CRIMINAL LAW (MENTAL IMPAIRMENT) BILL 2022

EXPLANATORY MEMORANDUM

Overview of the Bill

The Criminal Law (Mental Impairment) Bill 2022 (Bill) implements a McGowan Labor Government election commitment to reform WA's mentally impaired accused laws.

It will repeal and replace the *Criminal Law (Mentally Impaired Accused) Act 1996* and introduce a contemporary framework for the management of persons with mental impairment in the justice system, including those who have been found unfit to stand trial and those who have been acquitted of an offence on account of mental impairment.

The Bill:

- contains objects and principles to which people performing functions under the new Act must have regard;
- replaces outdated and stigmatising language across the statute book;
- introduces a new special proceeding process so that the evidence against persons who have been found unfit to stand trial can be properly tested and a finding made about whether they committed the offence with which they were charged, or another offence which, on the charge, they could have been found to have committed;
- introduces new community supervision orders for the management of supervised persons in the community;
- removes the outdated "Governor's pleasure" model of indefinite detention;
- provides that custody orders must be of a fixed duration with a limiting term set, aligned to the best estimate of the term the court would have imposed if they were sentencing the person for the offence;
- establishes the new Mental Impairment Review Tribunal in place of the Mentally Impaired Accused Review Board and vests power in that Tribunal to make decisions as to the management in the community, and release from custody, of persons with mental impairment, including through imposing and varying conditions on supervision orders;
- requires annual reviews of all supervision orders and introduces extensive rights of internal review and appeal;
- allows for extended custody and community supervision orders to be made in respect of persons with mental impairment to address an unacceptable risk of them committing a serious offence;
- enshrines a statutory right to advocacy from the Mental Health Advocacy Service to persons with mental impairment in the justice system, regardless of their place of custody or type of supervision in the community;
- makes provision for victims to make statements and submissions to the courts and the Tribunal and to be notified of Tribunal proceedings;
- provides for the transfer of persons with mental impairment into and out of the State;
- requires limiting terms to be set on all existing custody orders in force under the *Criminal Law (Mentally Impaired Accused) Act 1996* as soon as practicable after commencement.

Terms used

In this Explanatory Memorandum:

- the *Children's Court of Western Australia Act 1988* is referred to as the Children's Court Act;
- the *Criminal Appeals Act 2004* is referred to as the Criminal Appeals Act;
- the *Criminal Law (Mentally Impaired Accused) Act 1996* is referred to as the former Act;
- the *Criminal Law (Mentally Impaired Accused) Regulations 1997* are referred to as the former Regulations;
- the *Criminal Procedure Act 2004* is referred to as the Criminal Procedure Act;
- the *Declared Places (Mentally Impaired Accused) Act 2015* is referred to as the Declared Places Act;
- the *Guardianship and Administration Act 1990* is referred to as the Guardianship and Administration Act;
- the *High Risk Serious Offenders Act 2020* is referred to as the HRSO Act;
- the *Mental Health Act 2014* is referred to as the Mental Health Act;
- the Mentally Impaired Accused Review Board is referred to as the Board;
- the Mental Impairment Review Tribunal is referred to as the Tribunal;
- the *Prisons Act 1981* is referred to as the Prisons Act;
- the *Young Offenders Act 1994* is referred to as the Young Offenders Act.

Part 1 – Preliminary

Division 1 – Introduction

Clause 1 – Short title

Clause 1 provides that the Act, once enacted, will be known as the *Criminal Law (Mental Impairment) Act 2022*.

Clause 2 – Commencement

Clause 2 provides for the commencement of the Act.

Clause 2(a) provides that Part 1 comes into effect on the day the Act receives Royal Assent.

Clause 2(b) provides that the rest of the Act will come into operation on a day fixed by proclamation. Different days may be fixed for different provisions.

Clause 2 provides for commencement on proclamation to allow time for the drafting of rules and regulations to underpin the new Act, establishment of the Tribunal in place of the Board and preparation for its commencement as a new body, establishment of new court hearing types for special proceedings and transitional matters, expansion of the functions of the Mental Health Advocacy Service, the development of new and updated administrative arrangements, such as policies, procedures, information sharing and notification processes, information and communications technology changes, and training of staff across several agencies.

It is expected that the new Act and all necessary subsidiary legislation and administrative arrangements will be in place and able to commence on the same date, within approximately 12 months of Royal Assent.

Division 2 – General overview

This Division contains clauses 3 to 6, which are general overviews of the Act and serve as a guide to the order in which particular matters are dealt with. Overview provisions, which can also be found in Parts 3 and 5-12, are intended to assist users of legislation by providing explanatory statements regarding the content of each Part. The inclusion of overview provisions is at the recommendation of Parliamentary Counsel's Office, given the breadth and complexity of the matters dealt with in this Act. A similar approach was taken to the *Aboriginal Cultural Heritage Act 2021* and the *Criminal Organisations Control Act 2012*.

Clause 3 – Overview of Act

Clause 3 sets out an overview of the Act.

Clause 4 – Overview: supervision orders

Clause 4 sets out an overview of supervision orders that may be made under the Act.

Clause 5 – Overview: appeals and internal review

Clause 5 outlines the various Divisions and Parts of the Act that deal with requests for internal and external reviews and appeals.

Clause 6 – Overviews are guide only

Clause 6 states that the overview provisions are intended as a guide to the general scheme and effect of this Act. This is to confirm that the overview provisions do not limit or otherwise affect the Act's other provisions.

Division 3 – Objects, principles and paramount consideration

This Division sets out the objects, principles and paramount consideration to which persons performing functions under the Act must have regard.

Clause 7 – Objects and principles

Clause 7 outlines the objects and principles of the Act. The objects, as outlined at clause 7(1), are to ensure:

- the protection of the community (clause 7(1)(a) – see also the paramount consideration at clause 8); and
- that persons with mental impairment in the justice system who are charged with offences:
    - are identified early in their contact with the justice system (clause 7(1)(b)(i));
    - are given a reasonable opportunity to become fit to stand trial (clause 7(1)(b)(ii));
    - are given a fair hearing even if they are found unfit (clause 7(1)(b)(iii));
    - are not found to have committed the offence with which they were charged unless it can be proven to the ordinary criminal standard of proof on the evidence available (clause 7(1)(b)(iv)); and
    - are subject to the least possible interference with their rights and dignity (clause 7(1)(b)(v)).

Persons performing a function under the Act must also ensure that persons who are subject to supervision orders are afforded procedural fairness in the administration and management of those orders, and are reintegrated into the community in a safe manner (clause 7(1)(c)).

The principles to which regard must be had by a person or body (including when constituting or a member of a court or tribunal) when performing a function under the Act are set out in clause 7(2).

Those principles are that persons with mental impairment in the justice system:

- should be subject to the least possible restriction on their freedom that is consistent with the protection of the community (clause 7(2)(a));
- should have access to advocacy services (clause 7(2)(b));
- should be provided with the best possible treatment, care and support (clause 7(2)(c));
- should be treated in a culturally appropriate manner (clause 7(2)(d)); and
- should not have their freedom more severely restricted than it would have been had they been convicted of the offence (clause 7(2)(e)).

Children with mental impairment in the justice system should:

- be given fair treatment (clause 7(2)(f));
- only be detained as a last resort and for as short a time as is necessary (clause 7(2)(g));
- if detained, be detained in a facility that is for, and is suitable for, children (clause 7(2)(h)); and
- if detained in a facility in which adults are detained:
    - when under the age of 16, not be exposed to contact with adults (clause 7(2)(i)); or
    - when 16 or over, not share living quarters with adults (clause 7(2)(j)).

The principles also provide that victims of offences committed by persons with mental impairment should have the opportunity to be acknowledged and heard (clause 7(2)(k)), and that the role of carers and families in the treatment, care and support of persons with mental impairment in the justice system should be recognised (clause 7(2)(l)).

Clause 8 – Paramount consideration

Clause 8 provides that the paramount consideration of a person when performing a function under this Act, including when constituting or a member of a court or tribunal, is the protection of the community.

Division 4 – Interpretation

This Division sets out the terms used throughout this Act.

Clause 9 – Terms used

Clause 9 defines numerous terms used in this Act.

Clause 9(1) defines the following terms:

- ***accused*** means a person charged with an offence, including a person who has been acquitted on account of mental impairment or has been found to have committed the offence charged (paragraph (a)), but has not yet been made subject to a supervision order (paragraph (b));
- ***administrator*** means an administrator as defined in section 3(1) of the Guardianship and Administration Act: a person appointed to administer the estate of another, including joint administrators or the Public Advocate acting as administrator where the administrator has died (paragraph (a)), and a donee of an enduring power of attorney as those terms are defined in section 102 of the Guardianship and Administration Act (paragraph (b)). Paragraph (b) of this definition has been included because every use of “administrator” in the Act is intended to include a donee of an enduring power of attorney. It is not intended to conflate the functions of administrators and donees generally into a single role;
- ***advocacy services officer*** is defined in section 374(1) of the Mental Health Act to mean a person who is appointed or made available to assist the Chief Mental Health Advocate or an officer or employee whose services are being used by the Chief Mental Health Advocate by arrangement under section 376(1) of that Act;

- ***audio link*** has the meaning given in section 3(1) of the Criminal Procedure Act – facilities that allow a court and a person to hear each other at another place at the same time;
- ***authorised hospital*** has the meaning given in section 4 of the Mental Health Act (defined in section 541 of that Act: a public hospital, or part of a public hospital, which is authorised for the reception of persons and admission of involuntary patients, or a private hospital with a licence endorsed under section 26DA(2) of the *Hospitals and Health Services Act 1927*);
- ***carer*** has the meaning given in section 5 of the *Carers Recognition Act 2004*: someone who provides ongoing care or assistance to a person with a disability (under the *Disability Services Act 1993*), a person with chronic illness (including mental illness under the Mental Health Act), a person who requires assistance to carry out everyday tasks due to frailty, or a person of a prescribed class (there are currently no such persons);
- ***CEO***, ***CEO (Corrections)*** and ***CEO (Young Offenders)*** respectively mean the CEO of the Department of Justice, the CEO of the Department of the Public Service principally assisting in the administration of Part 8 of the *Sentence Administration Act 2003* (also currently the Department of Justice; Part 8 of that Act deals with corrective services functions of staff, including community corrections officers, who have supervisory responsibilities under Part 5 of the Bill) and the CEO of the Department of the Public Sector principally assisting in the administration of the Young Offenders Act (also currently the CEO of the Department of Justice);
- ***charge*** has the meaning given in section 3(1) of the Criminal Procedure Act (an allegation in a prosecution notice or indictment that a person has committed an offence);
- ***Chief Mental Health Advocate*** has the meaning given in section 4 of the Mental Health Act – the person appointed to that role under section 349 of that Act;
- ***Chief Psychiatrist*** has the meaning given in section 4 of the Mental Health Act – the Chief Psychiatrist appointed under section 508(1) of that Act;
- ***child*** means a person who is under 18 years of age;
- ***child-specific considerations*** means the considerations set out at clause 10, being a list of matters to which a person performing a function under the Act must have regard when the supervised person is a child;
- ***close family member*** has the meaning given in section 281 of the Mental Health Act;
- ***community*** has a meaning affected by clause 9(3);
- ***community corrections officer*** has the meaning given in section 4(2) of the *Sentence Administration Act 2003* – a person appointed as a community corrections officer under section 98 of that Act, including an honorary community corrections officer;
- ***Community Services Department*** means the department of the Public Service principally assisting in the administration of the *Children and Community Services Act 2004* (currently the Department of Communities);
- ***community supervision orders (CSOs)*** and ***custody orders (COs)*** are orders made under:
    - clause 46(1)(b) – a community supervision order made by the court (paragraph (a));

    - clause 110(4) – a community supervision order made by the Supreme Court in an application for an extended custody order (paragraph (b));
    - clause 121(3) – a community supervision order made by the Supreme Court on review of an extended custody order (paragraph (c));
    - clause 206(3)(b) – a community supervision order made by the Supreme Court for a person who has been transferred from a participating jurisdiction (paragraph (d));
    - clause 46(1)(a) – a custody order made by the court (paragraph (a));
    - clause 89(1) – a custody order made by the relevant court following breach of a community supervision order (paragraph (b));
    - clause 206(3)(a) – a custody order made by the Supreme Court for a person who has been transferred from a participating jurisdiction (paragraph (c));
- ***declared place*** means a place to which a declaration under clause 60 applies;
- ***Department*** means the Department principally assisting in the administration of the Act – currently, the Department of Justice;
- ***Deputy President*** means a Deputy President of the Tribunal (noting one or more Deputies can be appointed: see Part 10);
- ***detention centre*** has the meaning given in section 3 of the Young Offenders Act (a place declared as such under section 13 of that Act);
- ***Disability Services Commission*** means the body referred to in section 6 of the *Disability Services Act 1993*;
- ***DSC declared place*** means a declared place that is controlled and managed by or on behalf of the Disability Services Commission under the Declared Places Act;
- ***enduring guardian*** has the meaning given in section 3(1) of the Guardianship and Administration Act: the person or persons who is or are enduring guardian(/s) under an enduring power of guardianship, including a substitute;
- ***experienced lawyer*** has the meaning given in clause 155 (a lawyer with at least five years' legal experience);
- ***extended community supervision order*** and ***extended custody order*** mean orders made under clause 114(1) or clause 110(1) respectively;
- ***extended order*** means an extended community supervision order or an extended custody order;
- ***guardian*** means a guardian as defined in section 3(1) of the Guardianship and Administration Act: the person or persons appointed as guardian or joint guardians, or the Public Advocate acting where a guardian has died (paragraph (a)), and includes an enduring guardian (paragraph (b)). Paragraph (b) of this definition has been included because every use of guardian in the Act is intended to include an enduring guardian. It is not intended to conflate the functions of guardians and enduring guardians into a single role;
- ***health professional*** has the meaning given in section 4 of the Mental Health Act – a medical practitioner, nurse, occupational therapist, psychologist, social worker, or, in relation to a person of Aboriginal or Torres Strait Islander descent, any of these professions or an Aboriginal or Torres Strait Islander mental health worker;
- ***hospital order*** means an order made under clause 19, being an order that an accused person be taken to and detained at an authorised hospital to be examined by a psychiatrist;

- ***inpatient treatment order*** has the meaning given in section 4 of the Mental Health Act – an order under section 22(1) of that Act which provides that a person can be admitted into and detained at a hospital for the purposes of being provided with treatment without informed consent;
- ***interim community supervision orders*** and ***interim custody orders*** are orders made under clause 108(2) or clause 107(2) of this Act while an application for an extended order is in progress under Part 7;
- ***interim disposition*** has the meaning given in clause 200 – a determination by the Minister that a person who has been transferred from a participating jurisdiction either be detained at a place of custody as though under a custody order, or released into the community on conditions as though under a community supervision order;
- ***involuntary inpatient*** and ***involuntary patient*** have the meanings given in section 4 of the Mental Health Act – respectively, a person under an inpatient treatment order and a person under an involuntary treatment order (either inpatient or community);
- ***leave of absence order*** has the meaning given in clause 77(1) – an order that a supervised person be released from a place of custody under conditions for a period or periods, and a purpose or purposes, specified by the Tribunal;
- ***limiting term***, for a custody order, means the term set under clause 50(2) (paragraph (a)), and for an extended custody order, means the term set under clause 110(1) (paragraph (b)). A limiting term is the best estimate of the term of imprisonment or term of detention that the court would have imposed, in all of the circumstances, if the court were sentencing the person for the offence, any mental impairment of the person was not taken into account, and the person had pleaded guilty at the earliest opportunity;
- ***member*** means a member of the Tribunal;
- ***mental health advocate*** has the meaning given in section 4 of the Mental Health Act – the Chief Mental Health Advocate or a person engaged by the Chief Mental Health Advocate under section 350(1) of that Act;
- ***mental illness*** has the meaning given in section 4 of the Mental Health Act: a condition characterised by a disturbance of thought, mood, volition, perception, orientation or memory and which significantly impairs the person's judgment or behaviour, whether temporarily or permanently;
- ***mental impairment*** means any of, or a combination of, intellectual disability (paragraph (a)), mental illness as defined in section 1(1) of *The Criminal Code* (an underlying pathological infirmity of the mind, whether or short or long duration and whether permanent or temporary, not including a condition resulting from the reaction of a healthy mind to external stimuli) (paragraph (b)), an acquired brain injury (paragraph (c)) or dementia (paragraph (d));
- ***Minister for Corrective Services*** means the Minister to whom the administration of the Prisons Act is committed;
- ***parent***, in relation to a child, includes anyone with parental responsibility for the child. The term "parental responsibility" takes its meaning from section 68 of the *Family Court Act 1997* and means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children;
- ***personal information*** means information or an opinion, whether true or not, about an individual whose identity is apparent or reasonably ascertainable from that information

or opinion. This definition is drawn from the Glossary to the *Freedom of Information Act 1992*;

- ***prescribed*** means prescribed by regulations made under this Act. The general regulation-making power is at clause 232;
- ***President*** means the President of the Tribunal;
- ***prison*** has the meaning given in section 3(1) of the Prisons Act – places declared to be prisons under sections 4 and 5 of that Act;
- ***psychiatrist*** and ***psychologist*** have the meanings given in section 4 of the Mental Health Act – respectively: a Fellow of the Royal Australian and New Zealand College of Psychiatrists or a person prescribed by regulations, and a person registered in the psychology profession under the *Health Practitioner Regulation National Law (Western Australia)*;
- ***Public Advocate*** has the meaning given in section 3(1) of the Guardianship and Administration Act – the person holding, or acting in, the office of Public Advocate under section 91(1) of that Act;
- ***remuneration*** has the meaning given in section 4(1) of the *Salaries and Allowances Act 1975* – salary, allowances, fees, emoluments and benefits, whether in money or not;
- a ***representative*** of a supervised person means a guardian of the person (paragraph (a)), or a person recognised as a representative of the person by the Tribunal under clause 58 (paragraph (b));
- ***safety of the community*** has a meaning affected by clause 9(4);
- ***serious offence*** means an offence listed in Schedule 1;
- ***special proceeding*** means a proceeding under Part 3 Division 3 Subdivision 3, which may take place after a person has been found unfit to stand trial;
- ***specified***, in relation to an order, instrument or other document made under or referred to in this Act, means specified in that order, instrument or document;
- ***statutory penalty*** has the meaning given in section 4(1) of the *Sentencing Act 1995* – the penalty specified for an offence by a written law;
- ***supervised person*** means a person subject to a supervision order;
- ***supervising officer***, for a supervised person, means a person designated under clause 99 for the supervised person and, where relevant, includes a person referred to in clause 54(2)(a) (a community corrections officer or officer assigned for a child by the CEO (Young Offenders));
- ***supervision order*** means any of the following:
    - a community supervision order or custody order (paragraphs (a) and (b));
    - an extended community supervision order or extended custody order (paragraphs (c) and (d));
    - an interim community supervision order or interim custody order (paragraphs (e) and (f));
    - an interim disposition (paragraph (g));
- ***supporting agency*** has the meaning given in clause 219;
- ***support measure*** means any measure which may facilitate an accused or supervised person's participation in proceedings before a court or the Tribunal, including a person approved by the court or Tribunal who may provide them with support (paragraph (a)), communication partner (as defined in clause 21) (paragraph (b)) or communication device (paragraph (c));

- ***trial*** is not defined in the Bill. This means that it has a meaning that is apparent from the context where it is used. However, in order to ensure that the provisions dealing with the question of fitness, and when it may be raised, operate as intended, clause 9 clarifies that "trial" excludes a proceeding in relation to bail (paragraph (a)), a sentencing proceeding (paragraph (b)), and special proceedings (paragraph (c));
- ***Tribunal*** means the Mental Impairment Review Tribunal established by clause 156;
- ***underlying custody order***, in relation to a leave of absence order, means the custody order in respect of which the leave of absence order is made;
- ***unfit accused*** means an accused who is currently unfit to stand trial, or in respect of whom the question of fitness to stand trial has been raised but is yet to be resolved;
- ***victim***, of an offence, has the meaning given in clause 142;
- ***video link*** has the meaning given in section 3(1) of the Criminal Procedure Act – facilities, including closed circuit television, that enable, at the same time, a court at one place to see and hear a person at another place and vice versa;
- ***working day*** means a day other than Saturday, Sunday or a public holiday.

Clause 9(2) explains that a reference to varying conditions of an order includes the imposition of new conditions on an order (clause 9(2)(a)) and cancellation of one or more, but not all, conditions of an order (clause 9(2)(b)). The Tribunal may vary conditions of orders under Part 6.

Clause 9(3) explains that a reference to the community includes any community, and is not limited to the community of Western Australia (WA) or Australia.

Clause 9(4) explains that a reference to the safety of the community includes a reference to the safety of an individual in the community.

Clause 10 – Child-specific considerations

Clause 10 outlines the child-specific considerations. These are matters to which a person performing a function under this Act must have regard when dealing with an unfit accused or supervised person who is a child.

They include the child's age and level of maturity (paragraph (a)), the availability of a responsible person to care for the child (paragraph (b)), any requirement for the child to attend school, educational or vocational training (paragraph (c)), the availability of accommodation for the child (paragraph (d)), any involvement of the Community Services Department in relation to the child (paragraph (e)), and the best interests of the child (paragraph (f)).

Responsible person is defined in Schedule 1 Part C clause 2 to the *Bail Act 1982* and means a parent, relative, employer or other person who is in a position to both influence the child's conduct and provide the child with support and direction.

The child-specific considerations are particularly relevant in the making of, and setting of conditions on, supervision orders by the court under Part 5 and in the administration of supervision orders by the Tribunal under Part 6.

Clause 11 – Commission of offence: persons who have been acquitted on account of mental impairment

The finding that a person is acquitted on account of mental impairment can occur through an ordinary trial under section 27 of *The Criminal Code* or at a special proceeding held under Part 3 Division 3: see clause 41(2)(b).

In effect, this finding means that the accused person did do the act, or make the omission, that constitutes the offence with which they were charged; however, they were held not to be criminally responsible on account of mental impairment.

The phrases “found to have committed” and “commission of an offence” appear throughout this Act. Clause 11, at (1) and (2), confirms that these terms also apply to circumstances where persons have been acquitted on account of mental impairment.

Clause 11(3) provides that this clause applies unless the contrary intention appears.

Division 5 – Other provisions

This Division contains miscellaneous provisions of general application.

Clause 12 – Act binds Crown

Clause 12 provides that the Act binds the Crown. The High Court in *Bropho v Western Australia* [1990] HCA 24 held that the presumption against binding the Crown only provides limited protection and gives way to an express or implied intention that legislation binds the executive. Current drafting practice in WA is to include an express statement where the Crown is bound, for the avoidance of doubt.

Clause 13 – Application of *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* Part 2

Clause 13 is drawn from section 5AA of the former Act and provides that Part 2 of the *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* applies to this Act. Part 2 of that Act provides for the use of electronic technology in relation to court and related proceedings, and the record of those proceedings. This includes allowing for things required to be done in writing under an applied Act to be done electronically; electronic lodgement of documents with courts and tribunals; electronic recordkeeping; electronic authentication; and giving and obtaining information, provided those processes are done in accordance with regulations or rules of court.

