation treats such patients as forensic patients. However, as the James report concluded, this raises a number of problems and does not correctly reflect the status of these patients. Mr James said:

the admission of a remandee or convicted offender to a mental health facility is analogous to the admission of any other member of the community to hospital for mental health treatment.

In accordance with the James review, the bill recognises that those who are transferred for care or treatment have a quite different status from that of forensic patients. Forensic patient status will generally apply to a person who has been found not guilty of a crime due to their mental illness or who has been found unfit to stand trial. Correctional patients, however, will be persons who are subject to a sentence of imprisonment after having been found guilty of a crime or who have been charged with a crime and refused bail. The bill recognises the legal distinction between these two classes of patients by classifying inmates and persons on remand who are transferred to a mental health facility as "correctional patients". Correctional patients will have the same access to mental health treatment as forensic patients, but correctional patients will remain subject to their sentence of imprisonment, including the laws and processes that follow from that status.

New provisions set out in clause 67 of the bill will also allow the tribunal to make community treatment orders for correctional centre inmates. This means that where it is appropriate and in accordance with the normal requirements for the granting of a treatment order an inmate can receive mental health treatment while in a correctional setting. Treatment orders will be used when a patient's condition has been stabilised in hospital to ensure that his or her mental health will not be allowed to deteriorate upon release back into the community or prison environment. As Mr James noted in his review, "As with the compulsory orders operating in the community, this will assist the long-term management of an offender's mental health." The review noted that some concerns were expressed in submissions that there was potential for abuse of such a system. To this end and to ensure that there is adequate implementation of these orders, Mr James recommended that an inmate the subject of a community treatment order should be reviewed by the tribunal every three months rather than

the standard six-monthly review for forensic and correctional patients. This is reflected in clause 67.

I should note that changes brought in under the new Mental Health Act in 2007 began the process of allowing treatment orders to be made by the tribunal in relation to a forensic patient recommended to be released conditionally or to be transferred to a correctional centre. This power was, however, subject to confirmation through the exercise of the executive discretion. The new changes ensure the power is clearly placed with the tribunal. The Act also provides for regulations to be made to adapt the current civil rules to ensure consistency with the laws applying in a correctional setting. It is important to recognise that care, treatment and monitoring of patients covered by these laws involve a range of different government agencies, including agencies in the Health portfolio, such as Justice Health, and other agencies such as Corrective Services and Juvenile Justice. From time to time other human service agencies, such as the Department of Ageing, Disability and Home Care or the Department of Community Services, may also have a role in some service provision for patients or their families.

One of the important elements to come out of the overall review of the Mental Health Act was the need to enhance and support agency cooperation in providing services to persons with a mental illness. This is also a key consideration when looking at the situation of forensic patients. To this end, the bill proposes to include in a new section 76G in the Mental Health (Criminal Procedure) Act provisions similar to those applying under the civil law to ensure that agencies that may be involved in providing services to a person or carers or family members after the person is released are consulted as part of the release planning.

The bill will also add provisions to the Act to ensure that agencies that may have a role in providing services after release use their best endeavours to respond to requests the tribunal may make in performance of its functions. This will enhance the capacity of the tribunal to assist in developing coordinated service plans for patients on release. I take this opportunity to thank Mr Greg James, the president of the tribunal, for conducting the review of the laws in this area. His considered and thoughtful work and recommendations have provided a good platform for reform. I am sure that Mr James would also want me to thank his team at the tribunal and a number of people at New South Wales Health for their cooperation and assistance in undertaking the review. I commend the bill to the House.