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Proof

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MENTAL HEALTH (FORENSIC PROVISIONS) AMENDMENT BILL 2013

Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [3.38 p.m.], on behalf of the Hon. Michael Gallacher: 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.

The Government is pleased to introduce the Mental Health (Forensic Provisions) Amendment Bill 2013, the purpose of which is to allow for extension orders to be made in respect of a limited number of forensic patients, in order to facilitate the continued supervision and review of those patients by the Mental Health Review Tribunal.

The bill implements a recommendation of the New South Wales Law Reform Commission in its report on *People with Cognitive and Mental Health Impairments in the criminal justice system—Criminal Responsibility and Consequences* of May 2013.

The Mental Health Review Tribunal can already make orders in relation to the care, treatment and control of a forensic patient who is assessed as a mentally ill person at the expiry of their limiting term. However, the NSW Law Reform Commission noted that there is a gap in the New South Wales legislative framework for dealing with forensic patients who pose an unacceptable risk of serious harm to others at the end of a limiting term, but who may not come within the definition of a mentally ill person.

This bill addresses that gap by ensuring that the Mental Health Review Tribunal can continue its oversight of these forensic patients in limited circumstances, making sure they continue to receive the help they need.

The bill enables the Supreme Court to make an extension order, which continues the jurisdiction of the tribunal for up to five years after a limiting term expires.

Extension orders will be available for patients who have been found unfit to be tried for an offence but are not acquitted at a special hearing and in respect of whom a limiting term is imposed, provided that strict risk criteria are met.

The risk threshold for making an extension order is high. A high risk threshold is appropriate, as one of the orders the tribunal may make in respect of a forensic patient subject to an extension order is that the patient be detained. Detention for the protection of the community should only ever occur in exceptional circumstances. Such detention is permissible if it can be demonstrated that less intrusive alternatives have been expressly considered and found to be unsuitable. This proposal specifically requires the Supreme Court to consider the availability of less restrictive options, such as the transfer to the civil mental health scheme, the making of a guardianship order or entry into the Community Justice Program, before making an order.

I will now turn to the detail of the bill.

Items [1] to [11] of schedule 1 make amendments to the Mental Health (Forensic Provisions) Act to define extension orders and provide that a patient whose status as a forensic patient has been extended by the Supreme Court is to be treated as any other forensic patient under that part.

The Mental Health Review Tribunal will continue to review the case of a forensic patient subject to an extension order every six months. The tribunal may make any order or recommendation in relation to that person that it can make in relation to other forensic patients, except for an order for unconditional release. This includes a recommendation under section 47 that, in the tribunal's opinion, the person has become fit to be tried. In accordance with the recommendation of the NSW Law Reform Commission, the tribunal may not make an order for unconditional release, but may recommend to the Supreme Court that the extension order be revoked.

Item [12] of the bill inserts schedule 1 into the principal Act. Schedule 1 contains the procedures for applying for and making an extension order.

Proposed clause 2 of schedule 1 sets out the test for making an extension order. Orders are available where the Supreme Court is satisfied, to a high degree of probability, that the forensic patient poses an unacceptable risk of

causing serious harm to others if he or she ceases to be a forensic patient, and that risk cannot be adequately measured by other less restrictive means. The test varies in one respect from the test recommended by the Law Reform Commission. Rather than requiring that the forensic patient pose an unacceptable risk of causing serious physical or psychological harm to others, the bill provides that the patient must be at risk of causing serious harm to others. That change brings the test into line with the test for involuntary detention under the Mental Health Act, without losing the stringency of the NSW Law Reform Commission's test. It is noted that a number of the commission's recommendations make changes to statutory tests in the Mental Health (Forensic Provisions) Act. Those recommendations are still under consideration by the Government.

Under proposed clause 3 of schedule 1, applications for extension orders may be made by the Minister for Health, the Minister for Mental Health, or the Attorney General, and must be made within the last six months of a forensic patient's limiting term. Proposed clauses 5 to 6 of schedule 1 set out the requirements with respect to making an application, including the documents that must accompany an application, and the notice requirements. The procedures require a preliminary hearing into the application. If, following a preliminary hearing, the Supreme Court is satisfied that the matters alleged in the application would, if proved, justify the making of an order, the court must appoint independent clinical experts to conduct examinations of the patient.

Proposed clause 7 of schedule 1 sets out the matters to which the Supreme Court is to have regard in determining whether to make an extension order.

Clauses 8 and 9 provide that extension orders are limited to five years in duration, but that subsequent orders may be made

Clauses 10 and 11 of proposed schedule 1 enable the Supreme Court to make an interim extension order if the matters alleged would, if proved, justify the making of an extension order, and the person would otherwise cease to be a forensic patient before the proceedings are determined.

Clause 12 provides for the variation or revocation of an extension order at any time, following an application by the patient or a Minister, or a recommendation by the tribunal.

Parts 3 and 4 of proposed schedule 1 set out procedural provisions and provide rights to appeal a decision of the Supreme Court.

The bill does not permit the Supreme Court to make specific orders about the care, treatment or control of a forensic patient. Those orders will continue to be made by the Mental Health Review Tribunal, which has expertise in determining the best options for the care, supervision, treatment and, if necessary, detention of forensic patients.

The Government will consider the other recommendations made by the Law Reform Commission as to people with cognitive and mental health impairments in the criminal justice system in coming months. However, this recommendation has been progressed in advance of a full Government response in order to address an identified gap in the legislation in relation to forensic patients who may pose an unacceptable risk to public safety.

The Government considers that the bill strikes the right balance between protecting the interests of forensic patients, and protecting the community. The legislation will only apply to a very small number of patients and will leave questions about the appropriate care, treatment and control of patients to the Mental Health Review Tribunal, which has expertise to make orders appropriate to each individual patient.

I commend the bill to the House.