A provision of general application which allows the giving of notice, information, summonses and other documents to be effected through electronic means is included in Part 13, Division 6, clause 229.

Part 15 Division 30, clause 409 amends the *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* to replace the reference to the former Act in section 6(1)(f) with a reference to this Act.

Part 2 – General provisions

This Part deals with general matters, including matters that take place in the initial stages of criminal proceedings (Part 2 Division 1) and matters that apply to, or have an impact on, numerous provisions of the rest of the Act (Part 2 Divisions 2-5).

Division 1 – Courts' procedures

This Division sets out court procedures in criminal proceedings under this Act.

Clause 14 – Application of *Criminal Procedure Act 2004* to proceedings under Pt. 3 and 5

Clause 14 sets out the relationship between this Act and the Criminal Procedure Act. That Act governs the general procedure for criminal proceedings in WA courts and applies to proceedings under this Act.

Clause 14 makes special provision for the Criminal Procedure Act to be modified where necessary in order to accommodate proceedings for persons found unfit to stand trial. This recognises that ordinary criminal proceeding processes may not be suitable for persons who are unfit to stand trial, and that requirements arising out of unfitness will vary in each case.

To address this, a specific Act modification power is included at clause 14(1) and a general regulation-making power is included at clause 14(3).

Clause 14(1) is a specific power for courts to modify the application of the Criminal Procedure Act as necessary for proceedings under Part 3 and Part 5.

Clause 14(2) provides that the definition of "prosecution" in section 3(1) of the Criminal Procedure Act is to be read as including proceedings under Part 3 of this Act. This is to ensure that the general procedural requirements for criminal prosecutions also apply to special proceedings under this Act.

Clause 14(3) provides a general regulation-making power to modify the application of the Criminal Procedure Act in relation to Part 3 and Part 5 proceedings under this Act.

Clause 14(4) is included to clarify that this Act prevails to the extent of any inconsistency.

The purpose of including both specific and general modification powers is to enable criminal proceedings to operate in a manner suitable for persons under this Act. It may be that, once the Act is operational and special proceedings become more commonplace, the same modifications are made to the Criminal Procedure Act in many cases. To allow efficiency and certainty, regulations may be made in the future which modify the operation of the Criminal Procedure Act in respect of proceedings under Parts 3 and 5.

Clause 15 – Adjournments

Clause 15 outlines the courts' general powers of adjournment under this Act. This provision is drawn from section 14 of the former Act and provides, at (1), that a court has a general power to adjourn proceedings under this Act at any time.

Clause 15(2) provides that, on adjournment, a court may:

- remand the person in custody, or grant them bail, subject to and in accordance with the *Bail Act 1982* (clauses 15(2)(a) and (b));
- make a hospital order under clause 19 (clause 15(2)(c)); or
- if the person is an involuntary inpatient, the court may order that the person be returned to the hospital at which they are detained (clause 15(2)(d)).

A transitional provision is included to deal with grants of bail, or remands in custody, immediately before commencement day: Part 14 Division 2, clause 252.

Division 2 – Interaction with the *Mental Health Act 2014*

This Division sets out the relationship between this Act and the Mental Health Act.

Clause 16 – Criminal law applies to involuntary patients

Clause 16 provides that the operation of this Act, and the criminal law, is not affected by the fact that a person is an involuntary patient under the Mental Health Act, unless this Act provides otherwise. It is drawn from section 6(1) of the former Act.

Clause 17 – Person in custody may be made involuntary patient

Clause 17 is drawn from section 6(2) of the former Act. It provides that a person who is subject to a custodial order can be made an involuntary patient.

Custodial order is defined at clause 17(1) to mean an order remanding an accused in custody (clause 17(1)(a)), a hospital order under which a person is in custody (clause 17(1)(b)), a custody order (clause 17(1)(c)), an interim or extended custody order (clause 17(1)(d)), or an interim disposition (of custody) (clause 17(1)(e)).

Clause 17(2) provides that this Act does not prevent a person in custody under a custodial order from being made an involuntary patient. The detention of a supervised person at an authorised hospital under a custody order is governed by this Act, and clause 17(2) provides that the person may also be made an involuntary patient under the Mental Health Act.

Clause 17(3) provides that if an inpatient treatment order is made under the Mental Health Act in respect of a person who is in custody under a custodial order (except where it requires that the person be detained at an authorised hospital – see (5)), then the person must be detained at a hospital in accordance with that Act.

Clause 17(4) provides that if a person under a custodial order who is subject to an inpatient treatment order is released from hospital, then they are to be detained in accordance with the custodial order.

Clause 17(5) provides that where a supervised person is required to be detained at an authorised hospital under a custody order, interim or extended custody order, or an interim disposition of custody, the detention of that person at the hospital is under this Act and not the Mental Health Act.

A Note is included at (5) to explain that the detention, leave of absence and release from hospital of a supervised person required to be detained at an authorised hospital under this

Act is dealt with by this Act, rather than the Mental Health Act. This is explained at section 82 of the Mental Health Act, which expressly excludes supervised persons who are detained at an authorised hospital under this Act from the operation of Part 7 of that Act. Clause 356 updates terminology in section 82 of that Act.

Clause 18 – Supervised person in community may be made involuntary patient

Clause 18 is drawn from section 39 of the former Act, and provides that this Act does not prevent a supervised person living in the community under a community supervision order (clause 18(1)(a)) (including interim and extended orders (clause 18(1)(b)) and interim dispositions (clause 18(1)(d))) or a leave of absence order (clause 18(1)(c)) from being made an involuntary patient under the Mental Health Act.

Note that Part 15 Division 20 of this Act amends the Mental Health Act. Clause 360 inserts a new Division 4 into Part 9 of the Mental Health Act to require the Tribunal to be notified of absences being granted to supervised persons under the Mental Health Act and various other related matters.

Clause 19 – Court may make hospital order in respect of accused

Clause 19 is drawn from section 5 of the former Act and provides, at (1), that it applies if an accused person has been refused bail under the *Bail Act 1982*. It also provides, at (2), that a judicial officer may make an order requiring the accused person to be taken to and detained at an authorised hospital (clause 19(3)(a)) and examined by a psychiatrist (clause 19(3)(b)).

There are strict criteria that must be met before a hospital order can be made. These are that the judicial officer reasonably suspects that the accused has a mental illness for which they need treatment (clause 19(2)(a)), and that because of that mental illness, there is a significant risk to the health or safety of the accused or to the safety of another person, or a significant risk of serious harm to the accused or another person (clause 19(2)(b)), and the accused does not have the capacity to consent to treatment (clause 19(2)(c)).

Following examination by a psychiatrist in accordance with the hospital order, an inpatient treatment order may be made in respect of the accused requiring their detention at a hospital. If an inpatient treatment order is not made, the accused must be detained in custody until they are brought back before the court (noting that hospital orders can only be made where a person has been refused bail) (clause 19(3)(c)).

Clause 19(4) provides that hospital orders have a duration of no more than seven days, after which the accused must be brought back before the court specified in the order.

Clause 19(5) states that a hospital order has effect as though it were a referral for examination by a psychiatrist under section 26(2) of the Mental Health Act, and subject to subclauses (3) and (4), that Act applies to the person. Subclauses (3) and (4) deal with the operation of the criminal law – that is, requirements to detain the person in custody and bring them back before the court.

Clause 19(6) clarifies that an accused who is away from an authorised hospital without lawful authority while required to be detained there under a hospital order may be returned to that hospital under either Part 7 Division 5 of the Mental Health Act or on the basis that they have escaped lawful custody. Escaping lawful custody is a crime under section 146 of *The Criminal*

Code attracting a penalty of imprisonment for seven years or, if dealt with summarily, imprisonment for three years and a fine of $36,000.

Finally, clause 19(7) provides that a hospital order cannot be made if the accused is subject to an inpatient treatment order. This is because an inpatient treatment order already allows a person to be detained at a hospital for treatment without informed consent.

A transitional provision which deals with hospital orders that are in force on commencement is contained in Part 14 Division 2, clause 251.

Division 3 – Communication with accused and supervised persons

This Division sets out provisions of general application which deal with ways in which communication with accused and supervised persons under this Act must take place.

Clause 20 – Communication and support measures

Clause 20, which is drawn from section 9 of the Mental Health Act, deals with communication and support measures.

Clause 20(1) provides that communication includes the provision of advice, explanation, information, notification or reasons.

Clause 20(2) provides that communication with an accused or supervised person under this Act must be in a language, form of communication and terms that the person is likely to understand. Communication is to be undertaken using any means of communication that is practicable, including an interpreter if necessary and practicable.

Clause 20(3) provides that for the purpose of proceedings before a court or the Tribunal, the court or Tribunal may order that the accused or supervised person be provided with any support measure that is reasonably available. Support measure is defined at clause 9 to mean a support person, a communication partner (as defined in clause 21) or a communication device.

Clause 21 – Appointment of communication partner for accused or supervised person

Clause 21, at (1), provides for the appointment of a ***communication partner*** for an accused or supervised person to assist them to communicate with the court or Tribunal during proceedings. A communication partner's function is set out at (2): to communicate with the person and the court or Tribunal and explain questions put to, and information given by, the person. This provision is drawn from section 106F of the *Evidence Act 1906*, which deals with the appointment of a person to assist a child witness to give evidence in any proceeding in a court.

Clause 21(3) provides that the court or Tribunal can only appoint a person as a communication partner if it considers that the person is suitable and competent. It is a matter for a court or the Tribunal to satisfy itself of the person's suitability and competence and regulations may be made in this regard: clause 21(6).

Clause 21(4) provides that a communication partner must take an oath or make a declaration that they will faithfully perform their function. The making of a knowingly false or misleading

statement by a communication partner is a crime punishable by imprisonment for five years or, if dealt with summarily, imprisonment for two years and a fine of $24,000: clause 21(5).

Clause 21(6) provides that the kinds of qualifications and experience that a court or the Tribunal must have regard to when considering whether to appoint a communication partner may be prescribed in regulations.

Division 4 – Submissions by close family members and carers

This Division provides for the involvement of close family members and carers of accused and supervised persons in court and Tribunal proceedings.

Clause 22 – Submission by close family members and carers

Clause 22 provides that close family members and carers may make submissions to a court or the Tribunal in proceedings under Parts 5, 6, 7 or 11.

Close family member is defined at clause 9 to have the meaning given in section 281 of the Mental Health Act, and is any of the following, whether by consanguinity, marriage, a de facto relationship, a written law or a natural relationship:

- a spouse or de facto partner;
- a child or step child;
- a parent, step parent or foster parent;
- a sibling;
- a grandparent;
- an aunt or uncle;
- a niece, nephew or cousin; and
- if the person is of Aboriginal or Torres Strait Islander descent, any person regarded under the customary law, tradition or kinship of that person's community as the equivalent of the other people listed above.

Such a person must not also be the person's carer, but must provide ongoing care or assistance. ***Carer*** is defined at clause 9 to have the meaning given in section 5 of the *Carers Recognition Act 2004*.

An example of a person who may be recognised as a close family member under a written law is the CEO of the Community Services Department. Under the *Children and Community Services Act 2004*, that CEO may be given parental responsibility for a child; for example, if a protection order (time-limited) or protection order (until 18) is in force in respect of a child. In such an example, that CEO would be a "parent" within the definition of "close family member" under section 281 of the Mental Health Act and be able to make a submission to a court or the Tribunal in respect of the child's treatment, care and support requirements.

Clause 22(2) provides that a close family member or carer may make a submission to the court or Tribunal about the accused or supervised person's treatment, care and support requirements. Submissions must be in writing (clause 22(3)) and may include suggestions about the conditions that should apply to the accused or supervised person (clause 22(4)).

Clause 22(5) provides that the court may rule as inadmissible the whole or any part of a submission, and clause 22(6) provides that the Tribunal must establish procedures for the

giving of submissions. Clause 22(7) provides that the Tribunal may have regard to a submission received by it and may give that submission any weight that it sees fit.

A provision allowing close family members and carers to make submissions in proceedings to set limiting terms on existing custody orders is included at Part 14 Division 2, clause 263(8).

Division 5 – Reports under this Act

This Divisions deals with matters to be included in reports about the mental state of accused and supervised persons.

Clause 23 – Reports to include information about treatment, training or other measures

Clause 23 is drawn from section 7 of the former Act. It is intended to clearly set out matters that must be addressed in reports about the mental state of an accused or supervised person. Those matters are the nature of any treatment, training or other measures provided in relation to the person's condition (clause 23(a)), the reasons for the treatment, training or other measures (clause 23(b)), the person's response to it (clause 23(c)), and the prescribed information (clause 23(d)).

This regulation-making power has been included to prescribe specific matters that may be required to be included in reports, such as a statement of the author's qualifications or expertise.

Part 3 – Accused who are unfit to stand trial

This Part outlines the process for determining fitness of accused persons, including when and how the question of fitness can be raised, inquired into and decided, and special proceedings that may take place following a finding of unfitness.

Division 1 – Preliminary matters

This Division contains an overview provision and specifies the application of Part 3.

Clause 24 – Overview of Part

Clause 24 provides an overview of the matters dealt with in Part 3.

Clause 25 – Application of Part

Clause 25 clarifies that Part 3 applies in respect of an accused before a court exercising criminal jurisdiction. This provision is drawn from section 4 of the former Act.

Division 2 – Raising and deciding question of fitness of accused

This Division deals with how the question of an accused person's fitness to stand trial can be raised and decided.

Clause 26 – Accused who is unfit to stand trial

Clause 26 sets out the various matters which can result in an accused person being unfit to stand trial. To be unfit, an accused person must be unable to do one or more of the following:

- understand the nature of the charge (clause 26(a));
- instruct a legal practitioner who is representing them (clause 26(b));
- understand the requirement to plead to a charge or the effect of a plea (clause 26(c));
- understand the purpose of a trial (clause 26(d));
- understand or exercise the right to challenge jurors (clause 26(e));
- follow the course of the trial (clause 26(f));
- understand the substantial effect of evidence presented by the prosecution at the trial (clause 26(g));
- decide whether to give evidence, or give evidence if they wish to do so (clause 26(h));
- properly defend the charge (clause 26(i)).

This provision is drawn from section 9 of the former Act, with the addition of two matters: the ability to instruct a legal practitioner at clause 26(b) and the ability to decide whether to give evidence or give evidence if they wish to do so at clause 26(h). The inclusion of these additional matters ensures that proper consideration is given to an accused's ability to effectively participate in, and make decisions about, their trial.

Clause 27 – Presumptions as to fitness to stand trial

Clause 27 provides, at (1), that there is a presumption of fitness to stand trial until the contrary is found under Part 3 Division 2. Clause 27(2) provides that once an accused is found to be unfit, there is a presumption that they will remain unfit unless the contrary is found. This provision is drawn from section 10 of the former Act.

A transitional provision which deals with an accused who was found unfit before commencement of the Act is set out at Part 14 Division 2, clause 248.

Clause 28 – When the question of fitness to stand trial may be raised

Clause 28 provides, at (1), that the question of fitness may be raised at any time before or during a trial and is drawn from section 11 of the former Act. The exclusions of certain proceedings from the term "trial" at clause 9 are important to note.

Clause 28(2) provides that the question may be raised by the defence, the prosecution or the court on its own initiative.

Clause 28(3) provides that the question may be raised more than once; however, if the question is raised a second or subsequent time, it need not be considered unless the court is satisfied that new facts have been discovered, new circumstances have arisen, or the circumstances have changed since the question was last raised.

A transitional provision to deal with circumstances where the question of fitness was raised, but not yet decided, on commencement of the Act is set out in Part 14 Division 2, clause 245.

Clause 29 – Deciding question of fitness to stand trial

Clause 29 outlines how the question of fitness to stand trial is to be decided. It is drawn from section 12 of the former Act.

Clause 29(1) provides that the question is to be decided on the balance of probabilities by a court constituted by a magistrate or judge sitting alone. Part 15 Divisions 2 and 19 amend the Children's Court Act and *Magistrates Court Act 2004* to provide that when those courts are constituted by one or more JPs only, and the question of fitness is raised, the question must be referred to the court constituted by a judge or magistrate (as is relevant).

Clause 29(2) provides that the court may inquire into the question and inform itself in any way it considers appropriate.

Clause 29(3)(a) provides that the court may order that the accused be examined by a psychiatrist, psychologist or other appropriate expert determined by the court and order that a report about the accused by an expert be submitted to the court (clause 29(3)(b)). The addition of a psychologist is an expansion of section 12(2)(a) of the former Act to expressly recognise that a psychologist may be an appropriate expert to report on the fitness of a person who does not have a mental illness.

The term "other appropriate expert" is retained from section 12(2)(a) of the former Act. It is deliberately broad to recognise that other professions may be appropriately recognised as experts for the purposes of a report into fitness. For example, in the matter of *The State of Western Australia v IMK* [2018] WADC 171, a report was sought from a geriatric specialist. If a report is ordered for a child, the appropriate expert may be a child and adolescent psychiatrist as defined in section 4 of the Mental Health Act. If a report is ordered for a person with a cognitive impairment or intellectual disability, a psychologist with experience in forensic disability may be an appropriate expert.

For the purpose of the fitness inquiry, the court may adjourn the proceedings and discharge any jury (if there was one) (clause 29(3)(c)), or make any other order the court thinks appropriate (clause 29(3)(d)).

Clause 29(4) provides that the court may make a report about the accused available to the prosecutor and the accused on any conditions the court considers appropriate.

Clause 29(5) provides that, in deciding the question, the court may have regard to the extent to which any support measures that are, in the court's opinion, reasonably available would enable the accused to be fit to stand trial.

A decision that an accused is fit, or unfit, to stand trial may be appealed under sections 6(ea) and 25A(a) of the Criminal Appeals Act, which are inserted by clauses 299 and 306

A transitional provision to deal with fitness inquiries that were in progress, but not yet decided, at commencement of the Act is set out in Part 14, Division 2: see clause 246. That provision also deals with appeals commenced under section 12(4) of the former Act and section 7(5) of the Criminal Appeals Act that were not completed before commencement: see clause 246(5).

Clause 30 – Chief Mental Health Advocate to be notified

Clause 30 requires that the Chief Mental Health Advocate be notified immediately by the court if a proceeding against an accused is adjourned because the question of fitness has been raised. This notification will trigger contact requirements under Part 8.

The Chief Mental Health Advocate must also be given the prescribed information. This prescribed information will be set out in regulations, and is likely to include the person's name, address and contact details, age and Aboriginality (if known), details of the charges, and whether the person has been granted bail or remanded in custody.

A transitional provision to deal with adjournments that occurred prior to commencement is set out in Part 14, Division 2: see clause 246(4).

Clause 31 – Determining question of fitness if charge to be dealt with on indictment

Clause 31 provides, at (2), that the question of fitness must be reserved for determination by the court that is to deal with the charge in the following circumstances set out at (1):

- where the accused is before the Magistrates Court, charged with an indictable offence, and the charge is to be dealt with on indictment by the District or Supreme Court (clause 31(1)(a));
- where the accused is before the Children's Court, charged with an indictable offence, and the charge is to be dealt with on indictment by the District or Supreme Court because of section 19B(1) or 19C(1) of the Children's Court Act (clause 31(1)(b));
- where the accused is before the Children's Court, charged with an indictable offence, and the charge is to be dealt with by the Magistrates Court because of section 19D of the Children's Court Act (clause 31(1)(c)).

The sections of the Children's Court Act referred to at clause 31(1)(b)(ii) and clause 31(1)(c)(ii) above respectively deal with:

- a child who has elected to be tried on indictment by the District or Supreme Court (section 19B(1));
- a child and adult who are charged with the same offence on indictment and the Children's Court has determined it is appropriate for the child and adult to be jointly tried (section 19C(1));
- a person who has attained the age of 18 years is charged with an indictable offence that is alleged to have been committed when the person was under 18 and the Children's Court has ordered the transfer of the prosecution notice to the Magistrates Court (section 19D).

Clause 32 – Fit to stand trial with support measures

Clause 32 provides that if an accused is fit to stand trial while they have access to support measures, those support measures must be made available to the person throughout the trial to the extent that they remain necessary for them to be fit.

Division 3 – Procedure following finding of unfitness

This Division sets out the procedures to be followed once a person has been found unfit.

Subdivision 1 – Application of Division

This Subdivision contains provisions outlining the application of Part 3 Division 3.

Clause 33 – Division applies to accused found unfit

Clause 33 provides that Part 3 Division 3 applies when a court has found an accused to be unfit to stand trial.

Clause 34 – Application of *Young Offenders Act 1994*

Clause 34 provides that Part 3 Division 3 of this Act does not prevent an accused who is a young person as defined in section 3 of the Young Offenders Act from being dealt with under Part 5 of that Act, unless a finding has been made at a special proceeding under clause 41(2).

The effect of this provision is to clarify that, until a finding is made under clause 41(2), a young person under the Young Offenders Act who has been found unfit may be dealt with by means other than court proceedings. In particular, this is referring to the option for the court to refer the matter to a juvenile justice team.

Safeguards remain in place under the Young Offenders Act to ensure these measures can only be used where appropriate.

Subdivision 2 – General procedure

Subdivision 2 outlines the general procedure to be followed after a finding of unfitness.

Clause 35 – Opportunity for accused to become fit to stand trial

This provision outlines the requirement to give an accused who has been found unfit the opportunity to become fit to stand trial. It is drawn from sections 16 and 19 of the former Act.

Clause 35(1) provides that, after making the finding of unfitness, the court must make an order under clause 37, being an order as to how the charge against the person will be dealt with, if the court is satisfied, on the balance of probabilities, that the accused will not become fit within six months.

If the court is not so satisfied, clause 35(2) allows the court to adjourn proceedings in order to see whether the accused will become fit to stand trial.

Clause 35(3) deals with the length of an adjournment to regain fitness. Adjournments may be made for a period of up to six months or, in exceptional circumstances justifying a longer period, 12 months after the finding of unfitness. This is effectively a doubling of the length of adjournment allowable under the former Act. The adjournment period has been extended to allow more time for an accused to regain fitness – for example, an accused with mental illness may require time to trial a course of mental health treatment that may stabilise their condition and give them the opportunity to become fit to stand trial.

Clause 35(4) requires the court to make an order under clause 37 if it becomes satisfied at any time within the adjournment period that the accused will not become fit within that period. Similarly, clause 35(5) provides that if the accused has not become fit at the end of the adjournment period, an order under clause 37 must be made.

The court's general powers on adjournment are set out in clause 15.

A transitional provision for adjournment periods to regain fitness that were already running on commencement is set out in Part 14 Division 2: see clause 247.

Clause 36 – Chief Mental Health Advocate to be notified

Clause 36 sets out another requirement for the Chief Mental Health Advocate to be immediately notified by the court if proceedings are adjourned to give the accused an opportunity to regain fitness. As with the notification provision at clause 30, this will trigger contact requirements under Part 8. A transitional provision to deal with adjournments that occurred prior to commencement is set out in Part 14, Division 2: see clause 247(3).

Clause 37 – Court to make orders as to how charge against unfit accused to be dealt with

Clause 37 provides, at (1), that it applies if the court must make an order under clause 35; that is, is satisfied that an accused who has been found unfit will not become fit within six months, or any adjournment period beyond six months.

