Second Reading

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [8.15 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

I am pleased to bring before the House the Health Legislation Further Amendment Bill 2010.

This bill makes a number of changes to:

· the Health Records and Information Privacy Act 2002,

· the Mental Health Act 2007, and

· the Mental Health (Forensic Provisions) Act 1990.

The amendments to the Health Records and Information Privacy Act are set out in Schedule 3 to the bill and are designed to respond to the establishment of healthcare identifiers by the Commonwealth Healthcare Identifier Act 2010.

The Healthcare Identifier Act, which commenced on 1 July 2010, establishes the healthcare identifier service and authorises the assignment of healthcare identifiers to individuals and healthcare providers. The Act will assist in improving the management and communication of health information and is a key component of the development of electronic health records.

Privacy is a key concern in the Commonwealth Healthcare Identifier Act, which sets out limits on authorised uses and disclosures of healthcare identifiers. It also creates offences and penalties for the misuse of healthcare identifiers.

The establishment of the healthcare identifier service was agreed to by the Council of Australian Governments, which also agreed that the Commonwealth provisions would apply to the States and Territories on an interim basis until the States and Territories enacted appropriate laws to regulate the use and disclosure of healthcare identifiers.

As such, the Commonwealth Healthcare Identifier Act enables the Commonwealth Minister to declare that specified provisions of the Commonwealth Act do not apply to the public bodies of a specified State or Territory provided that the Commonwealth Minister is satisfied that there are appropriate laws, as determined by the Ministerial Council, in force in the State or Territory.

The ability of the Commonwealth Minister to make a declaration recognises that some State and Territories already have robust privacy laws that apply to their public sectors, and that it is appropriate to utilise those laws in regulating the use and disclosure of healthcare identifiers by the public sector within a particular State or Territory.

It is the New South Wales Government's intention to seek a declaration from the Commonwealth Minister that the Commonwealth Healthcare Identifier Act does not apply to the New South Wales public sector and apply New South Wales law instead.

If such a declaration is made, the use and disclosure of healthcare identifiers by the New South Wales public sector will be regulated by one law, the New South Wales Health Records and Information Privacy Act, and the NSW Privacy Commissioner will have the power to investigate complaints against the misuse of healthcare identifiers by the New South Wales public sector, as is currently the case with all health information. New South Wales law will also be able to adopt the strict penalties applying to the Commonwealth offence provisions.

Schedule 3 of the bill before the House is an integral part of this process. Schedule 3 amends sections 4 and 6 of the Health Records and Information Privacy Act to ensure that the Commonwealth healthcare identifiers are considered health information under New South Wales law.

The bill will also insert a new section 75A into the Health Records and Information Privacy Act to allow regulations to be made with respect to healthcare identifiers, including regulations relating to the use and disclosure of healthcare identifiers.

Section 75A also makes it clear that any use or disclosure of a healthcare identifier in contravention of the regulations is an offence with a maximum penalty of 120 penalty units and/or 2 years imprisonment for individuals and 600 penalty units for corporations. This is consistent with the Commonwealth Healthcare Identifier Act.

To ensure that the Ministerial Council established under the Commonwealth Healthcare Identifier Act is satisfied that the regulations provide appropriate directives regarding the use and disclosure of healthcare identifiers, NSW Health will consult with the Commonwealth and other States and Territories before making regulations under the new section 75A of the Health Records and Information Privacy Act.

This will in turn ensure that, once appropriate regulations are in place, a declaration can be sought from the Commonwealth Minister under section 37 of the Commonwealth Healthcare Identifier Act.

I turn now to Schedules 1 and 2 of the bill which make a number of amendments to the Mental Health Act 2007 and the Mental Health (Forensic Provisions) Act 1990. These amendments are intended to clarify matters relating to the operation of both Acts.

The bill makes a number of amendments to the power of the Mental Health Review Tribunal in reviewing patients under the Mental Health Act. The bill amends section 37 to make it clear that the tribunal is empowered to review an involuntary patient at any time it sees fit, in addition to the mandatory reviews conducted at least every 3 months in the first 12 months of detention and at least every 6 months thereafter.

Consequential amendments have also been made to section 37 to ensure that it is the duty of the authorised medical officer to bring a patient before the tribunal at any review.

The bill also amends section 40 of the Mental Health Act to give the tribunal the power to reclassify an involuntary patient as a voluntary patient when conducting a review of the patient. Currently, this power only resides with the authorised medical officer and the amendment will ensure that the tribunal also has this power.

