NSW Legislative Assembly Hansard

Mental Health (Criminal Procedure) Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Tuesday 8 November 2005.

Second Reading

Ms ALISON MEGARRITY (Menai—Parliamentary Secretary) [8.06 p.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Mental Health (Criminal Procedure) Amendment Bill. It is estimated that close to one in five people in Australia will be affected by a mental illness at some stage of their lives. The trend over the past five years indicates a substantial increase in the numbers of people with a mental illness who come before the courts. The prevalence of mental illness in the New South Wales correctional system is substantial and indicative of the high incidence of defendants in court who have mental illness. These amendments simplify procedures, improve operational efficiency and update the law with respect to people suffering a mental illness, mental condition or intellectual disability. This bill is the result of the most exhaustive process of consultation and we have reached an uncommon degree of consensus.

The amendments are based on the Law Reform Commission Report 80, "People with an Intellectual Disability and the Criminal Justice System". The Interdepartmental Committee on the Mental Health Criminal Procedure Act 1990 and Cognate Legislation was established to consider the recommendations. The committee comprised representatives from NSW Police, the Office of the Director of Public Prosecutions, Crown prosecutors, the Department of Corrective Services, NSW Health, including Corrections Health Service, the Community Court Liaison Service, the Centre for Mental Health, the Legal Aid Commission of New South Wales, public defenders, the Department of Community Services, the Department of Ageing, Disability and Home Care, the Mental Health Review Tribunal, the Department of Juvenile Justice, magistracy and the Attorney General's Department. The committee also proposed other recommendations independently. All of the recommendations of the committee were unanimously agreed upon.

I now turn to the specific provisions of the bill. Schedule 1 amends the Mental Health (Criminal Procedure) Act 1990. These amendments relate to the functions of the Attorney General, the court, the tribunal and the Director of Public Prosecutions. The first amendment relates to the question of fitness hearings. Item [1] amends section 8 of the Act to require the court, rather than, as at present, the Attorney General, to determine whether an inquiry should be conducted as to a person's fitness to be tried for an offence where this question is raised before arraignment. The court already has this power under section 9 of the Act in circumstances where the question of a person's fitness is raised after arraignment.

There is no good reason why the Attorney General makes the decision before arraignment and the court makes the decision after arraignment. When expert reports support the issue, invariably the Attorney General directs that an unfitness inquiry be conducted. This process takes time. It is an unnecessary process, particularly when the defence, the Crown and the court are of the same view that the issue of unfitness should be determined before the trial. Items [2] and [3] make consequential amendments. Items [8], [9] and [15] remove the Attorney General from the process of directing that fitness hearings and special hearings be conducted. Item [8] omits section 18 of the Act, which requires the Attorney General, after receiving notification from the tribunal that a person is unlikely to become fit to be tried for an offence within 12 months, to direct the court to hold a special hearing in respect of the offence or to notify the court and the Minister for Police that no further proceedings will be taken.

Item [9] substitutes section 19 of the Act to require the court to hold a special hearing after receiving such a notification unless the Director of Public Prosecutions [DPP] advises that no further proceedings will be taken. It is intended that the DPP's power to direct no further proceedings in relation to a special hearing matter mirror the DPP's powers in relation to criminal proceeding trial matters. Item [15] substitutes section 29 of the Act to require the court to hold a further inquiry into the fitness of a person to be tried for an offence if the tribunal has notified that a person who was previously found to be unfit to be tried has become fit. However, the court is not to hold a further inquiry if the Director of Public Prosecutions advises that the person will not be further proceeded against. Currently, the court holds such further inquiries at the request of the Attorney General. Unfitness through mental illness can be a fluctuating condition.

An unfit person may become fit, only to regress into a state of unfitness at some subsequent time. It is desirable that there be an efficient process for bringing a person who has been found unfit back before the courts promptly upon an indication from the tribunal that he has become fit. Once again, the removal of the Attorney General from this procedure will help to improve the efficiency of the process without adversely affecting the nature of the proceedings. Items [6] and [10] make consequential amendments. Item [7] amends section 17 of

the Act to require the court to notify the tribunal of the grant of bail or the detention of a person in a hospital or other place under that section. This is required because those on bail will now be forensic patients and subject to the review of the tribunal.