If the charge is of a simple offence or an indictable offence that was to be dealt with summarily, clause 37(2) provides that the court must either discharge the accused from the charge (at clause 37(2)(a)) or order that a special proceeding take place under Part 3 Division 3 Subdivision 3 (at clause 37(2)(b)). This is a change from section 16(5) of the former Act, which

provides that an unfit accused charged with a simple or indictable offence that was to be dealt with summarily may either be released, or have a custody order made in respect of them.

If any other case, the court must order that a special proceeding take place under Part 3 Division 3 Subdivision 3: clause 37(3).

An order discharging an accused from a charge, or a refusal to make such an order, under clause 37(2)(a), may be appealed under the Criminal Appeals Act section 6(eb), which is inserted by clause 299.

Clause 37(4) provides that if the accused is discharged for a simple offence or an indictable offence that was to be dealt with summarily, the accused cannot be charged with or tried for an offence which, on the charge, the accused might have been found to have committed. This language is used for consistency with section 17 of *The Criminal Code*.

Clause 38 – Legal representation of unfit accused

Clause 38 deals with the legal representation of unfit accused persons, together with resolving any question of an unfit accused person's ability to instruct a legal practitioner or make admissions.

Clause 38(1) provides that the court may adjourn proceedings where it appears to the court that an unfit accused should have legal representation. An adjournment can occur on application or by the court's own initiative.

Clause 38(2) provides that if an accused is unable to instruct their legal practitioner, the legal practitioner may exercise an independent discretion and, in doing so, must act in a way that they reasonably believe to be in the accused's best interests. Similar provisions can be found in section 43ZO of the *Criminal Code Act 1983* (NT) and section 38 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

Clause 38(3) provides that if there is a question as to the extent to which the accused is able to instruct a legal practitioner or is able to make admissions, the question must be determined by the court.

Clause 38 does not require the court to appoint a legal practitioner for the person. It serves as a mechanism for the court to adjourn proceedings for the express purpose of allowing the person to find legal representation.

This may be facilitated through the provision of advocacy support from the Mental Health Advocacy Service, as a function of a mental health advocate under this Act is to assist CLMI identified persons to access legal services: see clause 134(1)(j).

Provision is also made for the court to adjourn proceedings to set limiting terms on existing custody orders under Part 14 Division 2 Subdivision 5 if it appears to the court that the person should have legal representation: clause 266.

Clause 39 – Procedure for deciding if accused has become fit to stand trial

Clause 39 provides that clauses 28 and 29 apply in relation to the question of whether the accused has become fit to stand trial, with any necessary modifications. This provision is drawn from section 13 of the former Act.

Clause 40 – Trial to continue if accused found fit to stand trial

Clause 40 provides that if, after a finding of unfitness, the accused is found fit to stand trial, then the trial must be resumed in accordance with ordinary procedures.

Subdivision 3 – Special proceedings

This Subdivision outlines the process and procedure for special proceedings.

Clause 41 – Nature of special proceedings

Clause 41 explains the purpose of, and findings available at, a special proceeding.

Clause 41(1) provides that the purpose of a special proceeding is for the court, constituted by a magistrate or judge sitting alone, to decide the charge against the accused on the evidence available. This is consistent with the objects at clause 7(1)(b)(iii): that persons with mental impairment in the justice system be given a fair hearing even if they are unfit to stand trial in accordance with ordinary procedures; and clause 7(1)(b)(iv): that persons with mental impairment in the justice system are not found to have committed the offence unless, on the evidence available, it can be proved to the ordinary criminal standard of proof. Similar arrangements are found in:

- Part 4 Division 3 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW);
- Part 3 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic);
- Part 2 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas);
- Part IIA Division 4 of the *Criminal Code Act 1983* (NT); and
- Part 13 Division 13.2 of the *Crimes Act 1900* (ACT).

Clause 41(2) outlines the findings the court may make in deciding the charge:

- clause 41(2)(a): that the accused is not guilty, other than as described in paragraph (b); or
- clause 41(2)(b): that the accused is not guilty on account of mental impairment under section 27 of *The Criminal Code*; or
- clause 41(2)(c): that the accused committed the offence charged or another offence which, on the charge, they might be found to have committed.

A finding under clause 41(2)(c) may be appealed under sections 6(ec) and 25A(b) of the Criminal Appeals Act, which are inserted by clauses 299 and 306 of the Bill.

To avoid doubt, clause 41(3) provides that, to make a finding that the accused committed an offence, the court must be satisfied beyond a reasonable doubt. Such a finding would be required in respect of clauses 41(2)(b) and (c).

Clause 41(4) provides that the court must give reasons for its decision, but a failure to give reasons does not affect the validity of such a decision.

Clause 42 – Conduct of special proceedings

Clause 42 outlines how special proceedings are to be conducted. Clause 42(2) gives flexibility to the court to conduct a special proceeding in the manner the court considers appropriate in the circumstances of the case, including without holding a hearing.

This flexibility is to be balanced against the requirement at clause 42(2) to endeavour, to the extent practicable, to conduct special proceedings as if they were an ordinary criminal proceeding.

Clause 42(3) requires the court to confer with the parties in determining how to conduct a special proceeding.

Clause 42(4) provides that, for the purpose of a special proceeding, and without limiting the court's ability to determine the conduct of the proceeding:

- the accused is taken to plead not guilty (clause 42(4)(a));
- the accused may raise any defence that they could have raised at a trial (clause 42(4)(b));
- the rules of evidence apply, subject to any modification determined by the court (clause 42(4)(c)); and
- the accused may give evidence (clause 42(4)(d)).

Clause 42(5) clarifies that, although clause 42(4)(d) provides that an accused may give evidence at a special proceeding, this does not imply that a hearing must be held in every case.

Clause 43 – Effect of findings

Clause 43 outlines the effect of a finding at a special proceeding, as it is through a special proceeding that an unfit accused becomes a supervised person for the purposes of this Act and is made subject to a supervision order.

Clause 43(1) provides that a finding under clause 41(2)(a) – that the accused is not guilty – is taken for all purposes to be a finding of not guilty at a criminal trial.

Clause 43(2) provides that a finding under clause 41(2)(b) – that the accused is not guilty on account of mental impairment – is taken for all purposes to be a finding of not guilty on account of mental impairment under section 27 of *The Criminal Code* at a criminal trial.

Clause 43(3) provides that a finding under clause 41(2)(c) – that the accused committed the offence charged or another offence on the charge – has a different effect to a finding of guilt at an ordinary criminal trial. If such a finding is made, the court must not enter a judgment of conviction: clause 43(3)(a). This accords with the principle that an accused cannot be convicted when their mental impairment is such that they are unfit to stand trial. However, despite not resulting in a conviction being recorded, a finding of committed the offence charged is to be treated as a conviction or a finding of guilt for certain purposes across the WA statute book. These include:

- securing a Working With Children or National Disability Insurance Scheme worker screening check;

- being licensed to perform certain security-related functions;
- for the purposes of the Ombudsman's reportable conduct scheme; and
- for the purposes of being a reportable offender under the *Community Protection (Offender Reporting) Act 2004*.

Amendments of this nature are set out in Part 15.

Additionally, where a charge against a child is proved and the court (constituted not to include a judge) makes an order against or in relation to the child as a consequence of that finding, the review provisions in Part 5 of the Children's Court Act apply. These provide that the court, constituted by the President, may, of its own motion or upon application, reconsider the order made. On reconsideration, the President may confirm the order or discharge it and substitute any other order that the court, if it had been constituted by the President, could have made in relation to the offence. The findings of not guilty on account of mental impairment and committed the offence charged are covered by these review provisions in the Children's Court Act as they are a finding that a charge against a child is proved.

If the offence the accused was found to have committed is a simple offence or an indictable offence that was to be dealt with summarily, the accused cannot be charged with or tried for an offence which, on the charge, they may have been found to have committed: clause 43(3)(b). This is consistent with the options available to the court following a finding of unfitness at clause 37, and is drawn from section 16(8) of the former Act.

If the offence the accused was found to have committed is an indictable offence other than one that was to be dealt with summarily, the accused may be charged with and tried for an offence which, on the charge, the accused might have been found to have committed: clause 43(3)(c). This is consistent with section 19(7) of the former Act.

Clause 43(4) provides that if the court finds the accused not guilty or not guilty on account of mental impairment, the court must enter judgment accordingly. That is, a judgment of acquittal or acquittal on account of mental impairment, as is relevant.

Clause 43(5) provides that if the court finds the accused not guilty on account of mental impairment, or finds that the accused committed the offence charged or another offence on the charge, the court must make an order under Part 5 in respect of the accused.

Part 4 – Persons required to be dealt with under this Act

This Part outlines the process to be followed for an accused who has been acquitted on account of mental impairment under section 27 of *The Criminal Code* and is now required to be dealt with under this Act.

Clause 44 – Persons acquitted on account of mental impairment or found to have committed offence

Clause 44(1) provides that if a court must deal with a person under this Act because of section 149(1) of the Criminal Procedure Act, the court must make an order under Part 5 in respect of the accused. Section 149(1) of that Act provides that if a court acquits an accused on account of mental impairment, the court must deal with the accused under this Act.

Clause 44(2) provides that if a court must deal with a person under this Act because of sections 30(5), 32(7) or 32A(6) of the Criminal Appeals Act (including section 32A(6) as referred to in section 14 of that Act), the court must make an order under Part 5 in respect of the accused.

A Note is included to clarify that clause 44 applies when a person is acquitted on account of mental impairment, either at trial or on appeal, and when, on appeal, a person is found under clause 41(2)(c) to have committed an offence.

Section 30 of the Criminal Appeals Act applies in the case of an appeal from a superior court against a conviction. Under section 30(5), if the Court of Appeal allows an appeal where it is satisfied that the offender should have been found not guilty on account of mental impairment, the Court must set aside the conviction, enter a judgment of acquittal on account of mental impairment, and deal with the offender under this Act.

Section 32 of the Criminal Appeals Act applies in the case of an appeal commenced under section 25 of that Act (an appeal against an acquittal on account of mental impairment). Appeals under section 32 are to be dealt with as appeals against either the factual finding (that the accused did the acts or made the omissions that constituted the offence), the finding of mental impairment (that is, that the accused was not criminally responsible for those acts or omissions), or both.

Section 32(7) provides that if the appeal against the factual finding is allowed and the appeal against the finding of mental impairment is dismissed, the Court must set aside the acquittal on account of mental impairment and order a trial or new trial, or enter a judgment of acquittal (other than on account of mental impairment) for the offence, or, if satisfied that the accused could have been found guilty of some other offence and the judge or jury must have been satisfied of facts that prove the accused was guilty of that other offence, enter a judgment of acquittal on account of mental impairment for that other offence and deal with the accused under this Act.

New section 32A of the Criminal Appeals Act, which is inserted by clause 310 in Part 15 Division 6, deals with, among other matters, appeals against a finding of committed the offence charged at a special proceeding. Section 32A(6) provides that if an appeal against such a finding is allowed, the Court of Appeal must:

- enter a judgment of acquittal (other than on account of mental impairment); or

- order that a special proceeding take place under this Act; or
- if the accused could have been found to have committed some other offence and the court is satisfied that the judge must have been satisfied on the evidence available of facts that prove the accused did the acts or made the omissions that constitute that other offence, make a finding under clause 41(2)(c) that the accused committed that other offence; or
- if the court is satisfied that the accused should have been found not guilty of the offence on account of mental impairment, enter a judgment of acquittal of that offence on account of mental impairment and deal with them under this Act; or
- if the accused could have been found to have committed some other offence instead of the offence charged and the court is satisfied that the judge must have been satisfied on the evidence available of facts that prove the accused did the acts or made the omissions that constitute that other offence, and the court is satisfied that the accused should have been found not guilty of that offence on account of mental impairment, enter a judgment of acquittal of that offence on account of mental impairment and deal with the accused under this Act.

The effect of clause 44 is to ensure that the disposition options available to the courts in respect of people with mental impairment are the same for those who have been found unfit to stand trial and had the charge against them decided in a special proceeding, and those who have been acquitted on the basis of mental impairment under section 27 of *The Criminal Code* in an ordinary criminal trial.

Part 5 – Court-ordered dispositions

This Part outlines the disposition options available to the courts.

Division 1 – Overview of Part

Division 1 contains an overview provision, which sets out information about disposition options, supervision orders, and notification requirements to the Tribunal and the Chief Mental Health Advocate.

Clause 45 – Overview of Part

Clause 45 is an overview provision.

Division 2 – Orders that may be made by court

This Division sets out the orders that may be made by a court.

Clause 46 – Orders that may be made

Clause 46(1) provides that, if a court must make an order in respect of an accused, it must make:

- a custody order (clause 46(1)(a)); or
- a community supervision order (clause 46(1)(b)); or
- an order that the person be released unconditionally (clause 46(1)(c)).

Clause 46(2) outlines that a custody order must be made in respect of a person if the offence that they were found to have committed is a serious offence (an offence in Schedule 1), unless:

- the court is satisfied, on the balance of probabilities, that any risk the person appears to present to the safety of the community can be adequately managed under a community supervision order (clause 46(2)(a)); or
- the person was a child at the time of the commission of the offence and the court is satisfied there are exceptional circumstances (clause 46(2)(b)).

Clause 46(2) is subject to (3), which provides that a custody order cannot be made unless the statutory penalty for the offence the person was found to have committed is, or includes, imprisonment. This is retained from sections 16(6) and 19(5) of the former Act.

Clause 46(4) restricts when an order for unconditional release can be made when the offence the person is found to have committed is a serious offence. Unconditional release can only be ordered where the person was a child at the time of commission of the offence and the court is satisfied that there are exceptional circumstances.

Clause 144(1) provides that a victim of an offence in respect of which a court must make an order under Part 5 may make a victim impact statement to the court to assist the court in determining what order to make.

The making of, or refusal to make, an order under Part 5 may be appealed under sections 6(ed) and 25A(c) of the Criminal Appeals Act, which are inserted by clauses 299 and 306.

Clause 47 – Orders that may be made: considerations

Clause 47, at (1), outlines what the court must have regard to when making an order under Part 5:

- the protection of the community (refer to paramount consideration at clause 8) (clause 47(1)(a));
- the nature of the offence and circumstances of its commission (clause 47(1)(b));
- the person's character, antecedents, age and health (clause 47(1)(c));
- the nature of the person's mental impairment (clause 47(1)(d));
- the relationship between the mental impairment and the offending conduct (clause 47(1)(e));
- the degree of risk that the person appears to present to themself or the safety of the community because of their mental impairment (clause 47(1)(f)); and
- the extent to which adequate resources are available for the treatment, care and support of the person in the community (clause 47(1)(g)).

Where the person is a child, the court must also have regard to the child-specific considerations (clause 47(1)(h)) and, if the person was a child at the time of the commission of the offence, the general principles of juvenile justice set out in section 7 of the Young Offenders Act (clause 47(1)(i)).

The considerations at (1)(b) and (c) are drawn from sections 16(6) and 19(5) of the former Act.

Clause 47(2) clarifies that the matters set out in (1) are not exhaustive, and the court may have regard to others.

Clauses 47(3) and (4) respectively provide that the court may require a prosecutor to provide copies of documents relevant to the factors to be considered under clause 47(1)(b) and clause 47(1)(c), and that the court may order that a report by a psychiatrist, psychologist or other appropriate expert relevant to any of the matters listed in (1) to be submitted to the court. This provision is drawn from sections 16(7) and 19(6) of the former Act, expanded to encompass expert reports.

A transitional provision is included to deal with a prosecutor's requirement to provide documents to the court that had not been fulfilled on commencement of the Act: see Part 14 Division 2, clause 247(6)-(7).

Clause 48 – Court to notify Tribunal and Chief Mental Health Advocate of orders

Clause 48 contains a requirement for the court to immediately notify the Tribunal and the Chief Mental Health Advocate if a custody order or community supervision order has been made (clause 48(a)) and give the Tribunal and Chief Mental Health Advocate a copy of the order and the prescribed information (clause 48(b)).

As with the notification requirements at clauses 30 and 36, the prescribed information will be set out in regulations and determined in consultation with the courts, Tribunal and the Chief Mental Health Advocate. The information to be provided to the Tribunal is likely to include the information currently prescribed under regulation 3(2) of the former Regulations, which will be repealed by this Act: Part 14 Division 1, clause 236.

A transitional provision has been included to require that the Tribunal and Chief Mental Health Advocate are notified of people who were subject to community orders under the former Act immediately before commencement. Community orders, which are community based orders, conditional release orders or intensive supervision orders under the *Sentencing Act 1995*, available under section 22(1)(b) of the former Act, will be taken to be community supervision orders on commencement day. The court that made the community order must notify the Tribunal and Chief Mental Health Advocate as soon as practicable after commencement: see Part 14 Division 2, clause 253(4)(a).

In respect of custody orders that were in force prior to commencement, within seven working days after commencement, the Tribunal must provide the Chief Mental Health Advocate with details of all supervised persons, including any orders under the former Act that have effect in respect of the person, if applicable, the place where the person is detained, and the prescribed information (unless the person is detained in a DSC declared place or at an authorised hospital): see Part 14 Division 2, clause 276.

Division 3 – Custody orders

This Division deals with custody orders.

Clause 49 – Custody orders

Clause 49 provides that a custody order is an order that a person be detained in custody at a place determined from time to time by the Tribunal under Part 6 Division 3 for the protection of the community.

A transitional provision is included to provide that custody orders under the former Act that were in effect immediately before commencement day have effect as though they were made under Part 5: Part 14 Division 2, clause 254.

Clause 50 – Limiting term for custody orders

Clause 50 requires that a limiting term be set for a custody order.

Clause 50(1) defines ***term of detention*** to mean a term of detention under the Young Offenders Act, and ***term of imprisonment*** to mean term as defined in section 85(1) of the *Sentencing Act 1995*: a term of imprisonment imposed on an offender by a court as a sentence, whether a fixed term or life imprisonment, not including detention determined by the Governor for a child who is guilty of murder under section 279(5)(b) of *The Criminal Code* or indefinite imprisonment. This has been included to clarify that life imprisonment may be imposed as a limiting term.

Clause 50(2) provides that the court must set a limiting term for a custody order that is the best estimate of the term of imprisonment or term of detention that the court would have imposed in all the circumstances if they were sentencing the person for the offence

(clause 50(2)(a)) and any mental impairment of the person was not taken into account (clause 50(2)(b)).

For the purposes of (2), the court must assume that the person had pleaded guilty to the charge at the earliest opportunity (clause 50(3)(a)), and there is no option but to impose a term of imprisonment or term of detention (clause 50(3)(b)). This last assumption at (3)(b) is included because it may be that, while the court has determined that a custody order is necessary for the protection of the community, the sentence that would have been imposed in an ordinary trial if the court were sentencing the person for the offence would have been non-custodial (and therefore the court would not have imposed a term of imprisonment or detention in the ordinary course). Clause 50(3)(b) overcomes any conceptual difficulty that may arise.

Clause 50(4) deals with the commencement of the limiting term. The limiting term commences on the day on which the order is made unless the court orders that it be taken to have commenced earlier. It is open to the court to take into account any time that the person has already spent in custody in relation to the offence. This may include, for example, time spent on remand during a fitness inquiry, or during a special proceeding following a finding of unfitness.

The setting of a limiting term on a custody order may be appealed under sections 6(ee) and 25A(d) of the Criminal Appeals Act, which are inserted by clauses 209 and 306.

Clause 51 – When custody order ceases to have effect

Clause 51 outlines when a custody order ceases to have effect. This will be the earliest of the following:

- the expiry of the limiting term (clause 51(a));
- the order is cancelled under clause 74 (on application by the Tribunal to the court within the first 12 months or first half of the limiting term, depending on its length) (clause 51(b));
- if a leave of absence order applies to the person – when an order of the Tribunal cancelling all conditions of that leave of absence order under clause 73(1)(d)(iii) comes into effect (clause 51(c)).

Division 4 – Community supervision orders

Division 4 deals with community supervision orders.

Clause 52 – Community supervision orders

Clause 52 provides that a community supervision order is an order that a person must, while residing in the community, comply with the conditions of the order for the protection of the community.

Clause 53 – Term of community supervision order

Clause 53 outlines the duration of a community supervision order. Clause 53(1) provides that the term of a community supervision order must be set by the court and must not be more

than five years and clause 53(2) provides that the term of a community supervision order commences on the day the order is made.

Clause 54 – Conditions of community supervision order: statutory conditions

Clause 54 outlines the statutory conditions of community supervision orders.

Clause 54(1) provides that it is a condition of every community supervision order that the supervised person be under the supervision of a supervising officer. Being under supervision includes complying with the lawful directions of the supervising officer.

The other statutory condition of a community supervision order is set out at clause 54(2): that the supervised person report to a community corrections officer (if an adult) or an officer of the Department as defined in section 3 of the Young Offenders Act (the Department of Justice) assigned by the CEO (Young Offenders) (if a child; such officers are referred to as "youth justice officers" in this Explanatory Memorandum). The person must report on the next working day after the day on which the order is made (clause 54(2)(a)) and be under that officer's supervision (clause 54(2)(b)). The person must comply with the lawful directions of that officer until a supervising officer is designated for them (clause 54(2)(c)).

Clause 54(3) provides that the powers of a community corrections officer or youth justice officer when that officer is performing functions under clause 54(2) are those of a supervising officer under this Act.

This initial requirement to report within one working day after the day on which the order is made is to ensure the person is under appropriate supervision until the Tribunal has designated a supervising officer for the person under clause 85. The Tribunal must designate a supervising officer within five working days after the day on which a community supervision order is made.

A transitional provision is included at clause 253 which states that community orders in place at the time of commencement are to have effect as though they were community supervision orders made under Part 5. The Tribunal is required to review those orders and report to the Minister as soon as practicable: clause 253(4)(b).

Clause 55 – Conditions of community supervision order: court imposed conditions

Clause 55 outlines other conditions that may be imposed by the court. The court may impose any conditions it considers are necessary to protect the community: clause 55(1).

Clause 55(2) provides that if the supervised person is a child, the court must have regard to the child-specific considerations.

Clause 55(3) sets out a non-exhaustive list of the kind of conditions that may be imposed:

- that the person undergo treatment, training or other measures that may alleviate or prevent the deterioration of the person's condition (clause 55(3)(a));
- that the person reside at a specified place (clause 55(3)(b));
- that the person notify the supervising officer of any change to their name or place of residence within a specified number of days after the change (clause 55(3)(c));

- that the person not leave the State except with, and in accordance with, the permission of the supervising officer (clause 55(3)(d));
- that the person be subject to electronic monitoring under clause 221 or a curfew under clause 222, or both (clause 55(3)(e));
- that the person comply with requirements relating to the protection of victims (for example – non-contact conditions) (clause 55(3)(f)); and
- if the person is a child, conditions that are relevant to the child-specific considerations (clause 55(3)(g)).

Clause 55(4) provides that electronic monitoring cannot be imposed as a condition of a community supervision order unless the court has received a report from the CEO (Corrections) about the suitability of electronic monitoring in relation to the person (clause 55(4)(a)), and cannot be imposed on a child (clause 55(4)(b)). Provisions relating to electronic monitoring are set out at Part 13 Division 2. In this context, the CEO (Corrections) is an "appropriate expert" from whom the court could order a report.