The review by the tribunal of involuntary patients is an important safeguard of patients' rights and the amendments in the bill will assist in ensuring the tribunal is properly empowered to conduct reviews of patients where appropriate.

The bill also makes a number of minor changes to the provisions in the Mental Health Act relating to community treatment orders (CTOs).

Under the Mental Health Act, the tribunal may make a CTO which authorises the compulsory treatment of a person in the community. A number of requirements must be met before a CTO can be made.

These requirements include, at section 53 (2) (c), if the affected person has previously been diagnosed with a mental illness, that the affected person has a previous history of refusing to accept appropriate treatment.

Under section 53 (5) of the Act, a person who has a "*previous history of refusing to accept appropriate treatment"* must not only have refused treatment in the past, but the refusal must have led to a relapse into an active phase of a mental illness requiring involuntary admission into a mental health facility.

The Mental Health Review Tribunal has emphasised that this is a high threshold that will often not be met where there has been continual monitoring and supervision of a person with a mental illness. For example, this threshold may not be met for a person who has recently been on a CTO or a person who has previously been a forensic patient.

Currently, section 53 (3A) provides that this threshold does not have to be met where the person has, within the last 12 months, been the subject of a CTO. In such circumstances, the Mental Health Act allows a CTO to be made if the tribunal is satisfied that the person is likely to continue in or to relapse into an active phase of mental illness if the order is not granted.

The bill proposes an amendment that would recognise that persons who were previously forensic patients are a further class of persons for whom this threshold requirement at section 53 (2) (c) should not apply.

The bill will amend section 53 (3A) to ensure that the tribunal, when considering an application for a CTO, has to be satisfied that a former forensic patient is likely to continue in or to relapse into an active phase of mental illness if the order is not granted. This will replace the existing requirement of having to consider whether the former forensic patient has a history of refusing to accept appropriate treatment.

The bill also clarifies the CTO breach provisions in the Mental Health Act. Section 58 will be amended to ensure that, after the director of community treatment has formed the view that a breach has occurred and a breach notice is required, the director can send a copy of the breach notice to the affected person's residential address only if it is not reasonably practicable to hand the notice directly to the affected person.

The forensic CTO provisions in the Mental Health (Forensic Provisions) Act 1990 are also amended in the bill in order to clarify that the tribunal can make a forensic CTO in respect of all forensic patients, rather than only those in a correctional facility. This will ensure that a forensic CTO may be made for forensic patients who are in, for example, a hospital or an aged care facility.

The bill also includes minor amendments to Division 2 of Part 3 of the Mental Health Act, which relates to the regulation of the administration of electro-convulsive therapy (ECT) to involuntary patients.

This amendment is proposed to correct a discrepancy in the current requirements whereby two medical practitioners must certify that ECT for an involuntary patient is "*necessary **or** desirable for the safety or welfare of the patient*", but the tribunal, when making a determination, must be satisfied that the ECT is "*necessary **and** desirable*",

Whilst the difference is minor it does nonetheless import different tests in relation to the administration of ECT. Given that the equivalent provision of section 96 (3) in the previous Mental Health Act 1990 contained the words "*necessary or desirable*", the replacement of the word "or" with "and" in the current Act appears to be an typographical error. Accordingly, the bill amends section 96 to replace the words "*necessary and desirable*" with "*necessary or desirable*".

The final amendments to the Mental Health Act relate to section 150 which deals with the composition of the tribunal.

When exercising its functions under the Mental Health Act, the tribunal must consist of at least 1 member who is to be the President, a Deputy President or a member who is an Australian legal practitioner. In addition, section 151 (3) allows the President of the tribunal to nominate:

a) a member who is a psychiatrist, and

b) a member who (not being an Australian lawyer) has other suitable qualifications or experience.

The requirement that the member not be an Australian lawyer is intended to ensure that the tribunal allows representatives from the medical and community sector to sit as members.

The general intent of this requirement is supported. However, the requirement that the member who has other suitable qualifications or experience not be an Australian lawyer has the effect of precluding members, who are appointed on the basis of their other suitable qualifications or experience, who are also Australian lawyers.

This can happen with persons who qualified as Australian lawyers early in their career and then later obtained other qualifications, such as in psychology. If such a person is appointed on the basis of their qualifications in psychology, section 151 (3) (b) prevents the person from sitting as a member who has other suitable experience or qualifications.

To rectify this situation, the bill amends section 151 (3) (b) to ensure that members appointed as having other suitable qualifications or experience are not prevented from sitting on a tribunal hearing merely because the member also happens to be an Australian lawyer.

I commend this bill to the House.