The next amendments relate to judge-alone fitness hearings and special hearings. Item [4] substitutes section 11 of the Act and omits section 11A to provide that the question of a person's unfitness to be tried for an offence is to be determined by the judge alone. Item [5] makes a consequential amendment. At present that question is determined by a jury unless the person, with the consent of the prosecutor, elects otherwise. The use of a jury in a fitness hearing delays proceedings and is unnecessarily costly. In the majority of cases there is no issue between the parties that the accused person is unfit, and both the Crown and defence experts agree on this. Despite this, because the accused is often not capable of making an election for a judge-alone hearing, the unfitness hearing must proceed before a jury.

Such a hearing may be significantly and unnecessarily protracted when compared with one that is determined by a judge alone who can often determine the issue of fitness by simply reading the expert reports and finalising the matter in less than one hour. In contrast, if the hearing proceeds before a jury, the process takes up to two days. The jury must be empanelled, the judge must explain to the jury the proceedings and its role, evidence of experts is more likely to be called rather than reports being relied upon, both the defence and the Crown address the jury, the judge sums up, and finally the jury considers its verdict. It is not uncommon for the jury to be confused as to its role and to return to court on several occasions to ask questions. On some occasions the questions relate to the guilt or innocence of the accused rather than the issue of unfitness.

The question of a person's unfitness to be tried is preliminary to any determination of guilt or innocence. Members of the jury may be perplexed and frustrated as they may not understand their purpose in the proceedings. Item [12] substitutes section 21A of the Act to provide that a special hearing is to be determined by the judge alone unless an election to have the special hearing determined by a jury is made by the accused person, a legal practitioner representing the accused or the prosecutor. At present a special hearing is determined by a jury unless the accused person, with the consent of the prosecutor, elects otherwise. This provision protects the rights of an accused person to have a jury determine the matter when it is in his or her best interests.

The unfitness of the accused will not be an impediment to electing for a jury, because the legal practitioner is allowed to make that decision. The accused person is entitled to elect for a jury up until the day before the day fixed for the special hearing. However, the prosecution must elect at least a week in advance in order to secure a jury. Item [11] makes a consequential amendment. Item [13] inserts proposed section 22A into the Act to enable the Director of Public Prosecutions to amend an indictment for a special hearing. The DPP follows a similar process in amending an indictment in ordinary criminal proceedings. It will save the accused person from having to undergo an unfitness inquiry again in relation to the fresh matters on the amended indictment. Item [14] amends section 23 of the Act to enable the court, when imposing a limiting term after a special hearing, to impose the term consecutively with, or partly concurrently and partly consecutively with, another limiting term applying to the person or a sentence of imprisonment imposed on the person.

This amendment is directed towards dealing with a deficiency in the legislation highlighted in the judgment of Justice Giles in *R v RTI* [2005] New South Wales Court of Criminal Appeal 337, in particular paragraph 45. The amendment gives effect to Justice Giles's suggestion that there should be a power to accumulate limiting terms. It is not intended that accumulation of limiting terms be dealt with in a way that is more onerous than the accumulation that takes place after a normal trial. The insertion of proposed section 23 (6) is intended to ensure that the court takes account of, and is guided as far as possible by, the provisions governing consecutive sentences after a normal trial. In all but the worst cases limiting terms where accumulation is warranted should be partly concurrent and partly consecutive.

The next amendments relate to proceedings under section 32. In summary proceedings before a magistrate, the magistrate has the power to divert the defendant away from being dealt with at law and being subject to a punishment. The purpose of section 32 of the Act is to allow defendants with a mental condition, a mental illness or a developmental disability to be dealt with in an appropriate treatment and rehabilitative context enforced by the court. As currently drafted, under section 32, a magistrate is required to consider the state of mind of the accused only at the time he or she appears before the court, not at the time the offence was committed. This is inconsistent with principles that apply in mental health criminal proceedings under part 4 of the Act concerning the defence of mental illness.