Clause 56 – When community supervision order ceases to have effect

Clause 56 outlines when a community supervision order ceases to have effect. This will be the earliest of the following:

- the expiry of its term (clause 56(a));
- it is cancelled by a court (on application by the Tribunal within the first 12 months or first half of its term under clause 74, or in proceedings for breach of a community supervision order under clause 89(1)(a)) (clause 56(b));
- when an order of the Tribunal cancelling all conditions of the community supervision order under clause 73(1)(c)(ii) comes into effect (clause 56(c)).

Part 6 – Administration of supervision orders by Tribunal

Part 6 deals with the powers of the Tribunal to administer supervision orders.

Division 1 – Preliminary matters

Division 1 includes an overview provision and other provisions dealing with preliminary matters.

Clause 57 – Overview of Part

Clause 57 gives an overview of the matters dealt with in Part 6.

Clause 58 – Representative of supervised person

Clause 58 deals with representatives of supervised persons. It provides at (1) that the Tribunal may recognise a person as a representative of a supervised person. A representative may be a person chosen by the supervised person (clause 58(2)(a)), or another person, if the Tribunal is of the opinion that the supervised person is unable to choose a representative and the prospective representative has a sufficient interest in the person (clause 58(2)(b)).

This provision is drawn from section 32(2) of the *Disability Services Act 1993* and section 316 of the Mental Health Act, which respectively deal with the appointment of a representative for a person with disability or a person with mental illness.

Some examples of who may be recognised as a representative are listed under (1): a carer or a family member of the person. These are examples only and are not intended to limit the range of people who may be recognised as a representative. The definition of representative in clause 9 provides that a guardian is a representative of a person. This means a guardian need not request recognition as a representative under clause 58, as they already fall within the definition.

Clause 58(2) provides that the Tribunal cannot recognise a person as a representative unless satisfied that they are acting without remuneration; however, exceptions to this are set out in clause 58(3): where the person's representative is the Public Advocate (clause 58(3)(a)), an officer assisting the Public Advocate (clause 58(3)(b)), the Chief Mental Health Advocate (clause 58(3)(c)), or a mental health advocate (clause 58(3)(d)).

A representative may represent or accompany a supervised person in their dealings with and appearances before the Tribunal. A supervised person may also be accompanied by a representative and represented by a legal practitioner in Tribunal proceedings.

Clause 59 – Non-compliance with conditions of orders

Clause 59 provides that a reference to non-compliance with a condition of a leave of absence order or community supervision order is not limited to circumstances where non-compliance arises through an act or omission of the supervised person.

Non-compliance may arise due to the actions of another person; for example, if a supervised person is subject to an electronic monitoring condition and another person tampers with or removes the device.

Division 2 – Declared places

Division 2 deals with the declaration of declared places.

Clause 60 – Minister may make order as to declared places

Clause 60 outlines how a place may be declared. The Minister may, by order published in the *Government Gazette*, declare that a place has appropriate facilities for the assessment, detention, treatment, care and protection of persons subject to a custody order.

A transitional provision is included to provide that a place that was a DSC declared place under section 24(5A) of the former Act immediately before commencement is taken to have been declared under clause 60: Part 14 Division 2, clause 278.

A DSC declared place is a subset of a declared place, being a declared place that is controlled and managed by or on behalf of the Disability Services Commission under the Declared Places Act.

Division 3 – Custody orders: places of custody

This Division deals with the determination of places of custody, being places where a supervised person is to be detained under a custody order.

Clause 61 – Place of custody to be determined

Clause 61 outlines the requirement for the Tribunal to determine a place of custody for a supervised person. This provision is drawn from section 25 of the former Act.

The Tribunal must determine a place of custody for the person within five working days after the custody order is made: clause 61(1).

Clause 61(2) provides that the determination of a place of custody under (1) is subject to clause 62, which places limitations on placement in certain places of custody.

Clause 61(3) provides that until the place of custody is determined:

- if the supervised person was already detained at a hospital when the custody order was made (whether under an inpatient treatment order or otherwise), then the person is to remain at a hospital (clause 61(3)(a)); or
- in any other case, the person is to be detained in a prison or detention centre (clause 61(3)(b)).

A transitional provision is included to address circumstances where a determination of place of custody was required to be made, but had not yet been made, at commencement: see Part 14 Division 2, clause 269.

Clause 62 – Limitations on place of custody

Clause 62 sets out the limitations imposed on the Tribunal's determination of a place of custody. This provision is drawn from section 24 of the former Act.

Clause 62(1) provides that the Tribunal must not determine that a supervised person is to be detained in a prison or a detention centre unless satisfied that there is no suitable available alternative place of custody.

Clause 62(2) provides that the Tribunal must not determine that a supervised person is to be detained in a DSC declared place unless:

- the Tribunal is satisfied that the person is a person with a disability as defined in section 3 of the *Disability Services Act 1993*, the predominant reason for which is not mental illness (clause 62(2)(a)); and
- the Tribunal is satisfied that the person has reached 16 years of age (clause 62(2)(b)); and
- the Tribunal has regard to the degree of risk that the person's detention in the DSC declared place appears to present to the safety of the community (clause 62(2)(c)); and
- the Tribunal is constituted to include a member referred to in clause 171(1)(f) (a person who is appointed or employed under section 9 or made available under section 10 of the *Disability Services Act 1993* and appointed by the Minister on the nomination of the Minister for Disability Services) (clause 62(2)(d)).

These limitations are only in place for a DSC declared place. The former Act included a further limitation on placement in a DSC declared place, being a requirement for the Minister for Disability Services to consent to the placement (see section 24(5C) of the former Act); this limitation has now been removed.

Clause 62(3) provides that a supervised person must not be detained at an authorised hospital unless the Tribunal is satisfied that the person has a mental illness that is capable of being treated.

Clause 62(4) further provides that the Tribunal should not detain a supervised person at an authorised hospital unless the Tribunal is satisfied that:

- the person has a mental illness requiring treatment (clause 62(4)(a)); and
- because of the mental illness, there is a significant risk to the health or safety of the person or to the safety of another person, or a significant risk of serious harm to the person or to another person (clause 62(4)(b)); and
- the required treatment can only be satisfactorily provided at an authorised hospital (clause 62(4)(c)); and
- the Tribunal is constituted to include a member who is a psychiatrist (clause 62(4)(d)).

Clause 62(5) provides that a failure to comply with (4) does not affect the lawfulness of the person's detention.

Clause 63 – Tribunal to notify of determination of place of custody

Clause 63 requires the Tribunal to notify the Chief Mental Health Advocate and, in certain circumstances, the Minister for Disability Services, when it has determined a place of custody for a supervised person.

Clause 63(1) requires the Chief Mental Health Advocate to be notified within 24 hours after the determination is made. This will trigger contact requirements to enable the provision of advocacy services. Advocacy may be provided under Part 8 of this Act, Part 20 of the Mental Health Act, or Part 10 of the Declared Places Act, depending on the place where the person is detained.

Clause 63(2) provides that the Minister responsible for the administration of the Declared Places Act – the Minister for Disability Services – is be notified if the Tribunal has determined that a supervised person is to be detained in a DSC declared place. This notification must take place within five working days after the determination is made.

Clause 64 – Place of custody may be changed

Clause 64 provides at (1) that the Tribunal may change its determination as to the place where a supervised person is to be detained. It is drawn from section 26 of the former Act.

Clause 64(2) provides that if a supervised person turns 18, the Tribunal must, as soon as practicable, consider whether to change its determination as to the place where the person is to be detained.

Clause 64(3) clarifies that (1) is subject to the limitations set out in clause 62.

If the Tribunal determines a new place of custody for a supervised person, the Tribunal must notify the Chief Mental Health Advocate under clause 63.

Division 4 – Tribunal to review orders

This Division outlines the Tribunal's review functions in respect of supervision orders.

Clause 65 – Terms used

Clause 65 deals with terms used and, at (1), defines ***CEO (Community Services)*** and ***reviewable order***.

The CEO (Community Services) is the CEO of the Community Services Department as defined in clause 9.

A reviewable order is a custody order (clause 65(a)), community supervision order (clause 65(b)), or a leave of absence order (clause 65(c)).

Clause 65(2) provides that a reference in Part 6 Division 4 to a child in the care of the CEO (Community Services) is a reference to a child who, under section 30(a) or (b) of the *Children and Community Services Act 2004*, is in the CEO's care. This is:

- a child in provisional protection and care; or
- a child who is the subject of a protection order (time-limited) or protection order (until 18).

Clause 66 – Initial and periodic review

Clause 66 outlines the Tribunal's responsibility to conduct initial, and thereafter periodic, reviews of reviewable orders.

Clause 66(1) provides that the Tribunal must review a reviewable order as soon as practicable after it is made, but no later than four weeks after the order is made (clause 66(1)(c)). An exception to this is in the case of a leave of absence order – for a child, a leave of absence order must be reviewed no later than three months after it was made (clause 66(1)(a)), and for a supervised person who is not a child, 12 months (clause 66(1)(b)). This exception is included because a leave of absence order can only be made following a review of a custody order.

In comparison, section 25(1)(a) of the former Act required the Board to review an accused's case and determine the place where the accused was to be detained within five working days after a custody order was made, and section 33(2)(a) of the former Act required the Board to give a written report to the Minister about a mentally impaired accused within eight weeks after a custody order was made.

Clause 66(2) provides that a review must be carried out no later than three months after the previous review if the supervised person is a child (clause 66(2)(a)), and no later than 12 months after the previous review if the supervised person is not a child (clause 66(2)(b)).

Clause 66(3) clarifies that a previous review (as referred to in (2)) includes both an internal review (clause 66(3)(a)) and an appeal to the Supreme Court (clause 66(3)((b)) under Part 6 Division 7.

Transitional provisions are included to require reviews of any existing community, custody, leave of absence and release orders at the time of commencement: see clauses 253, 254, 255 and 257 in Part 14 Division 2. Under those provisions, reviews are to be conducted as soon as practicable after commencement as though they had been requested by the Minister under clause 69(1).

In comparison, section 33(2)(b) of the former Act required the Board to provide a written report to the Minister about a mentally impaired accused whenever it got a written request from the Minister to do so and section 33(2)(d) of the former Act required the Board to provide a written report to the Minister about a mentally impaired accused at least once in every year.

Clause 67 – Application for review by supervised person, representative or legal practitioner

Clause 67 provides, at (1), that a supervised person, their representative or legal practitioner may apply, in writing, for a review of the supervised person's reviewable order. An application for review can be made at any time, other than within 28 days of the making of a decision which considered substantially the same issue as that raised in the review application: clause 67(2).

After receiving an application for a review, the Tribunal must carry out that review within a reasonable period of time: clause 67(3).

Clause 67(4) provides that the Tribunal may reject an application if it is satisfied the application is vexatious or frivolous.

It is noted that the former Act did not include a right for a mentally impaired accused to request the Board to review their order or prepare a written report about them.

Clause 68 – Review by Tribunal on its own initiative

Clause 68 provides that the Tribunal may carry out a review of a reviewable order at any time if it considers there are circumstances that justify doing so.

Under section 33(2)(c) of the former Act, the Board could give the Minister a report about a mentally impaired accused whenever it thought there were special circumstances which justified doing so.

Clause 69 – Review at request of Minister

Clause 69, at (1), provides that the Minister may at any time request that the Tribunal conduct a review and provide a report on the outcome. Clause 69(2) provides that on receipt of a request from the Minister, the Tribunal must conduct the review within a reasonable period of time and clause 69(3) provides that the Minister's request must be in writing.

Under section 33(1) of the former Act, the Minister could, at any time, make a written request to the Board to provide a report about a mentally impaired accused.

Clause 70 – Time of review may be extended in certain cases

Clause 70 allows the Tribunal to extend the period within which a review must be carried out.

Clause 70(2) provides that where there is a requirement to carry out an initial or periodic review less than 28 days after a previous review was completed and a ***relevant decision*** (as defined in (1)) was made, the Tribunal may extend the time within which to conduct that review to a period no later than 28 days after that decision was made.

Clause 71 – Notice to supervised persons and CEO of review proceedings

Clause 71(1) requires notice of upcoming review proceedings to be given to a supervised person, their representative and their legal practitioner. The Tribunal must, before commencing review proceedings, give adequate notice of the impending proceedings, including the date, time and place where any hearing will be held (clause 71(1)(a)), and provide copies of any reports that will be considered when making a decision following the review (clause 71(1)(b)).

Clause 71(2) requires that notice also be given to the CEO. This is to facilitate giving notice to victims under Part 9 Division 5.

Clause 71(3) provides that if the supervised person is a child, then notice and copies of any reports must be given to a parent and any guardian of the child (clause 71(3)(a)). If the child is in the care of the CEO (Community Services), notice and copies of reports must be given to that CEO (clause 71(3)(b)).

Clause 71(4) provides that the obligation to give copies of reports under clause 71(1) is subject to any restriction on access to information or documents under clause 169 or section 249 of the Mental Health Act.

Clause 169 outlines the Tribunal's powers to make confidentiality orders, which restrict disclosure of information (for example, a victim statement or submission made under Part 9)

to a supervised person where the Tribunal is satisfied that disclosure would create a risk to the health or safety of the person or another person.

Section 249 of the Mental Health Act provides that a person is not entitled to have access to a relevant document about them (including a report) if a psychiatrist reasonably believes that the disclosure of the information would:

- pose a significant risk to the health or safety of the person or the safety of another person; or
- pose a significant risk of serious harm to the person or another person; or
- if disclosure would reveal either confidential information or personal information about another person (unless that person has consented).

Access is restricted under section 249 of the Mental Health Act if the document is about a supervised person required to be detained at an authorised hospital under this Act (that is, under a custody order) and the document came into existence under, or for the purposes of, the Prisons Act or Young Offenders Act. To ensure that the Tribunal knows whether such a restriction applies, section 249 of the Mental Health Act is amended by clause 375 in Part 15 Division 20 to insert new (4). New section 249(4) requires a person in charge of a mental health service who is required to provide a restricted document to the Tribunal to ensure the Tribunal is notified that the supervised person is not entitled to access it.

Clause 71(5) provides that notice of an impending review proceeding and copies of any reports need not be given when the Tribunal is constituted in accordance with clause 75(1). Clause 75 permits the Tribunal to be constituted by the President or a Deputy President alone to conduct a review where the circumstances are serious and urgent enough.

Clause 71(6) confirms that a failure to give notice does not affect the validity of a decision of the Tribunal.

Clause 72 – Matters to be considered on review

Clause 72 outlines the matters the Tribunal must consider when reviewing a reviewable order.

Clause 72(1)(a) provides that, in all cases, the Tribunal must have regard to the degree of risk that the release, or unconditional release, of the supervised person appears to present to the safety of the community. This is consistent with section 33(5)(a) of the former Act.

Clause 72(1)(b) provides that when reviewing a custody order, the Tribunal must have regard to:

- the likelihood that the supervised person would, if released on conditions under a leave of absence order, be able to comply with those conditions (clause 72(1)(b)(i)); and
- the likelihood that, if so released, the supervised person would be able to take care of their day-to-day needs and obtain appropriate treatment where relevant (clause 72(1)(b)(ii)); and
- whether there are facilities or services in the community for the treatment, care and support of the supervised person (clause 72(1)(b)(iii)).

The first two matters are drawn from sections 33(5)(b) and (d) of the former Act.

Clause 72(1)(c) provides that when reviewing a community supervision or leave of absence order, the Tribunal must have regard to the supervised person's ability to comply with the conditions of the order (clause 72(1)(c)(i)) and the supervised person's ability to take care of their day-to-day needs and obtain appropriate treatment where relevant (clause 72(1)(c)(ii)).

Regard must be had to the following matters in respect of all reviewable orders:

- the extent to which the person's mental impairment might benefit from, or is benefiting from, particular treatment, training or other measures (see section 33(5)(c) of the former Act) (clause 72(1)(d));
- the principle of imposing the least possible restriction on the freedom of the supervised person that is consistent with the need to protect the community (clause 72(1)(e)): see section 33(5)(e) of the former Act and clause 7(2)(a));
- any statement received from or on behalf of the supervised person (clause 72(1)(f));
- a victim impact statement or a victim's submission received under Part 9 that was given or made in respect of the supervised person (see section 33(5)(f) of the former Act) (clause 72(1)(g));
- any advice from a person with knowledge of issues relating to persons of the cultural background of the supervised person (clause 72(1)(h));
- any information received by the Tribunal under clauses 48, 122 or 204(4) (information required to be provided by the court following the making of a supervision order or extended order, or the Minister following the determination of an interim disposition) (clause 72(1)(i));
- where the supervised person is a child – the child-specific considerations (clause 72(1)(j));
- where the supervised person is a child in the care of the CEO (Community Services) – a submission from that CEO made for the purposes of the review (clause 72(1)(k)).

Clause 72(2) clarifies that the list at (1) does not limit the matters to which the Tribunal may have regard.

A Note is included which provides that the Tribunal may also have regard to submissions from close family members or carers in relation to the treatment, care and support of the supervised person received under clause 22.

Clause 73 – Orders the Tribunal may make after carrying out review

Clause 73, at (1), outlines the orders that may be made by the Tribunal following a review. The Tribunal may do any of the following:

- confirm the reviewable order and any conditions imposed on it (clause 73(1)(a));
- if the supervised person is subject to a custody order, make a leave of absence order in accordance with clause 78 (see Part 6 Division 5) (clause 73(1)(b));
- if the supervised person is subject to a community supervision order, vary the conditions of the order, or cancel all of the conditions of the order (clause 73(1)(c));
- if a leave of absence order applies to the person, the Tribunal may cancel the order, vary its conditions in accordance with clause 78 (see Part 6 Division 5), or cancel all conditions of the order (clause 73(1)(d)).

Notes are included under (1) to outline the consequences of cancellation of all conditions on both a community supervision order and a leave of absence order, and the consequences of cancellation of a leave of absence order. If all conditions are cancelled, the order ceases to have effect and the person is unconditionally released: see clause 51(b) for a custody order underlying a leave of absence order and clause 56(c) for a community supervision order.

If a leave of absence order is cancelled, the supervised person must be detained in custody in accordance with their underlying custody order: see clause 82.

The Note also clarifies that the Tribunal cannot cancel all conditions of a leave of absence order in the initial period of the order (see clause 73(3)) or where the supervised person is subject to an extended custody order: see clause 109(3).

A transitional provision is included to provide that leave of absence orders under the former Act in effect immediately before commencement have effect as leave of absence orders under clause 73(1)(b): Part 14, Division 2, clause 255.

A transitional provision is included to provide that conditional release orders under section 35 of the former Act in effect immediately before commencement have effect as leave of absence orders under clause 73(1)(b): Part 14, Division 2, clause 257.

Clause 73(2) provides that the Tribunal cannot make an order cancelling all conditions of a community supervision order or leave of absence order unless satisfied that it is no longer necessary, for the protection of the community, for the supervised person to be subject to the order.

Clause 73(3) states that the Tribunal cannot make an order cancelling all conditions on a leave of absence order or community supervision order (that is, an order effecting unconditional release) in certain circumstances, being:

- if the term of the community supervision order or underlying custody order (for a leave of absence order) is two years or more, within the first 12 months of the term of the order (clause 73(3)((a)); or
- if the term of the community supervision order or underlying custody order (for a leave of absence order) is less than two years, the first half of the term of the order (clause 73(3)(b)).

A supervised person may request a review of a decision of the Tribunal under clause 73 under Part 6 Division 7.

The Minister may, with leave, appeal to the Supreme Court against a decision of the Tribunal to make a leave of absence order, cancel all conditions of a community supervision order, or cancel all conditions of a leave of absence order.

Clause 74 – Court may cancel certain orders

Clause 74 deals with the cancellation of leave of absence orders and community supervision orders if the Tribunal is unable to cancel all conditions on those orders due to clause 73(3). Clause 74(1) provides that, in these circumstances, the Tribunal may apply to the court that made the community supervision order or custody order, seeking cancellation of the order.

Clause 74(2) provides that the court may cancel the community supervision order or custody order if satisfied that the order is not necessary for the protection of the community. If not so satisfied, the court must confirm the order.

Clause 74(3) provides that the supervised person and the Minister are also parties to proceedings under clause 74.

Clause 148(1) provides that if an application is made under clause 74, a victim of an offence committed by the supervised person may make a submission to the court in relation to the need to ensure adequate protection of the victim.

Decisions to confirm and cancel orders may be appealed by the supervised person or the Minister under Part 6 Division 7 where the decision was made by a court of summary jurisdiction and under Part 12 where the decision was made by a superior court.

Clause 75 – Truncated review in serious and urgent cases

Clause 75, at (1), provides that the Tribunal may conduct a review when constituted only by the President or a Deputy President, where the President or Deputy is satisfied that the seriousness and urgency of the circumstances require that a review be conducted before it is practicable to constitute the Tribunal as ordinarily required under clause 158. Clause 158(1) provides that the Tribunal is ordinarily required to be constituted by the President or a Deputy President and at least two other members and clauses 158(2) – (5) require the Tribunal to be constituted in particular ways, so far as practicable, when dealing with particular supervised persons.

Clause 75(2)(a) provides that when constituted in accordance with (1), the Tribunal need only have regard to immediately relevant matters. Clause 75(2)(b) provides that despite clause 73, which sets out the orders that can be made following a review, the Tribunal, when constituted in accordance with clause 75, cannot cancel all conditions of a community supervision order or leave of absence order: that is, the Tribunal cannot unconditionally release a supervised person in these circumstances.

Clause 75 is intended to address any urgent need to, for example, cancel a leave of absence order and have a supervised person arrested and returned to a place of custody.

Clause 76 – Copy of order and reasons for decision to be given to certain persons

Clause 76 deals with copies of orders and reasons for decisions and, at (1), requires a copy of an order made by the Tribunal under clause 73, together with reasons for the Tribunal's decision, to be given to a range of people. Copies must be given to the following as soon as practicable after the order is made:

- the supervised person (clause 76(1)(a));
- their guardian or administrator (if they have one) (clause 76(1)(b));
- their legal practitioner (if they have one) (clause 76(1)(c));
- their representative (if they have one) (clause 76(1)(d));
- if the supervised person is a child – a parent of the child (clause 76(1)(e));
- if the supervised person is a child in the care of the CEO (Community Services) – that CEO (clause 76(1)(f)); and
- the Minister (clause 76(1)(g)).

These requirements apply to any order made under clause 73.

Clause 76(2) provides that as soon as practicable after making an order of a particular type under clause 73, the Tribunal must give a copy of the order and the reasons for its decision to a person prescribed in relation to orders of that type, unless the regulations provide otherwise.

This provision is drawn from section 34 of the former Act.

Division 5 – Custody orders: leave of absence

This Division deals with matters relating to the making, variation, and cancellation of leave of absence orders, non-compliance with conditions of those orders, and absence without leave.

Clause 77 – Leave of absence orders

Clause 77 provides for leave of absence orders.

Clause 77(1) provides that a ***leave of absence order*** is an order that a supervised person be released from a place of custody for a period or periods and for a purpose or purposes specified by the Tribunal, on conditions specified by the Tribunal.

Clause 77(2) gives examples of purposes that may be specified by the Tribunal, including but not limited to receiving medical or dental treatment, for cultural or compassionate purposes, or reintegration into the community.

Clause 77(3) provides that, to the extent practicable, the period specified for the order should not exceed the period that is necessary for its purpose or purposes.

Clause 77(4) provides that a leave of absence order does not have effect beyond the expiry of the limiting term of the person's custody order. This is because, once the limiting term has expired, the custody order ceases to have effect: see clause 51(a).

Clause 78 – Tribunal making or varying leave of absence orders

Clause 78 outlines the Tribunal's powers to make and vary leave of absence orders. Leave of absence orders are made under clause 73(1)(b) following a review and in accordance with clause 78.

Clause 78(1) provides that the Tribunal may, when making a leave of absence order, impose any conditions on the order that it considers are necessary to protect the community.

Clause 78(2) states that it is a condition of a leave of absence order that the supervised person be under the supervision of a supervising officer who has been designated for them, which includes complying with the lawful directions of the supervising officer.

Clause 78(3) requires the Tribunal to designate a person as the supervising officer for the supervised person under clause 99.

Clause 78(4) provides that the Tribunal may, when varying the conditions of a leave of absence order, impose further conditions on the order that it considers are necessary to protect the community.

Clause 78(5) gives examples of the kinds of conditions that may be imposed, without limiting clause 78(1) or (4). Those conditions include:

- that the supervised person undergo treatment, training or other measures that may alleviate or prevent the deterioration of the person's condition (clause 78(5)(a); see section 28(4)(a) of the former Act);
- that the person reside at a specified place (clause 78(5)(b); see section 28(4)(b) of the former Act);
- that the person notify the supervising officer of any change to their name or place of residence within a specified number of days after the change (clause 78(5)(c));
- that the person not leave the State except with and in accordance with the supervising officer's permission (clause 78(5)(d));
- that the person be subject to electronic monitoring under clause 221, a curfew under clause 222, or both (clause 78(5)(e));
- that the person comply with a specified requirement relating to the protection of a victim of an offence committed by the person (for example – non-contact conditions) (clause 78(5)(f)); and
- if the person is a child – the child-specific considerations (clause 78(5)(g)).

Clause 78(6) provides that a condition subjecting a person to electronic monitoring under clause 221 cannot be imposed unless the Tribunal has received a report from the CEO (Corrections) about the suitability of electronic monitoring for the person (clause 78(6)(a)), and cannot be imposed if the person is a child (clause 78(6)(b)).

Clause 79 – Effect of certain leave of absence orders

Clause 79 deals with the effect of certain leave of absence orders.

Clause 79(1) provides that clause 79 applies to a supervised person to whom a leave of absence order applies, unless the person is required by the underlying custody order to be detained at an authorised hospital.

Clause 79(2) provides that if the leave of absence order does not require that the person return to a place of custody at the end of the period of leave, the person is not to be regarded as a person who is required by the underlying custody order to be detained at a place of custody.

Clause 80 – Notifying Tribunal about breach of leave of absence order

Clause 80(1) provides that clause 80 applies to supervising officers and persons of a prescribed class.

Clause 80(2) provides that these persons must advise the Tribunal as soon as practicable if they form a reasonable suspicion that a condition of a leave of absence order has not been complied with.

Clause 81 – Breach of conditions of leave of absence order

Clause 81 provides, at (1), that it applies if the Tribunal reasonably suspects that a condition of a leave of absence order has not been complied with.

Clause 81(2) provides that the Tribunal may review the order under Part 6 Division 4.

Clause 81(3) provides that the Tribunal may cancel the leave of absence order without first carrying out a review if satisfied that the seriousness and urgency of the circumstances require.

Clause 81(4) provides that for the purposes of clause 81, the Tribunal may be constituted by the President or a Deputy President alone, if satisfied that the seriousness and urgency of the circumstances require that the matter be dealt with before the Tribunal can be constituted as ordinarily required under clause 158.

A transitional provision is included to provide that a person who was suspected of breaching a condition of a release order under section 35 of the former Act who had not been dealt with under the former Act before commencement day must be dealt with under clause 81: Part 14, Division 2, clause 258.

Clause 82 – Cancelled leave of absence order

Clause 82(1) outlines what must occur if a leave of absence order is cancelled under clause 73(1)(d)(i) (cancellation following review) or clause 81(3) (cancellation without review):

- the Tribunal must issue a warrant for the supervised person's arrest (clause 82(1)(a)); and
- the person must be arrested and detained under the custody order to which they are subject (clause 82(1)(b)); and
- if necessary, the person's place of custody is to be determined under Division 3 (clause 82(1)(c)).

Clause 82(2) provides that (1) need not be complied with to the extent that it is not relevant. Circumstances in which it may not be relevant include where the Tribunal is aware that the person has already returned to their place of custody in accordance with the leave of absence order.

Clause 83 – Absence without leave from place of custody

This provision deals with when a supervised person is absent without leave. It is drawn from section 31 of the former Act.

Clause 83(1) provides that a supervised person is absent without leave if they are away from a place at which they are required to be detained without lawful authority (clause 83(1)(a)) or, having been away from such a place with lawful authority, have failed to return to the place or another place at which they are required to be detained, when that authority to be absent ceases (clause 83(1)(b)).

Clause 83(2) outlines who may apprehend a supervised person who is absent without leave:

- a person who is employed at the place of custody from where the person is absent and has the prescribed qualifications (clause 83(2)(a));
- a person who is authorised by such a person and has the prescribed qualifications (clause 83(2)(b)); and
- a police officer (clause 83(2)(c)).

Clause 83(3) provides that the person apprehending the supervised person must, as soon as practicable, take the supervised person to the place from which they are absent.

It is intended that regulations to prescribe qualifications under (2) will mirror regulation 4 of the former Regulations, which currently prescribe a mental health practitioner as defined in section 4 of the Mental Health Act.

A transitional provision is included to provide that a person who was apprehended under section 31(3) of the former Act for being absent without leave but who, by the end of the day before commencement, had not been taken to the place from which they were absent, must be dealt with under clause 83(3): Part 14 Division 2, clause 256.

Clause 84 – Relationship of Division to other Acts

This clause is drawn from section 32 of the former Act. It explains how leave of absence orders under this Act interact with leaves of absence from prisons and detention centres.

Clause 84(1) provides that Part VIII of the Prisons Act does not apply to authorise the absence of a supervised person from a prison unless they are absent to facilitate the provision of medical or health services (clause 84(1)(a)) or to further the interests of justice (clause 84(1)(b)). The effect of this clause is to provide that absence permits under Part VIII of the Prisons Act may be granted to supervised persons who are prisoners. Effectively, the intention is to provide that leave of absence for reasons other than medical or health services or furthering the interests of justice are to be dealt with under this Act rather than under the Prisons Act.

Clause 84(2) provides that section 188(4) of the Young Offenders Act does not apply to authorise the absence of a supervised person from a detention centre, unless the reason for the absence is to attend, or travel to or from, a court, medical or dental practitioner or a hospital. Again, the intention is to provide that leave of absence for reasons other than court, medical, dental or health services are to be dealt with under this Act rather than the Young Offenders Act.

A Note is included at the end of clause 84 to clarify that Part 7 of the Mental Health Act, which generally deals with detention at, release and leave from authorised hospitals and other places, does not apply in relation to supervised persons who are required to be detained at an authorised hospital under this Act (that is, those persons subject to custody orders whose place of custody is an authorised hospital). This means that all leaves of absence for supervised persons whose place of custody is an authorised hospital are to be dealt with under this Act rather than the Mental Health Act.

Leave of absence for a resident of the DSC declared place is dealt with wholly under this Act. Section 19(3) of the Declared Places Act provides that a resident is absent without leave if they are away from the DSC declared place without a leave of absence order made under the former Act. The terminology used in section 19(3) of the Declared Places Act is amended by this Act: see Part 15 Division 11, clause 328.

A transitional provision provides that a leave of absence order that was in effect under the former Act on commencement has effect as a leave of absence order under this Act: see Part 14 Division 2, clause 255.

Division 6 – Community supervision orders

Division 6 of Part 6 deals with matters relating to community supervision orders, including supervision requirements, types of conditions that may be imposed, and how non-compliance with conditions may be dealt with.

Clause 85 – Tribunal to designate supervising officer

Clause 85 requires the Tribunal to designate a supervising officer under clause 99 for a supervised person subject to a community supervision order within five working days after the order is made. Clause 54(1) in Part 5 Division 4 provides that it is a condition of a community supervision order that the supervised person be under the supervision of a supervising officer. Clause 48(a) in Part 5 Division 3 provides that the court that makes the order must immediately notify the Tribunal after the order has been made.

While the Tribunal has five working days to designate a supervising officer, clause 54(2) in Part 5 Division 4 requires the supervised person to report to a community corrections officer or youth justice officer within one working day after the order is made, and to comply with any directions of that officer until a supervising officer is designated by the Tribunal. That community corrections officer or youth justice officer will, for this initial supervisory period, be taken to be performing the functions of a supervising officer: see clause 54(3). These provisions ensure that a supervised person is under supervision in the community for this initial period until a supervising officer is designated for them.

Clause 86 – Tribunal varying conditions on community supervision order

Clause 86 sets out the Tribunal's powers to vary conditions imposed on a community supervision order following a review.

Clause 86(1) provides that the Tribunal may, when varying the conditions of a community supervision order, vary conditions imposed under clause 55 (that is, the conditions imposed by a court), and impose conditions of a kind described in clause 55(3).

Clause 86(2) outlines the matters to which the Tribunal must have regard when considering varying the conditions of a community supervision order. Those matters are:

- the supervised person's rehabilitation, retraining or resocialisation requirements (clause 86(2)(a));
- the ways in which any risk that the supervised person appears to present to the safety of the community could be further reduced (clause 86(2)(b));
- measures that could be implemented to improve the supervised person's mental or physical health (clause 86(2)(c));
- whether there are facilities or services in the community for the treatment, care and support of the supervised person (clause 86(2)(d));
- where the supervised person is a child – the child-specific considerations (clause 86(2)(e)).

As the Tribunal may impose conditions of a type described in clause 55(3), this means it may impose a condition subjecting the supervised person to electronic monitoring under clause 221. Clause 86(3) provides that an electronic monitoring condition cannot be imposed

unless the Tribunal has received a report from the CEO (Corrections) about whether electronic monitoring is suitable for the supervised person (clause 86(3)(a)) and cannot be imposed on a child (clause 86(3)(b)).

Clause 87 – Notifying Tribunal about breach of conditions of community supervision order

Clause 87(1) applies to supervising officers and persons within a prescribed class.

Clause 87(2) provides that these persons must advise the Tribunal as soon as practicable if they form a reasonable suspicion that a condition of a community supervision order has not been complied with.

Clause 88 – Breach of conditions of community supervision order

Clause 88 provides, at (1), that it applies if the Tribunal reasonably suspects that a condition of a community supervision order has not been complied with.

Clause 88(2) provides that the Tribunal may review the community supervision order if it reasonably suspects a condition of the order has not been complied with.

Clause 88(3) provides that the Tribunal must apply to the court that made the community supervision order (the ***relevant court***) for an order under clause 89 if it reasonably suspects that there is a significant risk to the health or safety of a person (clause 88(3)(a)), the statutory penalty for the offence in respect of which the community supervision order was made is or includes imprisonment (clause 88(3)(b)), and it is satisfied that a custody order should be sought in relation to the supervised person (clause 88(3)(c)). Under clause 89, the court must either cancel the community supervision order and make a custody order, or confirm the community supervision order.

Clause 88(4) deals with notice requirements. As soon as practicable after making an application, the Tribunal must give notice of the application to the supervised person, their representative, and their legal practitioner, together with the prescribed details.

Clause 88(5) provides that, if the Tribunal makes an application, it may issue a warrant to have the supervised person arrested for the purposes of bringing them before the relevant court.

Clause 89 – Court's powers to deal with breach of conditions of community supervision order

Clause 89 outlines the relevant court's powers to deal with a Tribunal application under clause 88.

Clause 89(1) provides that if the court is satisfied of matters under (3), being that:

- a condition of the community supervision order has not been complied with (clause 89(3)(a)); and
- the failure to comply indicates a significant risk to the health or safety of a person (clause 89(3)(b)); and
- that risk cannot be adequately managed under a community supervision order (clause 89(3)(c)),

the court must cancel the community supervision order and make a custody order.

Clause 89(2) provides that if the court is not so satisfied, it must instead confirm the community supervision order.

Clause 89(4) provides that when the court is considering the risk presented by the failure to comply with conditions, it must have regard to the extent to which the supervised person has complied with the conditions of their community supervision order.

Clause 89(5) clarifies that Part 5, to the extent relevant, applies to the making of a custody order under clause 89 as if the order were being made under that Part. That is to ensure that the considerations set out at Part 5 Divisions 2 and 3 apply when a custody order is made in these circumstances. Applying Part 5 to a custody order made under clause 89 also ensures that relevant notifications are made to the Tribunal and the Chief Mental Health Advocate and that the order is a reviewable order for the purposes of Part 6.

Clause 89(6) requires the relevant court, when determining the limiting term for the custody order under clause 50, to take into account any time the supervised person has already spent in custody in relation to the failure to comply with the conditions of the community supervision order.

Clause 89(7) provides that, if the court confirms the community supervision order under (2), the Tribunal may still exercise its jurisdiction in respect of that order under Part 6 Division 4. This is to clarify that the Tribunal may still review the order and vary its conditions after it has been confirmed by the court.

Clause 89(8) provides that these proceedings take place in the civil jurisdiction.

Clause 89(9) provides that the supervised person and the Minister are also parties to proceedings under clause 89.

Clause 89(10) provides that the relevant court may issue a warrant for the supervised person's arrest if they have failed to appear at the hearing of the application.

Clause 144(2) provides that if an application is made under clause 89, a victim of an offence committed by the supervised person may make a victim impact statement to the court.

A decision by a court of summary jurisdiction to make a custody order, and the determination of a limiting term on that order, may be appealed by the supervised person under Part 6 Division 7. Where the decision is made by a superior court, the supervised person may appeal under Part 12. A decision by a court of summary jurisdiction to confirm a community supervision order may be appealed by the Minister under Part 6 Division 7 and, where the decision is made by a superior court, under Part 12.

Division 7 – Review of and appeals against certain decisions

Division 7 deals with review of and appeals against decisions and orders made under Part 6.

Subdivision 1 – Internal review by Tribunal

Subdivision 1 of Part 6 Division 7 deals with requests for internal reviews of Tribunal decisions.

Clause 90 – Term used: reviewable decision

Clause 90 defines ***reviewable decision*** to mean a decision of the Tribunal under clause 73 (an order made after a review to confirm an order and its conditions, make a leave of absence order, vary conditions or cancel all conditions on leave of absence or community supervision orders to effect unconditional release).

Clause 91 – Internal review of Tribunal decisions

Clause 91 outlines how a request for internal review of a reviewable decision of the Tribunal may be made.

Clause 91(1) provides that if a reviewable decision is made, a supervised person, their legal practitioner or their representative may request that the Tribunal review that decision within 28 days after the day on which the reviewable decision was made.

Clause 91(2) outlines that a request for review must be in writing (clause 91(2)(a)), state the grounds for the request (clause 91(2)(b)), and include any submissions that the applicant wants to make to the Tribunal (clause 91(2)(c)).

Clause 91(3) allows an application to be made to the Tribunal for an extension of time within which to apply for a review. The Tribunal may grant an extension if satisfied that there is sufficient reason to do so.

Clause 91(4) outlines what the Tribunal must do once a request for review has been made. It must consider any submissions included with the request (clause 91(4)(a)), conduct the review within 28 days (clause 91(4)(b)), and do one of the following under clause 91(4)(c):

- confirm the decision (clause 91(4)(c)(i));
- vary the decision (clause 91(4)(c)(ii);
- cancel the decision and make another decision (clause 91(4)(c)(iii);
- cancel the decision and refer the matter to the Tribunal that made the decision for further considerations (clause 91(4)(c)(iv)).

Clause 91(5) requires the Tribunal to be constituted by the President or a Deputy President who is an experienced lawyer.

Clause 91(6) requires the Tribunal to give written notice of, and reasons for, the decision to to the applicant.

Clause 92 – Nature of review proceedings

Clause 92 outlines how a review of a reviewable decision is to be conducted.

Clause 92(1) provides that the review is to be by way of a hearing de novo and is not confined only to the matters that were before the Tribunal at the time the reviewable decision was made. The Tribunal may consider new material, whether or not it existed at the time the reviewable decision was made.

Clause 92(2) provides that the purpose of the review is to produce the correct and preferable decision at the time of the review.

Clause 92(3) provides that the reasons for the reviewable decision, or any grounds for review set out in the application, do not limit the Tribunal in conducting the review.

Subdivision 2 – Appeals to Supreme Court

This Subdivision outlines rights of appeal to the Supreme Court.

Clause 93 – Appeals against certain decisions

Clause 93 outlines the different decisions that may be appealed by a supervised person or the Minister. It also deals with various procedural matters for those appeals.

Clause 93(1) provides that a supervised person may, with leave, appeal to the Supreme Court against the following:

- a decision of a court of summary jurisdiction to confirm a custody order or a community supervision order under clause 74 (clause 93(1)(a));
- a decision of a court of summary jurisdiction under clause 89 to make a custody order (clause 93(1)(b)(i)) or determining the limiting term for a custody order (clause 93(1)(b)(ii));
- a decision of the Tribunal under clause 91 (being a decision of the Tribunal on internal review), other than a decision under that clause reviewing a decision of the Tribunal to:
    - vary conditions on a community supervision order (under clause 73(1)(c)(i)); or
    - vary conditions on a leave of absence order (under clause 73(1)(d)(ii)) (clause 93(1)(c)).

Clause 93(2) outlines the decisions the Minister may, with leave, appeal, being the following decisions to:

- cancel a custody order or community supervision order under clause 74 (where the decision is made by a court of summary jurisdiction) (clause 93(2)(a));
- confirm a community supervision order under clause 89 (where the decision is made by a court of summary jurisdiction) (clause 93(2)(b));
- decisions by the Tribunal to:
    - make a leave of absence order (under clause 73(1)(b): clause 93(2)(c)(i));
    - cancel all conditions on a community supervision order, effecting unconditional release (under clause 73(1)(c)(ii): clause 93(2)(c)(ii));
    - cancel all conditions on a leave of absence order, effecting unconditional release (under clause 73(1)(d)(iii)): clause 93(2)(c)(iii)).

The Minister may also appeal a decision of the Tribunal on internal review (under clause 91), other than a decision to vary conditions on either a community supervision or leave of absence order (clause 93(2)(c)(iv)).

Clause 93(3) is a procedural provision which states that an appeal is commenced by lodging an application for leave to appeal, setting out the grounds of the appeal, with the Supreme Court.

Clause 93(4) provides that an appeal against a decision cannot be commenced later than 21 days after the day on which the Tribunal made its decision.

Clause 93(5) provides that the Supreme Court may decide whether or not to give leave to appeal with or without written or oral submissions from the parties (clause 93(5)(a)) and before or at the hearing of, or when giving judgment on, the appeal (clause 93(5)(b)).

Clause 93(6) provides that the Supreme Court may extend the time limit in (4) in a particular case, and that such an extension may be given even when the time limit has passed.

Clause 93(7) requires a party commencing an appeal to notify the Tribunal.

Clause 94 – Arrest of person subject to custody order

Clause 94 provides that the Supreme Court may issue a warrant for the arrest of a supervised person if an appeal is brought by the Minister against:

- a decision of a court to cancel a custody order (clause 94(1)(a)); or
- a decision of the Tribunal to make a leave of absence order (clause 94(1)(b)); or
- a decision of the Tribunal on internal review (under clause 91) to make, or confirm the making of, a leave of absence order (clause 94(1)(c)).

Clause 94(2) provides that the Supreme Court may issue a warrant for the arrest of a supervised person if satisfied that it is necessary to do so because of the risk the person appears to present to the safety of the community.

Clause 94(3) requires a person arrested under a warrant issued under (2) to be returned to their place of custody under the custody order as soon as practicable.

Clause 95 – Grounds of appeal

Clause 95 outlines the grounds of an appeal. The grounds are that the court or Tribunal made an error of law or of fact, or of both law and fact (clause 95(a)(i)), or acted without jurisdiction or in excess of jurisdiction (clause 95(a)(ii)), or that there is another sufficient reason for hearing an appeal against the decision (clause 95(b)).

Clause 96 – Dealing with appeal

Clause 96 outlines how an appeal is to be dealt with.

Clause 96(1) provides that an appeal is by way of rehearing.

Clause 96(2) provides that the Supreme Court may make any order it considers appropriate when dealing with an appeal.

Clause 96(3) provides that in deciding an appeal, the Supreme Court may do one of the following:

- confirm the decision (clause 96(3)(a));
- vary the decision (clause 96(3)(b));
- set aside the decision and make any decision that the court or Tribunal could have made in the proceedings (clause 96(3)(c));

- set aside the decision and return the matter to the court or Tribunal for reconsideration, with or without hearing further evidence, and in accordance with any directions or recommendations that the court considers appropriate (clause 96(3)(d)).

Clause 96(4) provides that if the Supreme Court does send the matter back to the court or Tribunal for reconsideration, it may give directions as to the court or Tribunal's constitution for that purpose.

Clause 97 – Effect of appeal on decision appealed against

Clause 97 outlines the effect of an appeal on the decision that is being appealed.

Clause 97(1) states that an appeal does not in itself affect the operation of the decision being appealed, or prevent a person from taking action to implement the decision (for example, releasing a person subject to a custody order from prison onto a leave of absence order to be under supervision in the community).

Without limiting (1), the Supreme Court may order that the operation of a decision of the Tribunal be stayed pending the determination of an application for leave to appeal, and the determination of any appeal that follows.

Subdivision 3 – Effect of decisions made on, or as a consequence of, review or appeal

This Subdivision outlines the practical effect of decisions made on, or as a consequence of, review or appeal.

Clause 98 – Effect of decisions made on, or as a consequence of, review or appeal

Clause 98(1) states that the fact that a decision is made on reconsideration as required under either clause 91(4)(c)(iv) (a decision by the Tribunal on internal review to cancel the original decision and refer the matter back for reconsideration) or clause 96(3)(d) (a decision by the Supreme Court to set aside the court or Tribunal decision and refer the matter back for reconsideration) does not prevent that decision from being open to review or appeal under Part 6 Division 7.

Clause 98(2) provides that the rest of clause 98 applies to and in relation to a decision (the ***original decision***) described in clause 90 (a decision of the Tribunal under clause 73) or clause 93(1) or (2) (decisions that a supervised person or the Minister may appeal).

Clause 98(3) provides that the original decision as confirmed or varied by the Tribunal or Supreme Court, or a decision of the Tribunal or Supreme Court substituted for the original decision, is to be regarded as and have effect as a decision of the original decision maker (clause 98(3)(a)). That decision is to be taken as having effect, or having had effect, from the time when it originally would have taken or had effect (clause 98(3)(b)).

Clause 98(4) provides that, despite the original decision being regarded as the decision of the original decision maker (and having the same effect as that decision), the decision as confirmed, varied or substituted is not again open to review or appeal under this Division.

Division 8 – Supervising officers

This Division deals with the designation of supervising officers for supervised persons. It is a condition of a community supervision order and a leave of absence order that the person be under the supervision of a supervising officer.