For example, a person may have committed a minor offence such as shoplifting during a manic stage of a manic depressive illness. By the time he or she appears in court—even one or two weeks later—his or her illness may be under control, the person having recommenced medication after arrest. As currently drafted, section 32 can be invoked only if the person is suffering from a mental condition or illness at the time of the hearing. Accordingly, item [17] amends section 32 to allow diversion for a person who suffers a mental condition or illness or a developmental disability at the time of the commission of the offence, even though they might have recovered by the time they appear before a magistrate on criminal charges. This means that the magistrate has

the option of adjourning the proceedings, granting the defendant bail, or making any other appropriate order.

It also enables the magistrate to dismiss the charges and to release the defendant unconditionally or into the care of a responsible person or subject to the condition that the defendant undertake specified treatment. Item [16] makes a consequential amendment. Items [18] and [20] amend sections 32 and 33 of the Act to require a magistrate to state reasons for his decision as to whether or not a defendant should be dealt with under those sections. This will provide more information about the type of people being refused applications and allow a body of law to be built up in this area. Item [19] inserts a new section 32A into the Act to permit a person who provides treatment in accordance with an order under section 32 to report failures to comply with the order and other associated information.

Service providers are to make breach reports to the Community Offender Services of Probation and Parole or to officers of the Department of Juvenile Justice, as the case requires. These agencies will then weigh up whether it is appropriate to bring the matter to the attention of the court. The provision is designed to facilitate the reporting of failures to comply with conditions, and to ameliorate concerns of service providers in relation to client confidentiality issues. This will strengthen the integrity of the operation of orders.

Item [21] omits section 34 of the Act, which requires a magistrate to disqualify himself or herself, on the application of the defendant, from hearing the proceedings if the magistrate has refused to deal with the defendant under sections 32 or 33 of the Act. Members of the magistracy have noted that this section permits spurious applications to be made to facilitate magistrate shopping. The improper use of this section can create problems in regional areas serviced by a single magistrate, and result in lengthy delays in the resolution of the proceedings. The repeal of section 34 will not remove the common law obligation on magistrates to disqualify themselves where appropriate.

The common law provides that a magistrate should not hear and determine proceedings if affected by actual bias, or if there is a reasonable apprehension that the magistrate is not impartial and unprejudiced. That is the test to be applied in all proceedings and the same test should apply in relation to continuing to hear a matter after declining to divert a defendant under section 32 or section 33. The situation is no different to where magistrates continue to hear matters, where appropriate, even though the facts, criminal history and evidence about the mental condition of the defendant have been raised on bail hearings.

The final amendments in schedule 1 relate to sections 38 and 39 of the Act for people found not guilty by reason of mental illness. In 2003 section 39 was amended to allow the court to order the conditional or unconditional release of a person found not guilty by reason of mental illness. Prior to that amendment all people found not guilty by reason of mental illness had to be detained in strict custody. Items [22] and [23] amend sections 38 and 39 of the Act to ensure that such persons are not released into the community by order of the court unless the court is satisfied on the balance of probabilities that the safety of the person or any member of the public will not be seriously endangered by the person's release.

Section 39 is also amended to require the registrar of the court to notify the Minister for Health and the tribunal of the terms of any order made under the section. The court will be given the power to remand the person in custody pending its consideration of this issue. While courts already take public safety into account on a routine basis when determining whether to release an accused pursuant to section 39, the proposed amendment provides an extra layer of comfort to the community by specifically requiring the court to carefully consider this issue, one I am sure all honourable members will agree is of paramount importance.

Schedule 2 makes amendments to the Act by way of statute law revision. The amendments change out-of-date references to prisoners and the Prison Medical Service and include references to detention centres for juveniles. The amendments also include references in certain provisions to the Director General of the Department of Juvenile Justice and juvenile justice officers so as to involve them in certain matters relating to accused persons who are juveniles.