Clause 99 – Supervising officer

Clause 99 deals with supervising officers. It is drawn from section 45 of the former Act. Clause 99(1) provides that the Tribunal must be satisfied that a person who is designated as a supervising officer for the purposes of clause 78(3) (a leave of absence order) or 85 (a community supervision order) is suitably qualified and experienced.

Clause 99(2) sets out a non-exhaustive list of the functions of a supervising officer in relation to a supervised person, including:

- assisting in the determination of appropriate conditions for the person (clause 99(2)(a)); and
- supervising, at the Tribunal's direction, the supervised person, including giving lawful directions to them (clause 99(2)(b)); and
- reporting to the Tribunal about the person in accordance with the Tribunal's directions (clause 99(2)(c)).

The requirement for the supervised person to comply with the lawful directions of their supervising officer is contained in clause 54(1) for a community supervision order and clause 78(2) for a leave of absence order.

Clause 99(3) provides that if the supervised person dies, the supervising officer must, upon being informed of that, immediately notify the Tribunal of the death. This triggers a requirement for the Tribunal to immediately notify the coroner: Part 10 Division 7, clause 191. This will ensure that the death of a supervised person, who is a ***person held in care*** under the *Coroners Act 1996* (see amendments to that Act at Part 15 Division 4, clause 290), is reported to the coroner immediately.

Clause 99(4) provides that the President may make arrangements with any person, department of the Public Service, or statutory authority, for the purpose of or in connection with designating a person to be a supervising officer.

Clause 99(5) provides that a supervising officer may be designated for a supervised person for a fixed or unspecified period. If the period is not fixed in the designation or cancelled by the Tribunal under (6), it ends when the person ceases to be a supervised person.

Clause 99(6) provides that the Tribunal may cancel the designation of a person as a supervising officer, either generally or in relation to a supervised person, at any time.

A transitional provision is included to preserve the designation of a supervising officer under section 45(1) of the former Act on commencement: Part 14 Division 2, clause 270.

Part 7 – Extended custody and community supervision orders

This Part provides for the making of extended custody and community supervision orders where necessary for the protection of the community.

Division 1 – Preliminary matters

Division 1 of Part 7 deals with preliminary matters, including overview provisions.

Clause 100 – Overview of Part

Clause 100 gives an overview of Part 7.

Clause 101 – Nature of court proceedings under this Part

Clause 101 provides that proceedings in the Supreme Court under Part 7 are civil proceedings.

Clause 102 – References to orders include extended orders

Clause 102 provides at (a) and (b) that, unless the contrary intention appears, references in Part 7 to custody orders and community supervision orders include references to extended custody orders and extended community supervision orders.

This is to clarify that Part 7 operates in respect of custody orders and community supervision orders and in respect of extended custody orders and extended community supervision orders. For example, a supervised person may be subject to a custody order which is subsequently replaced with an extended custody order with a limiting term of 10 years. Prior to the expiry of that limiting term of 10 years for the extended custody order, the Tribunal must again report to the Minister on the need for another extended order in respect of the person under clause 103.

Division 2 – Tribunal to consider and report on need for extended orders

This Division outlines the Tribunal's obligations under Part 7.

Clause 103 – Tribunal to consider and report on need for extended custody orders

Clause 103 deals with the Tribunal's reporting requirements for supervised persons subject to custody orders.

Clause 103(1) provides that if a supervised person is subject to a custody order with a limiting term of 12 months or more, the Tribunal must, no later than six months before the expiry of the order, consider the need for an extended custody order in respect of the person.

Clause 103(2) deals with custody orders with a limiting term of less than 12 months, and requires the Tribunal to consider the need for an extended custody order before the person has been under the custody order for half of the limiting term.

Clause 103(3) provides that the Tribunal must report to the Minister on the need for an extended custody order in respect of the supervised person as soon as practicable.

Clause 103(4) provides that, if the Tribunal is satisfied that an extended custody order is necessary to ensure the adequate protection of the community against an unacceptable risk that the supervised person would commit a serious offence (being an offence set out in Schedule 1), the Tribunal must recommend in its report that the Minister apply for an extended custody order.

A transitional provision is included which provides that the Minister may require the Tribunal to provide a report to the Minister which considers the need for an extended custody order in respect of all persons subject to existing custody orders on commencement, unless they were acquitted on account of unsoundness of mind for the offence of murder or manslaughter: Part 14 Division 2, clause 254(3).

Clause 104 – Tribunal to consider and report on need for extended community supervision orders

Clause 104 deals with the Tribunal's reporting requirements for supervised persons under community supervision orders.

Clause 104(1) requires the Tribunal to consider the need for an extended community supervision order for a supervised person no later than three months before the community supervision order is due to expire.

Clause 104(2) provides that the Tribunal must report to the Minister on the need for an extended community supervision order in respect of the person as soon as practicable.

Clause 104(3) provides that if the Tribunal is satisfied that the supervised person should remain under supervision after the expiry of the community supervision order to ensure the adequate protection of the community due to the person's rehabilitation, retraining or resocialisation requirements, the Tribunal must recommend in its report that the Minister apply for an extended community supervision order.

Division 3 – Applications for extended orders

This Division deals with the making of applications for extended orders by the Minister to the Supreme Court.

Clause 105 – Minister may apply for extended order

This clause outlines the Minister's ability to apply for an extended custody order (clause 105(1)) or extended community supervision order (clause 105(2)) after having regard to a report from the Tribunal made under clauses 103 or 104, as is relevant. Clause 105(3) provides that if the Minister applies for an extended order, the Minister must notify the Tribunal.

Clause 106 – Report to be prepared for application

Clause 106, at (1), requires the court to order that a supervised person the subject of an extended order application be examined by a psychiatrist, psychologist or other appropriate expert (clause 106(1)(a)) and a report be provided to the court. Clause 106(1)(b) provides that the court may make any related orders it considers appropriate.

Clause 106(2) provides that reports and examinations are to be arranged by the Minister.

Clause 106(3) provides that reports under (2) must set out the expert's assessment of:

- if the application is for an extended custody order, the likelihood that the supervised person would commit a serious offence if not subject to an extended custody order (clause 106(3)(a)); and
- the supervised person's rehabilitation, retraining or resocialisation requirements (clause 106(3)(b)); and
- the reasons for their assessment (clause 106(3)(c)).

Clause 106(4) provides that (2), which requires that reports must be arranged by the Minister, does not prevent a supervised person from arranging for their own examination and report (clause 106(4)(a)), or the court from considering the report (clause 106(4)(b)).

Division 4 – Interim orders pending determination of applications

Division 4 deals with the making of interim orders while extended order applications are awaiting determination.

Clause 107 – Interim custody orders

Clause 107 deals with interim custody orders.

Clause 107(1) provides that if an application for an extended custody order is made, and the current custody order will expire or is likely to expire before the application is determined, the Minister may apply to the Supreme Court for an interim custody order.

Clause 107(2) provides that the court may make an interim custody order if satisfied that it is desirable to ensure the adequate protection of the community until the extended custody order application is determined.

Clause 107(3) provides that a leave of absence order that was in operation in relation to the custody order immediately before the interim custody order was made continues to the extent not inconsistent with the terms of the interim order.

Clause 107(4) provides that Part 6 applies, to the extent relevant, to and in relation to the interim custody order as if it were a custody order, and to any leave of absence order continued under (3). This will ensure the Tribunal's powers to review custody orders, determine places of custody, and impose and vary conditions on leave of absence orders, continue to apply to the interim custody order and any leave of absence order that continues.

Clause 107(5)(a) clarifies that despite the application of Part 6, the Tribunal is not required to review the interim custody order or leave of absence order, including when exercising a power under clause 73.

Clause 107(5)(b) provides that the Tribunal cannot make a leave of absence order in respect of an interim custody order other than for a short term purpose (for example, to allow the supervised person to receive medical or dental treatment, or for cultural or compassionate purposes). This has the effect that if the person is detained in custody under a custody order at the time an interim custody order is made, they cannot be released on a long term leave of absence order pending the determination of an application for an extended custody order.

Clause 107(5)(c) provides that the Tribunal cannot cancel all conditions on a leave of absence order that was in place in respect of the custody order, preventing the Tribunal from unconditionally releasing a person while an application for an extended order is awaiting determination.

The making of an interim custody order cannot be appealed.

Clause 108 – Interim community supervision orders

Clause 108 deals with interim community supervision orders.

Clause 108(1) provides that if an application for an extended community supervision order is made, and the current order will or is likely to expire before the application is determined, the Minister may apply to the Supreme Court for an interim community supervision order.

Clause 108(2) provides that the court may make an interim community supervision order if satisfied that it is desirable that the person continue to be under supervision to ensure the adequate protection of the community until such time as the extended order application is determined.

Clause 108(3) provides that the conditions of an interim community supervision order are those of the order that it replaces, to the extent that the original order was not inconsistent with the interim order.

Clause 108(4) provides that Part 6, to the extent relevant, applies to and in relation to the interim community supervision order as if it were a community supervision order. This will ensure the Tribunal's powers to review, and impose and vary conditions on community supervision orders, continue to apply to the interim order.

Clause 108(5)(a) clarifies that despite the application of Part 6, the Tribunal is not required to review the interim order, including when exercising a power under clause 73.

Clause 108(5)(b) provides that the Tribunal cannot vary conditions of the order referred to in clause 54.

Clause 108(5)(c) provides that the Tribunal cannot cancel all conditions on a community supervision order, preventing the Tribunal from unconditionally releasing a person while an application for an extended order is being determined.

The making of an interim community supervision order cannot be appealed.

Division 5 – Making extended custody orders

This Division deals with the making of extended custody orders.

Clause 109 – Extended custody orders

Clause 109(1) provides that an extended custody order is an order that a supervised person be detained in custody subject to this Act at a place determined by the Tribunal for the protection of the community.

Clause 109(2) provides that Part 6 applies, to the extent relevant, to an extended custody order as though it were a custody order. This will ensure the Tribunal is able to, for example, make a leave of absence order for a person subject to an extended custody order.

Clause 109(3) clarifies that, despite (2), the Tribunal cannot cancel all conditions on a leave of absence order applying to an extended custody order. This prevents the Tribunal from unconditionally releasing a person subject to an extended custody order. Unconditional release from an extended custody order can only be ordered by the Supreme Court.

Clause 110 – Supreme Court may make extended custody order

Clause 110 deals with the making of extended custody orders on application under clause 105.

Clause 110(1) provides that the Supreme Court may, on application under clause 105(1), make an extended custody order that is to have effect for the term set by the court (its limiting term: see (2)).

Clause 110(3) provides that, before making an extended custody order, the Supreme Court must be satisfied, by acceptable and cogent evidence and to a high degree of probability, that it is necessary to make an extended custody order in respect of the person to ensure the adequate protection of the community against an unacceptable risk that the person will commit a serious offence.

Clause 110(4) provides that if the court is not satisfied of the matters in (3), but is satisfied that the supervised person should remain under supervision due to their rehabilitation, resocialisation or retraining requirements, the court may make a community supervision order in respect of the person.

Clause 110(5) provides that Part 5 applies, to the extent relevant, to the making of a community supervision order under this clause. This is because a community supervision order made under this clause is not an extended order. Applying Part 5 to the extent relevant will enliven the considerations under Part 5 Division 4, including the requirement for the supervised person to be under the supervision of a supervising officer, and will also ensure that relevant notifications are made to the Tribunal and Chief Mental Health Advocate, and that the order becomes a reviewable order for the purposes of Part 6.

Clause 110(6) provides that a reference to the commission of a serious offence includes a reference to the doing of an act or making of an omission in any State or Territory that would, if done within WA, constitute a serious offence, and the doing of an act or making of an omission outside Australia that would constitute a serious offence if done within WA.

Clause 110(7) provides that, for the purpose of clause 110, it makes no difference whether the person, in doing the act or making the omission that constituted the serious offence, would:

- be likely to be charged with an offence (clause 110(7)(a)); or
- if charged, be found fit to stand trial (clause 110(7)(b)); or
- if tried, be convicted (clause 110(7)(c)).

Clause 111 – Leave of absence orders and conditions carried over

Clause 111 deals with leave of absence orders that were in effect in relation to a custody or interim custody order immediately before the order was replaced by an extended custody order. It provides, at (1), that the leave of absence order continues on its terms to the extent not inconsistent with the extended custody order.

Clause 111(2) clarifies that (1) does not prevent cancellation of, or variation of the conditions of, the leave of absence order.

Clause 112 – When extended custody order has effect

Clause 112 outlines when an extended custody order has effect. It provides, at (1), that the order takes effect on either the expiration of the current custody order (clause 112(1)(a)), or the day on which the extended order is made (clause 112(1)(b)) – whichever is later.

Clause 112(2) provides that the extended custody order continues in effect until the earlier of the following:

- its limiting term expires (clause 112(2)(a)); or
- it is cancelled by an order of the Supreme Court following review under clause 121(2) (clause 112(2)(b)).

Division 6 – Making extended community supervision orders

This Division deals with the making of extended community supervision orders.

Clause 113 – Extended community supervision orders

Clause 113(1) provides that an extended community supervision order is an order that the supervised person comply with conditions whilst residing in the community, for the protection of the community.

Clause 113(2) provides that Part 6 applies to the extent relevant as though the extended community supervision order were a community supervision order. This is to ensure that the Tribunal's powers on review apply, including cancellation of all conditions to effect unconditional release.

Clause 114 – Supreme Court may make extended community supervision order

Clause 114 deals with the making of extended community supervision orders on application under clause 105.

Clause 114(1) provides that the Supreme Court may, on application under clause 105(2), make an extended community supervision order that is to have effect for the term set by the court.

Clause 114(2) provides that, before making an extended community supervision order, the court must be satisfied that the supervised person should remain under supervision due to their rehabilitation, retraining or resocialisation requirements, to ensure the adequate protection of the community.

Clause 115 – Conditions carried over

Clause 115, at (1), provides that the conditions of a community supervision order, or interim community supervision order, are taken to be the conditions of the extended community supervision order, to the extent that the conditions are not inconsistent.

Clause 115(2) clarifies that this carrying over of conditions does not prevent the Tribunal from varying, or cancelling all of, the conditions of the order.

Clause 116 – When extended community supervision order has effect

Clause 116 outlines when an extended community supervision order has effect.

It provides, at (1), that the order takes effect on either the expiration of the current order ((1)(a)), or the day on which the extended order is made ((1)(b)) – whichever is the later.

Clause 116(2) provides that an extended community supervision order continues in effect until the earliest of the following:

- its term expires (clause 116(2)(a));
- it is cancelled under clause 74 (by order of the court following an application by the Tribunal) or cancelled and replaced by a custody order under clause 89(1) (following non-compliance with a condition of the order) (clause 116(2)(b));
- when an order of the Tribunal cancelling all of the conditions of the community supervision order under clause 73(1)(c)(ii) comes into effect (clause 116(2)(c)).

Division 7- Review of extended custody orders

Division 7 outlines requirements for extended custody orders to be reviewed.

Clause 117 – Periodic review on application by Minister

Clause 117 provides, at (1), that while a supervised person is subject to an extended custody order, the Minister may apply to the Supreme Court for the order to be reviewed at any time.

Clause 117(2) requires the Minister to apply for reviews so as to ensure that reviews are carried out:

- as soon as practicable after the end of the period of one year commencing on the day on which the order is made (clause 117(2)(a)); and
- as soon as practicable after the end of the period of one year commencing on the day on which the order was most recently reviewed under Part 7 Division 7 (clause 117(2)(b)).

Clause 118 – Application by supervised person for review

Clause 118 outlines a supervised person's ability to apply for a review of an extended custody order.

Clause 118(1) provides that a supervised person who is subject to an extended custody order may, with leave of the court, apply for a review of the order.

Clause 118(2) requires the court to be satisfied that there are exceptional circumstances before granting leave for the person to apply for a review.

Clause 118(3) provides that the court may decide whether to grant leave with or without written or oral submissions from the parties (clause 118(3)(a)), and before or at the hearing of, or when determining, the application for review (clause 118(3)(b)).

Clause 118(4) requires the court to immediately give a copy of a supervised person's application for review to the Minister and the Tribunal.

Clause 119 – Dealing with application for review

Clause 119 outlines how an application for review is to be dealt with.

Clause 119(1) requires the court to give directions for the hearing of an application for review of an extended custody order as soon as practicable after the application is made.

Clause 119(2) requires the application to be heard, and review carried out, as soon as practicable, in accordance with any directions given by the court.

Clause 119(3) provides that the court may adjourn the hearing of the application and the carrying out of the review if there is sufficient reason to do so.

Clause 120 – Report to be prepared for review

Clause 120 provides, at (1), that if an application for review of an extended custody order is made, the court must order that the person be examined by a psychiatrist, psychologist or other appropriate expert, followed by the making and submission of a report to the court (clause 120(1)(a)). The court may make any related order it considers appropriate (clause 120(1)(b)).

Clause 120(2) requires the Minister to arrange for the examination and report.

Clause 120(3) outlines what must be set out in a report, being the expert's assessment of:

- the likelihood that the supervised person will commit a serious offence if not subject to the extended custody order (clause 120(3)(a));
- the person's rehabilitation, retraining and resocialisation requirements (clause 120(3)(b)); and
- the reasons for that assessment (clause 120(3)(c)).

Clause 120(4) clarifies that despite (2), the supervised person may arrange their own examination and report (clause 120(4)(a)), and the court may consider it (clause 120(4)(b)).

Clause 121 – Court's powers on review of extended custody order

Clause 121 outlines the court's powers on review of an extended custody order.

It provides, at (1), that if, on review, the court is satisfied that the unacceptable risk that the person will commit a serious offence if not subject to the extended order remains, the court must confirm the extended custody order.

Clause 121(2) provides that if the court is not so satisfied, the court must cancel the extended custody order.

Clause 121(3) provides that if the court cancels an extended custody order, it may, if satisfied as to the matter in clause 114(2), make a community supervision order in respect of the person instead. Clause 114(2) provides that the court must be satisfied that, to ensure the adequate protection of the community, the supervised person should remain under supervision due to the person's rehabilitation, retraining or resocialisation requirements.

Clause 121(4) provides that Part 5, to the extent relevant, applies to the making of a community supervision order under clause 121(3) as if the order were being made under Part 5.

Division 8 – General

This Division deals with general matters relating to Part 7 proceedings.

Clause 122 – Court to notify Tribunal of orders

Clause 122 requires the Supreme Court to immediately notify the Tribunal if the court makes an interim or extended order, or a community supervision order, under Part 7 (clause 122(a)) and give the Tribunal a copy of the order and the prescribed information (clause 122(b)).

Clause 123 – Evidence in extended order proceedings

Clause 123 deals with evidentiary matters in extended order proceedings.

Clause 123(1) defines ***relevant proceeding*** in relation to a supervised person to mean any proceeding of a court relating to an offence with which the person was charged (clause 123(1)(a)), and that the Supreme Court considers relevant, having regard to the matter to be determined by the court under Part 7 (clause 123(1)(b)).

Clause 123(2) requires the Supreme Court to hear evidence given or called by the parties to an application made under this Part if the evidence is admissible.

Clause 123(3) provides that the rules of evidence apply to evidence given or called under (2), except as modified by (4).

Clause 123(4) outlines the things the court may receive in evidence for the purpose of determining an application, including:

- documents relevant to the supervised person's antecedents or criminal record (clause 123(4)(a));
- anything relevant contained in the official transcript of any relevant proceedings against the person (clause 123(4)(b));
- any relevant material that was tendered to the court or that informed the court in relevant proceedings against the person (clause 123(4)(c));
- any report of a psychiatrist, psychologist or other appropriate expert prepared under Part 7, and information about the extent to which the supervised person cooperated with the expert when they were examined (clause 123(4)(d));

- any other medical, psychiatric, psychological or other assessment relating to the person (clause 123(4)(e));
- information indicating whether or not the person has a propensity to engage in conduct that could constitute a serious offence in the future (clause 123(4)(f));
- information indicating whether or not the person has a pattern of offending behaviour (clause 123(4)(g)).

A Note is included to indicate that the Supreme Court may receive a victim's submission made under Part 9 Division 4, clause 148.

Clause 124 – Court may give directions

Clause 124 provides that the Supreme Court may, on its own initiative or on the application of a party to Part 7 proceedings, give directions in relation to the conduct of the proceedings, including with respect to evidence received, or to be received, under clause 123.

Clause 125 – Appearance at hearings

Clause 125(1) provides that a supervised person is entitled to appear at the hearing of an application for an extended order (clause 125(1)(a)), or an application for review (clause 125(1)(b)).

Clause 125(2) provides that appearance may be by way of audio or video link, as directed by the court.

Part 8 – Mental health advocacy services for unfit accused and supervised persons

Part 8 provides for the functions and powers of the Mental Health Advocacy Service to provide advocacy to unfit accused and supervised persons under the Act. It is largely drawn from Part 20 of the Mental Health Act and provides a statutory right to advocacy for all persons with mental impairment in the justice system who are not otherwise entitled to such support.

Persons with mental impairment in the justice system who are detained at an authorised hospital or are receiving treatment in the community from a mental health service under the Mental Health Act, and people who are detained at the DSC declared place under the Declared Places Act, already have statutory rights to advocacy under Parts 20 and 10 of those Acts. Advocacy is not currently provided to people with mental impairment who are detained in prison or detention, or in the community if they are not receiving treatment under the Mental Health Act. Similarly, advocacy is not currently provided to people who have raised the question of fitness and have been released on bail or held on remand.

Division 1 – Preliminary matters

Division 1 of Part 8 contains an overview of Part 8 and a definitions provision.

Clause 126 – Overview of Part

Clause 126 is an overview provision which sets out the matters dealt with under Part 8.

Clause 127 – Terms used

Clause 127 sets out terms used in Part 8.

The term ***CLMI identified person*** encompasses both an unfit accused and a supervised person, other than a person who is an identified person as defined in section 348 of the Mental Health Act ((a)) or a resident as defined in section 3 of the Declared Places Act ((b)).

The definition excludes these two categories because those Acts already deal with the provision of advocacy to persons receiving treatment from a mental health service and persons detained in the DSC declared place, respectively.

The term ***mandatory service*** means a service in relation to an unfit accused or supervised person that is required by, or necessary for compliance with, conditions of a grant of bail to the person, a community supervision order or a leave of absence order.

The term ***medical practitioner*** means a person registered in the medical profession under the *Health Practitioner Regulation National Law (Western Australia)*.

The term ***mental health practitioner*** has the meaning given in section 4 of the Mental Health Act: a psychologist, nurse registered under the *Health Practitioner Regulation National Law (Western Australia)*, an occupational therapist or a social worker with at least three years' experience in the management of people with a mental illness.

Division 2 – Access to mental health advocacy services

This Division outlines how advocacy may be accessed under this Act.

Clause 128 – Access to mental health advocacy services

Clause 128 sets out the duty of the Chief Mental Health Advocate to ensure that a person is informed of their right to request that they be contacted by an advocate, and given an explanation of an advocate's functions under this Act. The intent of clause 128 is to ensure that the Chief Mental Health Advocate is given timely notification of a person's status as an unfit accused or supervised person to trigger the provision of advocacy.

Clause 128(1) provides that the Chief Mental Health Advocate must ensure that the person is informed of their right to request that they be contacted by a mental health advocate (clause 128(1)(a)), and given an explanation of an advocate's functions under this Act (clause 128(1)(b)), within three working days of first being notified under either clause 30 or clause 36 that there has been an adjournment of proceedings in respect of a person.

Clause 30 requires a court that has adjourned proceedings to inquire into the question of a person's fitness to stand trial to immediately notify the Chief Mental Health Advocate of the adjournment and give them the prescribed information.

Clause 36 requires a court that has adjourned proceedings to give an unfit accused person the opportunity to regain fitness to immediately notify the Chief Mental Health Advocate of the adjournment and give them the prescribed information.

Clause 128(2) provides that the Chief Mental Health Advocate must ensure the person is informed of their right to request that they be contacted by a mental health advocate (clause 128(2)(a)), and given an explanation of an advocate's functions under this Act (clause 128(2)(b)), within three working days after receiving a notification under clause 48 or clause 204(4).

Clause 48 requires a court that has made a community supervision order or custody order to immediately notify the Tribunal and the Chief Mental Health Advocate, and provide a copy of the order and the prescribed information.

Clause 204(4) requires the Minister, after determining an interim disposition for a person who has been transferred into WA from a participating jurisdiction, to immediately notify the Tribunal and the Chief Mental Health Advocate, and provide a copy of the interim disposition and the prescribed information.

Clause 128(3) provides that if the person to whom (1) or (2) applies is a child, the Chief Mental Health Advocate must inform them of their right to request contact from an advocate, and explain the advocate's functions under this Act, within 24 hours of being notified.

A transitional provision is included at Part 14 Division 2, clause 276 to require the Tribunal to provide the Chief Mental Health Advocate details of all orders that have effect under the former Act or this Act, where the person is detained (if applicable) and the prescribed information, within seven working days after commencement. The giving of this information to the Chief Mental Health Advocate in respect of each supervised person is to be taken to be a notification under clause 128(2) and the Chief Mental Health Advocate must fulfil their obligations under that provision in respect of each supervised person, unless the person is detained in a DSC declared place or an authorised hospital. This is because people detained in either of these

two places will already be known to the Mental Health Advocacy Service under the Declared Places Act or Mental Health Act.

Clause 129 – Request for CLMI identified person to be contacted

Clause 129 outlines the process for requesting to be contacted by an advocate. It is drawn from section 356 of the Mental Health Act, which deals with requesting contact from an advocate under that Act.

Clause 129(1) provides that a request that a CLMI identified person be contacted by a mental health advocate may be made by the person, their representative or their legal practitioner (clause 129(1)(a)); a psychiatrist or psychologist (clause 129(1)(b)); if the person is detained at a place, the person in charge of the place where the person is detained (clause 129(1)(c)), or any other person with a sufficient interest in the person (clause 129(1)(d)).

Clause 129(2) provides that a request may be made to the Chief Mental Health Advocate (clause 129(2)(a)) or, if the person is detained at a place, to the person in charge of the place (clause 129(2)(b)).

Clause 129(3) provides that if the request relates to a person who is detained, then the person in charge of the place must ensure that the Chief Mental Health Advocate is notified of the request as soon as practicable, but no later than 24 hours after the request is made.

Clause 129(4) provides that the person in charge of a place where a CLMI identified person is detained must ensure that the person is given the means and opportunity to exercise their right to request that they be contacted by an advocate.

Clause 130 – Duty to contact CLMI identified person

Clause 130 details requirements for CLMI identified persons to be visited or otherwise contacted by a mental health advocate. It is drawn from section 357 of the Mental Health Act.

Clause 130(1) requires that a person detained under this Act is to be visited or otherwise contacted by a mental health advocate within three working days after the Chief Mental Health Advocate has been notified that the person is detained. The Chief Mental Health Advocate must be notified under clauses 30, 36, 48 and 204(4) and given the prescribed information, which will include if and where the CLMI identified person is detained. This duty imposed on a mental health advocate only arises where the Chief Mental Health Advocate has been so notified.

Clause 130(2) requires a person to be visited or otherwise contacted by a mental health advocate within three working days after the Chief Mental Health Advocate receives, or is notified of, a request for contact under clause 129.

Clause 130(3) provides that if the person who is detained or who has requested contact is a child, they must be visited or otherwise contacted within 24 hours of the Chief Mental Health Advocate being notified of their detention or receiving or being notified of their request for contact.

Clause 130(4) provides that, subject to any direction of the Chief Mental Health Advocate, a mental health advocate may visit or otherwise contact a CLMI identified person on their own initiative.

Division 3 – Functions and powers of mental health advocates

Division 3 sets out the functions and powers of the Chief Mental Health Advocate and of mental health advocates.

Clause 131 – Functions of Chief Mental Health Advocate

Clause 131 sets out the functions of the Chief Mental Health Advocate. It is drawn from section 351 of the Mental Health Act. Those functions are set out at (1) as follows:

- ensuring that CLMI identified persons are visited or otherwise contacted as required under clause 130 (clause 131(1)(a));
- promoting compliance with the principles in clause 7(2)(a) to (j) (clause 131(1)(b));
- preparing and publishing information about the role of mental health advocates and how to contact the Chief Mental Health Advocate (clause 131(1)(c));
- promoting the role of mental health advocates (clause 131(1)(d));
- developing standards and protocols for the performance of mental health advocate functions under this Act, including a conflict of interest policy (clause 131(1)(e));
- ensuring that mental health advocates receive adequate training in relation to the performance of their functions under this Act (clause 131(1)(f));
- providing advice, assistance, control and direction to mental health advocates in relation to the performance of their functions under this Act (clause 131(1)(g)); and
- any other functions conferred on the Chief Mental Health Advocate under this Act (clause 131(1)(h)).

Clause 131(2) clarifies that the function of publishing information about the role of advocates does not include the publication of personal information about a CLMI identified person.

Clause 131(3) provides that the Chief Mental Health Advocate's functions under this Act are in addition to, and do not limit, functions the Chief Mental Health Advocate has under any other written law.

Clause 132 – Directions to Chief Mental Health Advocate about general matters

Clause 132 deals with Ministerial directions to the Chief Mental Health Advocate and provides, at (1), that the Minister may, after consultation with the Chief Mental Health Advocate, issue written directions about the general policy to be followed by the Chief in performing functions under this Act. It is drawn from section 354 of the Mental Health Act.

Clause 132(2) provides that the Chief Mental Health Advocate may request the Minister to issue a direction.

Clause 132(3) provides that a direction cannot be issued in respect of a particular CLMI identified person (clause 132(3)(a)), a particular place at which a person is detained or receives mandatory services (clause 132(3)(b)), or any other particular person or body (clause 132(3)(c)).

Clause 132(4) provides that the Chief Mental Health Advocate must comply with a direction.

Clause 132(5) clarifies that the power to issue a direction also includes the power to amend, replace or revoke it, in the same manner and subject to the same conditions as the power to issue.

Clauses 132(6) and (7) respectively provide that if the Minister issues a direction under clause 132 they must, within 12 sitting days, cause the text of that direction to be tabled in Parliament. Additionally, the text of any direction issued must be included in the Chief Mental Health Advocate's annual report under clause 140(2).

Clause 133 – Delegation by Chief Mental Health Advocate

Clause 133 deals with delegations and is drawn from section 374 of the Mental Health Act. It provides, at (1), that the Chief Mental Health Advocate may delegate any power or duty under this Act to another mental health advocate or an advocacy services officer. A delegation must be in writing signed by the Chief Mental Health Advocate: clause 133(2).

Clause 133(3) provides that, despite (1), the Chief Mental Health Advocate cannot delegate to an advocacy services officer a power or duty of the Chief as a representative of a supervised person. This may, however, be delegated to another mental health advocate.

Clause 133(4) provides that a delegated person cannot themselves delegate that power or duty.

Clause 133(5) provides that a person exercising a power or performing a duty that has been delegated to them is taken to do so in accordance with the terms of their delegation unless the contrary is shown.

Clause 133(6) clarifies that the Chief Mental Health Advocate's ability to delegate does not limit the ability of the Chief Mental Health Advocate to perform a function through an officer or agent.

Clause 134 – Functions of mental health advocates

Clause 134 outlines the functions of mental health advocates and is drawn from section 352 of the Mental Health Act. Functions of mental health advocates are also functions of the Chief Mental Health Advocate due to paragraph (a) of the definition of ***mental health advocate*** in section 4 of the Mental Health Act, which provides that the Chief Mental Health Advocate is also a mental health advocate.

Clause 134(1) provides that advocate functions are to assist and advocate for CLMI identified persons, including (without limitation):

- visiting or otherwise contacting CLMI identified persons in accordance with clause 130 (clause 134(1)(a));
- inquiring into or investigating any matter relating to the conditions of a place at which a CLMI identified person is detained, or receives mandatory services, that is, or is likely to, adversely affect the health, safety or wellbeing of the person (clause 134(1)(b));
- inquiring into or investigating the extent to which CLMI identified persons have been informed of their right to request contact from an advocate (clause 134(1)(c)(i)), have

been given the means and opportunity to exercise that right (clause 134(1)(c)(ii)), and have been visited or otherwise contacted (clause 134(1)(c)(iii));
- inquiring into and seeking to resolve complaints about the treatment, care and support provided to a CLMI identified person at a place at which the person is detained or receives mandatory services (clause 134(1)(d)(i)), or the provision of mandatory services to a CLMI identified person (clause 134(1)(d)(ii));
- inquiring into or investigating the provision of mandatory services (clause 134(1)(e));
- referring any issues arising out of the performance of some of these functions (being those functions set out at paragraphs (b) to (e)) to the Chief Mental Health Advocate (clause 134(1)(f));
- assisting CLMI identified persons in relation to proceedings under this Act before a court (clause 134(1)(g));
- assisting and representing supervised persons in and in relation to proceedings under this Act before the Tribunal (clause 134(1)(h));
- liaising with the guardians and administrators of CLMI identified persons (clause 134(1)(i));
- assisting CLMI identified persons to access legal services (clause 134(1)(j));
- in consultation with the medical and mental health practitioners, other health professionals and representatives responsible for the treatment, care and support of CLMI identified persons, advocating for and facilitating access by CLMI identified persons to other services (clause 134(1)(k)); and
- any other functions conferred on a mental health advocate under the Act (clause 134(1)(l)).

Clause 134(2) provides that mental health advocate functions are to be performed in relation to particular CLMI identified persons. This provision has been included to clarify that the provision of advocacy to CLMI identified persons who are detained is on an individual basis to particular people, as distinct from a broader function to be performed in respect of prisoners and detainees across the custodial estate, like that of an independent prison visitor under the *Inspector of Custodial Services Act 2003*.

A complaint (which an advocate may inquire into and seek to resolve) may be made by a person with a sufficient interest in the CLMI identified person concerned: clause 134(3).

Mental health advocates are, in the performance of their functions under this Act, subject to the general direction and control of the Chief Mental Health Advocate: clause 134(4).

The functions of mental health advocates under this Act are in addition to, and do not limit, the functions of mental health advocates under any other written law: clause 134(5).

Clause 135 – Powers of mental health advocates relating to CLMI identified persons

Clause 135 sets out the powers of mental health advocates when performing a function under this Act. It is drawn from section 359 of the Mental Health Act. Those powers are set out at (1) as follows:

- visiting a place at which a CLMI identified person is detained or receives mandatory services (clause 135(1)(a));
- inspecting any part of a place that is visited under paragraph (a) (clause 135(1)(b));

- seeing and speaking with a CLMI identified person unless the person objects (clause 135(1)(c));
- asking a person who works at a place visited under paragraph (a) questions about:
    - the welfare, health, care, training, safety, management or security of any CLMI identified person who is detained, or receives mandatory services, at the place (clause 135(1)(d)(i)); and
    - the operation, control, management, security and good order of the place, to the extent relevant to the CLMI identified person (clause 135(1)(d)(ii));
- asking a person who is involved in the provision of a mandatory service questions about the provision of that service (clause 135(1)(e));
- inspecting and taking copies of the whole or part of any document about a CLMI identified person that is held at the place at which the person is detained, or receives mandatory services, unless the person objects (clause 135(1)(f)); and
- anything else necessary or convenient for the performance of the functions conferred on mental health advocates (clause 135(1)(g)).

Clause 135(2) clarifies that the exercise of powers under (1) in relation to a CLMI identified person who is detained, or who receives mandatory services at, a place is subject to the direction of the person in charge of the place (clause 135(2)(a)) and rules under the Prisons Act or Young Offenders Act (clause 135(2)(b)). Under those Acts, the CEO of a prison or detention centre may make rules for the management, control and security of those places.

Clause 135(3) provides that the powers to direct and make rules referred to at (2):

- must be exercised having regard to the principle in clause 7(2)(b) (that persons with mental impairment in the justice system should have access to advocacy) (clause 135(3)(a)); and
- cannot be exercised so as to limit the exercise of an advocate's powers, except for the purposes of:
    - ensuring the safety of persons (clause 135(3)(b)(i)); or
    - maintaining the security of a prison or detention centre, as is relevant (clause 135(3)(b)(ii)).

Rules and operating policies and procedures are already in place to deal with social and official visits to prisons and detention centres. Rules under both the Prisons and Young Offenders Acts specifically dealing with mental health advocate visits will be made to coincide with the commencement of this Act.

Clause 135(4) provides that a mental health advocate may require a person who works at a place at which a CLMI identified person is detained or receives mandatory services to give the advocate reasonable assistance for the purpose of the performance of the advocate's functions under this Act.

Clause 135(5) is an offence provision which provides that a person who, without reasonable excuse, proof of which is on the person, does not give reasonable assistance when required to do so, commits an offence. The penalty is $6,000. This is drawn from section 362(1)(d) of the Mental Health Act.

Clause 136 – Issues arising out of inquiries and investigations

Clause 136 deals with issues arising out of inquiries and investigations. It is drawn from section 363 of the Mental Health Act.

Clause 136(1) provides that an advocate may attempt to resolve any issue that arises in the course of an inquiry or investigation of a matter referred to under clause 134(1)(b) or (c) by dealing directly with persons who work at the place where the CLMI identified person is detained or receives mandatory services.

Clause 136(2) provides that if the advocate cannot resolve the issue themselves, or considers it appropriate to do so, the advocate must refer it to the Chief Mental Health Advocate.

Clause 136(3) provides that the Chief Mental Health Advocate may give a report about an issue referred to them to the person in charge of the place in relation to which the issue arose.

Clause 136(4) provides that the Chief Mental Health Advocate may also give a copy of that report to the Minister (clause 136(4)(a)), the Minister for Corrective Services (clause 136(4)(b)), the Minister to whom administration of the Young Offenders Act is committed (clause 136(4)(c)), the CEO (Corrections) (clause 136(4)(d)) or the CEO (Young Offenders) (clause 136(4)(e)). A report may be given to one or more of those listed.

Clause 136(5) provides that a person who is given a report under clause 136(4) must advise the Chief Mental Health Advocate whether they consider that further inquiry or investigation of the issue is warranted (clause 136(5)(a)) and, if there is an inquiry or investigation, the outcome of any further inquiry or investigation, including any recommendations made, directions given, or other actions taken (clause 136(5)(b)).

Clause 136(6) provides that clause 136 does not limit an advocate's powers to deal with any issue that may arise in the course of an inquiry or investigation.

Clause 137 – Documents to which access is restricted

Clause 137 deals with the restriction of access to documents about a CLMI identified person, to the person. It applies if a CLMI identified person who is detained or who receives mandatory services is not entitled to have access to a document under section 249 of the Mental Health Act.

Section 249 of the Mental Health Act provides that a person is not entitled to have access to the whole or any part of their medical record if a psychiatrist reasonably believes that the disclosure of information in that record to the person poses a significant risk to the health or safety of the person or to the safety of another person, or a significant risk of serious harm to the person or another person, or if disclosure would reveal personal information about another individual or confidential information obtained in confidence.

Further, section 249 provides that a supervised person required to be detained at an authorised hospital is not entitled to have access to a relevant document if it came into existence under, or for the purposes of, the Prisons Act. Clause 375 in Part 15 Division 20 amends section 249 of the Mental Health Act to also restrict access to a relevant document if it came into existence under, or for the purposes of, the Young Offenders Act.

Clause 137(2) provides that the person in charge of a place at which the CLMI identified person is detained or receives mandatory services must ensure that, before such a document is made available to an advocate, the advocate is advised that:

- the CLMI identified person is not entitled to have access to the document (clause 137(2)(a)); and
- that it is an offence under clause 138 for the advocate to disclose any information in the document to the person (clause 137(2)(b)).

Clause 137(3) requires the person in charge of a place to keep a record of any advice given to an advocate about the document being restricted and that disclosure is an offence.

Clause 138 – Disclosure by mental health advocate

Clause 138 deals with disclosure of documents by a mental health advocate. It is drawn from section 361 of the Mental Health Act.

If a mental health advocate inspects or takes a copy of the whole or any part of a document, the advocate must not disclose any information in a document to which the CLMI identified person is not entitled to have access under section 249 of the Mental Health Act, if the advocate was advised that it was restricted before it was made available to them.

Disclosure is an offence attracting a penalty of $5,000.

Division 4 – Interaction with *Mental Health Act 2014*

This Division deals with continuity of the provision of advocacy to a person under this Act and the Mental Health Act.

Clause 139 – Interaction with *Mental Health Act 2014*

Clause 139 is included to ensure continuity of the provision of advocacy to a CLMI or MHA identified person under this Act and the Mental Health Act, where appropriate. An unfit accused or supervised person may shift between being a CLMI identified person and a MHA identified person depending on where they are detained (for example, in a prison or at an authorised hospital) or the type of mandatory services they receive (for example, receiving treatment from a mental health service or completing a relationship skills course).

Clause 139(2) provides that a ***MHA identified person*** is an identified person as defined at section 348 of the Mental Health Act.

Clauses 139(3) and (5) provide that if a CLMI identified person becomes a MHA identified person (and vice versa), and there is a corresponding power or duty of a ***responsible person*** in relation to an identified person under provisions of this Act and the Mental Health Act, the corresponding duty or power under this Act or the Mental Health Act applies, as is relevant (clauses 139(4) and (6)).

If an advocate has a power or duty to exercise in relation to an identified person as a responsible person and it is not practicable for them to do so, another advocate may do so instead: clause 139(7). This has been included to accommodate any practical barriers to the same advocate providing advocacy to the same person under both Acts. For example, a CLMI identified person may be detained in a prison in a regional area, be transferred to an authorised

hospital in the Perth metropolitan area and become a MHA identified person. It may not be practicable for the regionally based advocate to continue to provide advocacy to the person while they are in a different location.

A regulation-making power has been included at clause 139(8) to modify the effect of subclauses 139(4) and (6).

Division 5 – Reporting in relation to mental health advocacy services

Division 5 deals with annual reports by the Chief Mental Health Advocate.

Clause 140 – Annual reports

Clause 140 requires the Chief Mental Health Advocate to prepare an annual report on mental health advocate activities.

Contractor is defined at (1) to mean a person who is a contractor under the *Court Security and Custodial Services Act 1999*, the Declared Places Act, or the Prisons Act.

Clause 140(2) provides that, before 1 October in each year, the Chief must report to the Minister (clause 140(2)(a)), the Minister for Corrective Services (clause 140(2)(b)), and the Minister to whom the administration of the Young Offenders Act is committed (clause 140(2)(c)) on the activities of all mental health advocates during the previous financial year.

Clause 140(3) provides that personal information relating to a CLMI identified person must not be included in a report unless, on their views being sought, the person has consented to the disclosure.

Clause 140(4) provides that the Minister must table a copy of the Chief Mental Health Advocate's report within 12 sitting days after receiving it.

Clauses 140(5) and (6) provide that the Chief Mental Health Advocate must not disclose information or make a statement setting out an opinion that is either expressly or impliedly critical of the departments assisting in the administration of the Prisons Act (clause 140(5)(a)) and Young Offenders Act (clause 140(5)(b)), a contractor (clause 140(5)(c)), or any other person who performs functions under this Act or provides mandatory services (clause 140(5)(d)), unless the Chief Mental Health Advocate has given the CEO(s) of the department(s), the contractor, or the person, an opportunity to make written submissions before doing so.

This is to afford procedural fairness. Similar requirements can be found in the *Parliamentary Commissioner Act 1971*, *Inspector of Custodial Services Act 2003* and the *Corruption, Crime and Misconduct Act 2003*.

Clause 140(7) provides that if the Chief Mental Health Advocate is not able to comply with the requirement under (2) to report by 1 October in a year, they must inform each House of Parliament of the inability to do so, and the reasons for that inability, by 1 October in that year or the first sitting day of each House after that.

Part 9 – Victim considerations

Part 9 deals with victim impact statements and submissions to a court or the Tribunal, giving notice to victims of upcoming Tribunal review proceedings, and disclosure of information to victims.

Division 1 – Preliminary matters

Division 1 contains general provisions, including overviews and definitions.

Clause 141 – Overview of Part

Clause 141 is an overview provision setting out the matters dealt with in Part 9.

Clause 142 – Terms used

Clause 142, at (1), sets out terms used in Part 9. These are ***victim*** and, within the definition of ***victim***, the terms ***member of the immediate family of the deceased*** and ***violent personal offence***.

Victim, of an offence, is defined consistently with the *Sentence Administration Act 2003*, meaning a person who has suffered injury, loss or damage as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the person found to have committed the offence (paragraph (a)). If the offence resulted in a death, a member of the immediate family of the deceased is a victim (paragraph (b)). A person protected by a family violence restraining order under the *Restraining Orders Act 1997* to which the person is or was a respondent is also a victim (paragraph (c)). It is irrelevant that the family violence restraining order is unrelated to the offence (clause 142(2)). A victim may also be a person who can demonstrate, to the satisfaction of the CEO, that they are the victim of a violent personal offence previously committed by the person found to have committed the offence, and that the violent personal offence occurred in the context of a family relationship as defined in section 4 of the *Restraining Orders Act 1997* with the person found to have committed the offence (paragraph (d)).

Member of the immediate family of the deceased is drawn from section 23A of the *Sentencing Act 1995* and means the deceased's spouse (paragraph (a)), de facto partner (paragraph (b)), a person to whom the deceased was engaged to be married (paragraph (c)), a parent, grandparent, guardian, step-parent or step-grandparent (paragraph (d)), a child, grandchild, step-child or step-grandchild, or some other child for whom the deceased is a guardian (paragraph (e)), a brother, sister, half-brother, half-sister, step-brother or step-sister (paragraph (f)), or a person regarded under Aboriginal or Torres Strait Islander customary law and culture as a member of the extended family or kinship group of the deceased (paragraph (g)).

Paragraph (g) of the definition is taken from section 4(2) of the *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021* and has been included to recognise family and kinship structures that exist in Aboriginal and Torres Strait Islander communities.

Violent personal offence, as used in paragraph (d) of the definition of ***victim***, means an offence specified in section 63(4AA)(a), or a violent personal offence defined in section 63A(1A), of the *Restraining Orders Act 1997*.

Division 2 – Victim impact statements may be given to court

Division 2 deals with victim impact statements that may be given to a court that is required to make an order under Part 5 or Part 6. It is drawn from Part 3 Division 4 of the *Sentencing Act 1995*, which deals with victim impact statements in the sentencing process.

Clause 143 – Terms used

Clause 143 defines ***victim impact statement***. A victim impact statement, in relation to a victim of an offence, means a statement containing particulars of any bodily harm or psychological or psychiatric harm suffered by the victim as a result of the offence.