Schedule 3 amendments relate to the Mental Health Act 1990. As honourable members are aware, the Minister for Health is currently undertaking a review of the Mental Health Act. The amendments in this bill are mostly procedural issues that are consequential to the changes to be made to the Mental Health (Criminal Procedure) Act 1990. Item [1] amends section 80 of the Mental Health Act 1990 to require the tribunal to review the case of a person who has been found unfit to be tried for an offence by a court and has been granted bail, to determine whether the person has become fit to be tried.

This amendment will fill an identified gap in the existing legislation. Currently there is no procedure for a person who becomes fit whilst on bail to be promptly brought back before the court to have a further fitness hearing. As previously discussed, unfitness through mental illness can be a fluctuating condition. An unfit person may become fit, only to regress again at some subsequent time into a state of unfitness. It is desirable that there be an efficient process of reviewing a person's mental state while he or she is on bail and bringing a person who has been found unfit back before the courts promptly upon an indication from the tribunal that he or she has become fit.

Items [2], [3], [4], [5] and [8] amend sections 80, 82 and 104 of the Mental Health Act as a consequence of the amendments made to the Mental Health (Criminal Procedure) Act by schedule 1 [8], namely, to remove the role of the Attorney General from provisions relating to the holding of special hearings. Item [6] amends section 82 of the Mental Health Act to prevent the tribunal recommending the release of a forensic patient who has been transferred to a hospital while serving a sentence of imprisonment and has not served the term of the sentence or, if a non-parole period has been set in relation to the sentence, the non-parole period.

The proposed amendment has no impact on the situation of a forensic patient who was found at trial to be not guilty by reason of mental illness or a forensic patient who was unfit to stand trial. It is limited to a person who was fit to be tried, found guilty by a jury, and sentenced to imprisonment by the sentencing court. This amendment pays reverence to the ruling of the sentencing court, as well as to expectations in the community that convicted persons will not be released until they have served the non-parole or fixed-term period to which they have been sentenced. Items [9] to 11] make consequential amendments.

Item [7] amends section 93 of the Mental Health Act to enable the prescribed authority, if it appears that a person has committed a breach of a condition of an order releasing the person from custody under section 39 of the Mental Health (Criminal Procedure) Act, to make an order for the person's apprehension and detention, care or treatment. This amendment arises from a recommendation of District Court Judge Marien in the case of *R v Milakovic*, unreported, 22 March 2005, and brings persons released under section 39 of the Mental Health (Criminal Procedure) Act—after a finding of not guilty by reason of mental illness—into line with those released by the prescribed authority following a review under section 84 of the Act, by providing a mechanism whereby a breach of a condition imposed upon their conditional release can be effectively enforced.

Item [12] amends section 108 of the Act to provide that the Minister for Health may release certain forensic patients following advice from the Director of Public Prosecutions—rather than from the Attorney General, as is currently the case—that further proceedings will not be taken. Item [13] amends the definition of "forensic patient" in the Act to include a person who is granted bail pursuant to section 14 (b) or section 17 (2) of the principal Act. This is an important change because the tribunal conducts regular reviews of forensic patients. The tribunal review is the trigger for promptly bringing persons back before the court where necessary, that is, in circumstances where they have become fit or where the tribunal has determined that they will not become fit within 12 months from the date of the finding of unfitness. Item [14] enables regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act, and item [15] contains savings and transitional provisions consequent on the enactment of the proposed Act.

The foregoing amendments are expected to provide a safer and more efficient regime for dealing with persons affected by mental illness and other mental conditions in the criminal justice system. They will also produce a more responsive system, one that is better equipped to deal with the fluctuating nature of unfitness through mental illness, while further strengthening public safety considerations. They provide greater opportunity for diversion from the criminal justice system for those who should properly be dealt with in an appropriate treatment and rehabilitative context enforced by the court. The extensive consultation process underpinning the bill has helped to ensure that the rights of accused persons are preserved, and that the improvements produced will have long-lasting effect. I commend the bill to the House.