Clause 144 – Victim impact statements may be given to court

Clause 144 provides, at (1), that a victim of an offence in respect of which a court must make an order under Part 5 may give a victim impact statement to the court to assist the court in determining what order to make. A court may, under Part 5, make a community supervision order or a custody order and may, in some circumstances, order that the person be unconditionally released.

Clause 144(2) provides that if an application for an order to cancel a community supervision order and make a custody order is made under clause 89, a victim of an offence committed by the supervised person may give a victim impact statement to the court.

Clause 144(3) provides that another person may give a victim impact statement on a victim's behalf if the court is satisfied that it is appropriate for the person to do so. This may be because of age, disability or any other reason.

Clause 144(4) provides that a court may rule as inadmissible the whole or any part of a victim impact statement.

A transitional provision provides that a victim impact statement may be made in a proceeding to set a limiting term on an existing custody order: Part 14 Division 2, clause 263(6)(a).

Clause 145 – Content of victim impact statements

Clause 145(1) states that a victim impact statement must not address the way in which, or the extent to which, the person found to have committed the offence is to be dealt with under this Act.

Clause 145(2) provides that a victim impact statement may be accompanied by a report by any person who has treated the victim in connection with the offence.

Clause 146 – Availability of victim impact statements

Clause 146 deals with the availability of victim impact statements.

Clause 146(1) provides that a court may make a written victim impact statement available to another person on conditions it considers appropriate. If a court makes that statement available, it must notify the victim of this as soon as practicable: clause 146(2).

Clause 146(3) provides that after making an order under Part 5 (a community supervision order or custody order) or clause 89 in Part 6, (a custody order following cancellation of a

community supervision order in breach proceedings), the court must make available to the Tribunal any victim impact statement given to it under clause 144.

Division 3 – Victim submissions may be made to Tribunal

Division 3 of Part 9 deals with how victims may make submissions to the Tribunal. It is drawn from section 5C of the *Sentence Administration Act 2003*, which deals with victim submissions to the Prisoners Review Board.

Clause 147 – Victim submissions may be made to Tribunal

Clause 147 provides, at (1), that a victim of the offence in relation to which a custody order or community supervision order was made may make a submission to the Tribunal.

If the supervised person is subject to a custody order, the submission may state the victim's opinion of the effect on them of the release of the person and include suggestions about the conditions that should apply to the person if released: clause 147(1)(a).

If the supervised person is subject to a community supervision order, or a leave of absence order applies to them, the submission may state the victim's opinion of the effect on them of the cancellation of the conditions of the order and include suggestions about the conditions that should apply to the person: clause 147(1)(b).

Clause 147(2) provides that victim submissions must be in writing and clause 147(3) provides that another person may give a victim submission to the Tribunal on a victim's behalf if the Tribunal is satisfied that it is appropriate for the person to do so. This may be because of age, disability or any other reason.

Clause 147(4) requires the Tribunal to establish procedures for the giving of victims' submissions and clause 147(5) provides that, in exercising its jurisdiction, the Tribunal may have regard to a victim's submission received by it in accordance with those procedures. The Tribunal is to give the victim's submission such weight as it thinks fit.

Clause 147(6) provides that the Tribunal may make a victim's submission available to another person on the conditions the Tribunal considers appropriate and clause 147(7) provides that if a submission is made available, the Tribunal must notify the victim of this as soon as practicable.

Division 4 – Victim submissions may be made to court

Division 4 of Part 9 deals with victim submissions made to a relevant court in an application for the cancellation of a custody order or community supervision order under clause 74 and the Supreme Court for proceedings under Part 7 (being applications for, and reviews of, extended orders). It is drawn from Part 4 Division 8 of the HRSO Act, which deals with victim submissions in certain proceedings under that Act.

Clause 148 – Victim submissions may be made to court

Clause 148 provides, at (1), that if an application for cancellation of a custody order or community supervision order is made under clause 74, a victim of an offence committed by the supervised person may make a submission to the court that made the order in relation to the need to ensure the adequate protection of the victim.

Clause 148(2) provides that if an application for an extended order, or review of an extended order, is made under Part 7 in relation to a supervised person, a victim of an offence committed by the person may make a submission to the Supreme Court in relation to the need to ensure the victim's adequate protection.

Clause 148(3) provides that a submission must be in writing and clause 148(4) provides that another person may give a victim submission on a victim's behalf if the court is satisfied that it is appropriate for the person to do so. This may be because of age, disability or any other reason.

Clause 148(5) provides that a court may rule as inadmissible the whole or any part of a victim's submission.

Clause 149 – Content of victim's submission

Clause 149 deals with the content of submissions made under Part 9 Division 4.

Clause 149(1) provides at (a) that if the application under clause 148 is in relation to a custody order, the victim's submission may state their opinion of the effect on them of the release of the person. Clause 149(1) provides at (b) that if the application under clause 148 is in relation to a community supervision order, the submission may state the victim's opinion of the effect on them if the person is no longer under supervision, and include suggestions about the conditions that should apply to the person.

A transitional provision provides that a victim's submission may be made in proceedings to set limiting terms on existing custody orders, where an extended order is being considered: Part 14 Division 2, clause 263(6)(b).

Clause 150 – Availability of victim's submissions

Clause 150 deals with making a victim's submission available.

Clause 150(1) provides that a court may make a victim's submission available to another person on the conditions it considers appropriate and clause 150(2) provides that if it does so, the court must notify the victim as soon as practicable.

Clause 150(3) provides that the court must, after confirming a custody order or community supervision order under clause 74(2) or making an order under Part 7, make a copy of any victim's submission given under clause 148 available to the Tribunal.

Division 5 – Notice of Tribunal review given to victims

Division 5 of Part 9 deals with giving notice of Tribunal review proceedings under Part 6 Division 4 to victims.

Clause 151 – Notice to victims of review proceedings

Clause 151 provides, at (1), that as soon as practicable after receiving notice from the Tribunal of a review proceeding in relation to a supervision order (under clause 71), the CEO must give written notice to each victim of the offence in relation to which the order was made, who has notified the CEO that they wish to receive notice of review proceedings in relation to the supervised person.

Clause 151(2) provides that a victim may nominate another person to receive notice on their behalf, and clause 151(3) provides that notice to a victim who is a child must be given to a parent of the child and any guardian of the child.

Clause 151(4) provides that notice must include the following:

- at paragraph (a) - if the supervised person is subject to a custody order – whether or not a leave of absence order applies to them;
- at paragraph (b) - if the supervised person is subject to a community supervision order or there is a leave of absence order applying to them – the person's current level of supervision.

Clause 151(5) provides that notice need not be given in relation to review proceedings solely for the purpose of varying conditions of a leave of absence order (clause 151(5)(a)), or to a person whose whereabouts have not been ascertained after reasonable attempts to do so (clause 151(5)(b)), or when the Tribunal is constituted by the President or a Deputy under clause 75(1) (in serious and urgent cases; clause 151(5)(c))).

Clause 151(6) provides that the validity of a decision of the Tribunal is not affected by a failure to notify each victim under clause 151.

Clause 152 – Delegation by CEO

Clause 152 provides, at (1), that the CEO may delegate to a person any power or duty the CEO has under this Division. This power to delegate has been included to allow the CEO to delegate their powers and functions under Division 5; that is, give written notice to victims of upcoming review proceedings, to staff within the Office of the Commissioner of Victims of Crime, which administers the Victim Notification Register. It is through the Victim Notification Register that victims are notified of matters relating to those who have offended against them.

Clause 152(2) provides that the delegation must be in writing signed by the CEO and clause 152(3) provides that a delegated person cannot further delegate that power or duty.

Clause 152(4) provides that a person exercising a power or performing a duty that has been delegated to the person is taken to do so in accordance with the terms of the delegation unless the contrary is shown.

Clause 152(5) clarifies that the CEO's ability to delegate does not limit the ability of the CEO to perform a function through an officer or agent.

Division 6 – Miscellaneous

Division 6 deals with the disclosure of information to victims.

Clause 153 – Disclosing information to victims

Clause 153 provides that the CEO may, in relation to an offence committed by a supervised person, disclose information of a prescribed kind regarding the supervised person to a victim of the offence, or a person acting on the victim's behalf. It is drawn from section 97D of the *Sentence Administration Act 2003*.

The information to be disclosed will be prescribed in regulations but is likely to be drawn from regulation 23B of the *Sentence Administration Regulations 2003*. That regulation provides for disclosure of a range of information to victims about offenders.

Part 10 – Mental Impairment Review Tribunal

This Part establishes the Mental Impairment Review Tribunal in place of the Mentally Impaired Accused Review Board. Many of the provisions regarding the Tribunal's establishment, general powers and jurisdiction are drawn from the *State Administrative Tribunal Act 2004* and Part 21 of the Mental Health Act.

Division 1 – Preliminary matters

Division 1 deals with preliminary matters, including overviews and definitions.

Clause 154 – Overview of Part

Clause 154 gives a general overview of the matters dealt with in Part 10.

Clause 155 – Terms used

Clause 155 is a definitions provision, setting out terms used in Part 10. Those are:

- ***community member*** means a member of the Tribunal appointed under clause 171(1)(c);
- ***experienced lawyer*** means a lawyer with a least five years' legal experience;
- ***member of staff***, of the Tribunal, means an officer of the Department of Justice made available to assist the Tribunal under clause 188(5) (Registrar, staff and facilities to be made available);
- ***proceedings*** means proceedings of the Tribunal under this Act and includes part of a proceeding;
- ***public service member*** means a member of the Tribunal appointed under clause 171(1)(f), (g) or (h) (a person who is appointed, employed or made available under the *Disability Services Act 1993*, a person who works for the Department principally assisting in the administration of the Prisons Act, and a person who works for the Department principally assisting in the administration of the Young Offenders Act);
- ***question of law*** means a question of law arising in proceedings for decision by the Tribunal and includes a question of mixed law and fact; and
- ***registrar*** means the registrar of the Tribunal under clause 188(1).

Division 2 – Mental Impairment Review Tribunal

This Division establishes the Tribunal.

Clause 156 – Tribunal established

Clause 156 establishes the Tribunal.

Clause 157 – Tribunal's jurisdiction

Clause 157 states that the Tribunal has the jurisdiction conferred on it by this Act.

Clause 158 – Constitution of Tribunal

Clause 158 outlines how the Tribunal is to be constituted when exercising its jurisdiction. It provides, at (1), that the Tribunal must be constituted by the President or a Deputy President and at least two other members, as specified by the President.

Clauses 158(2) to (5) set out requirements for the Tribunal to be constituted in a particular way when considering certain supervised persons.

If the supervised person is an Aboriginal person, the President must, to the extent practicable, ensure that the Tribunal is constituted so as to include a community member with knowledge and understanding of Aboriginal culture local to the State (clause 158(2)).

If the supervised person is a child, the President must, to the extent practicable, ensure that the Tribunal is constituted so as to include a psychiatrist or psychologist who specialises in child and adolescent treatment (clause 158(3)).

If the supervised person has a mental illness, the President must, to the extent practicable, ensure that the Tribunal is constituted so as to include a psychiatrist (clause 158(4)).

If the supervised person has a disability as defined in section 3 of the *Disability Services Act 1993*, the predominant reason for which is not mental illness, the President must, to the extent practicable, ensure that the Tribunal is constituted so as to include a member appointed under clause 171(1)(f) – a person who is appointed or employed under section 9 or made available under section 10 of the *Disability Services Act 1993* and appointed by the Minister on the nomination of the Minister for Disability Services (clause 158(5)).

Clause 158(6) provides that the President may alter who is to constitute the Tribunal for the purpose of dealing with a matter or anything relating to a matter, and the Tribunal, as constituted after the alteration, may have regard to any record of the proceedings of the Tribunal in relation to the matter before the alteration or any evidence taken in the proceedings before the alteration.

Clause 158(7) provides that (1) to (5) have effect subject to the provisions of the Act that expressly provide otherwise. A Note is included to indicate those provisions, being:

- clause 75(1) – Tribunal constituted by President or Deputy President alone in serious and urgent circumstances;
- clause 81(4) – Tribunal constituted by President or Deputy President alone in serious and urgent circumstances (breach of conditions of leave of absence order);
- clause 91(5) – Tribunal constituted by President or a Deputy President who is an experienced lawyer.

Clause 159 – Contemporaneous exercise of jurisdiction

Clause 159 permits the Tribunal to exercise its jurisdiction in different constitutions at the same time.

Division 3 – Proceedings of Tribunal

This Division deals with matters relating to Tribunal proceedings.

Clause 160 – Conduct of proceedings

Clause 160 sets out how Tribunal proceedings are to be conducted. It provides, at (1), that proceedings must be conducted with as little formality and technicality, and as speedily, as proper consideration of the matter before the Tribunal permits.

Clause 160(2) provides that the Tribunal is bound by the rules of natural justice in proceedings.

Clause 160(3) permits a Tribunal member to participate in a proceeding, including a hearing, by means of audio or video link, or some other form of instantaneous communication. Participation by these means will be allowed if the presiding member considers it appropriate in the circumstances.

Clause 160(4) provides that the presiding member may, if appropriate, allow a party to proceedings, a representative and any witness, to participate in a hearing in proceedings by means of audio or video link, or some other form of instantaneous communication.

Clause 160(5) clarifies that, subject to Part 10, the practice and procedure of the Tribunal in proceedings is either as provided for in the practice notes under clause 194 (clause 160(5)(a)) or, if no relevant provision is made in those practice notes, as determined by the Tribunal (clause 160(5)(b)).

Clause 161 – Who presides

Clause 161 outlines who presides in a Tribunal proceeding. It provides, at (1), that the most senior of the members constituting the Tribunal must preside at proceedings and, at (2), that seniority of members is determined by the President.

Clause 162 – Decision of Tribunal

Clause 162 outlines how questions requiring a Tribunal decision are to be decided.

Clause 162(1) provides that the question is to be decided according to majority opinion.

Clause 162(2) provides that if there is an equal division of opinions, the question is to be resolved according to the opinion of the presiding member.

Clause 162(3) provides that clause 162 has effect subject to clause 163.

Clause 163 – Questions of law

Clause 163 deals with how questions of law are to be resolved.

Clause 163(1) provides that if a question of law arises in proceedings and the presiding member is the President or a Deputy President who is an experienced lawyer, the question is decided by the Tribunal according to the opinion of the presiding member.

Clause 163(2) provides that the presiding member referred to in (1) may, if the question is not a question of mixed law and fact, refer the question to the Supreme Court for a decision by the court.

Clause 163(3) provides that if a question of law arises in proceedings and the presiding member is neither the President nor a Deputy President who is an experienced lawyer, the

Tribunal must refer the question to the President or a Deputy President who is an experienced lawyer.

Clause 163(4) provides that if a question referred to the President or a Deputy President is not a question of mixed law and fact, the President or Deputy President may refer the question to the Supreme Court for a decision by the court.

Clause 163(5) provides that if a question of law is referred to the President or a Deputy President, and is not then referred to the Supreme Court, the question is taken to have been decided by the Tribunal according to the opinion of the President or Deputy President.

Clause 163(6) provides that a question of law referred to the Supreme Court under (2) or (4) is taken to have been decided by the Tribunal according to the decision of the court.

Clause 164 – Evidence generally

Clause 164 deals with evidence in Tribunal proceedings. It provides, at (1), that the Tribunal:

- is not bound by the rules of evidence (clause 164(1)(a)); and
- may inform itself in such manner as it considers appropriate (clause 164(1)(b)); and
- may, on its own initiative, call any person to give evidence; (clause 164(1)(c)); and
- may examine or cross-examine any witness to the extent considered appropriate (clause 164(1)(d)).

Clause 164(2) provides that evidence may be given orally or in writing, and clause 164(3) provides that the Tribunal may require evidence to be given on oath or by affidavit.

Clause 164(4) provides that the presiding member may direct a person appearing before the Tribunal as a witness in Tribunal proceedings to answer a relevant question (clause 164(4)(a)) or produce a relevant document (clause 164(4)(b)).

Clause 164(5) provides that a person appearing as a witness before the Tribunal has the same protection and immunity as a witness has in Supreme Court proceedings. This is subject to clause 168 (Privilege against self-incrimination).

Clause 165 – Appearance in review proceedings

Clause 165 outlines rights of appearance in review proceedings under Part 6 Division 4.

It provides, at (1), that a supervised person may appear before the Tribunal unless the Tribunal considers it is not safe or practicable for the person to do so (clause 165(1)(a)). A person may be accompanied by a representative (clause 165(1)(b)), and may be represented by that representative or a legal practitioner (clause 165(1)(c)).

Clause 165(2) provides that even if a supervised person is represented in proceedings, they are still entitled to express their views about any matter that may affect them that arises during the course of those proceedings.

Clause 165(3) provides that the President may order that a person's appearance be by means of an audio or video link or some other means of instantaneous communication.

Clause 166 – Summons to give evidence or produce documents

Clause 166 deals with issuing a summons to give evidence or produce documents.

Clause 166(1) provides that the Tribunal may, by issuing a summons and giving it to the person it is addressed to, require a person to attend before the Tribunal at the time and place specified in the summons to give evidence in proceedings (clause 166(1)(a)) and/or produce specified documents relevant to proceedings that are in the person's custody or control (clause 166(1)(b)).

Clause 166(2) provides that the registrar of the Tribunal, or a member, may exercise the power to issue a summons, and clause 166(3) provides that a summons must be signed by the person issuing it.

Clause 167 – Power to examine on oath

Clause 167 provides that a Tribunal member, the registrar, or a member of the Tribunal's staff, may administer an oath or affirmation to any person appearing as a witness in proceedings before the Tribunal.

Clause 168 – Privilege against self-incrimination

Clause 168 deals with privilege against self-incrimination.

Clause 168(1) provides that a person is not excused from complying with a direction of the Tribunal under clause 164(4), or complying with a summons issued under clause 166, on the ground that compliance might tend to incriminate them or make them liable to a criminal penalty.

Clause 168(2) clarifies that answers given or documents produced in compliance with a direction or summons are not admissible in evidence in any criminal proceedings against the person, other than for perjury or an offence under clause 189. Clause 189 contains numerous offences relating to information and records.

Clause 169 – Confidentiality orders

Clause 169 provides that the Tribunal may make confidentiality orders. It is drawn from section 696 of the *Mental Health Act 2016* (Qld).

Clause 169(1) provides that a ***confidentiality order*** is an order prohibiting or restricting the disclosure of any of the following to a supervised person:

- information given in proceedings relating to them (clause 169(1)(a));
- matters contained in documents received by the Tribunal relating to them (clause 169(1)(b));
- the reasons for decisions in proceedings in relation to them (clause 169(1)(c)).

Clause 169(2) provides that a confidentiality order must not be made unless the Tribunal is satisfied that disclosure would create a risk to the health or safety of the supervised person, or to the safety of another person.

Clause 169(3) provides that if the Tribunal makes a confidentiality order in respect of a supervised person, it must disclose to the person's representative or legal practitioner the information or matters to which the order relates (clause 169(3)(a)) and give the representative or legal practitioner a copy of the order and written reasons for it (clause 169(3)(b)).

Clause 169(4) provides that contravention of a confidentiality order without reasonable excuse, when the person knew or reasonably ought to have known that the order was in place, is an offence attracting a fine of $10,000.

Clause 169(5) provides that clause 169 has effect despite any other section of this Act. This is included to indicate that confidentiality orders prevail over other provisions enabling the disclosure of information (for example, between supporting agencies in Part 13 and the compulsory provision of reports to which regard will be had in review proceedings under Part 6).

Clause 170 – Publication of names

Clause 170 prohibits the publication or broadcast of names, pictures or other identifying information that would be likely to lead to the identification of a supervised person or any witness or other person appearing or mentioned in Tribunal proceedings, without the Tribunal's consent. A fine of $10,000 applies.

Division 4 – Membership of Tribunal

This Division deals with matters including the appointment, remuneration and qualifications of Tribunal members.

Clause 171 – Tribunal members

Clause 171, at (1), sets out the members of the Tribunal, being:

- the President, appointed by the Governor on nomination of the Minister (clause 171(1)(a));
- one or more Deputy Presidents, appointed by the Minister (clause 171(1)(b));
- as many community members as are necessary to deal with the workload of the Tribunal, appointed by the Minister (clause 171(1)(c));
- one or more psychiatrists and psychologists appointed by the Minister (clause 171(1)(d) and clause 171(1)(e));
- one or more persons who are appointed or employed under section 9, or made available under section 10, of the *Disability Services Act 1993* and are appointed by the Minister on the nomination of the Minister to whom the administration of the Disability Services Act is committed (clause 171(1)(f));
- one or more persons who work for the Department of Justice in the administration of the Prisons Act, nominated by the Minister for Corrective Services and appointed by the Minister (clause 171(1)(g)); and
- one or more persons who work for the Department of Justice in the administration of the Young Offenders Act, nominated by the Minister to whom the administration of the Young Offenders Act is committed and appointed by the Minister (clause 171(1)(h)).

Clause 171(2) provides that members may be appointed on a full-time, part-time or sessional basis.

This provision is drawn from section 42 of the former Act. The key differences, other than title changes from chairperson to President (and deputies), are:

- to provide that the President is directly appointed to the Tribunal rather than be appointed by virtue of being chairperson of the Prisoners Review Board;
- to provide for appointment by the Minister, rather than the Governor (except in the case of the President, which will continue to be an appointment by the Governor);
- to provide for direct appointment of community members, rather than automatic appointment of the Prisoners Review Board community members; and
- the addition of public service members from the Department of Justice, being staff involved in the administration of the Prisons Act and Young Offenders Act.

A transitional provision is included to deal with membership of the Board immediately before commencement: Part 14 Division 2, clause 272.

Clause 172 – Qualifications of certain members

Clause 172 outlines particular qualifications that are required for appointment of certain Tribunal members.

Clause 172(1) provides that the Minister must not nominate a person for the role of President unless the person has served as, or is qualified for appointment as, a judge of the District or Supreme Court of Western Australia or another State or Territory, the High Court of Australia or the Federal Court of Australia, and, if the person holds judicial office, the person has consented in writing to be nominated.

Clause 172(2) provides that a person holding a judicial office must retire upon being nominated as the President.

Clause 172(3) provides that the Minister must not appoint a person as a Deputy President unless satisfied that the person has extensive or special knowledge of matters involved in the performance of the Tribunal's functions.

Clause 172(4) provides that at least one Deputy President must be an experienced lawyer.

Clause 172(5) sets out the matters the Minister must be satisfied of in respect of appointing community members:

- that the person is able to make an objective and reasonable assessment of the degree of risk that a supervised person would appear to present to the safety of the community (clause 172(5)(a)); and
- that the person has one or more of the following attributes:
    - knowledge and understanding of forensic mental health and disability (clause 172(5)(b)(i));
    - knowledge and understanding of victims' interests and concerns (clause 172(5)(b)(ii));
    - knowledge and understanding of Aboriginal culture local to the State (clause 172(5)(b)(iii));

- knowledge and understanding of a range of cultures among Australians (clause 172(5)(b)(iv));
- knowledge and understanding of the criminal justice system (clause 172(5)(b)(v));
- broad experience in a range of issues such as issues relating to employment, substance abuse, physical or mental illness or disability, or lack of housing, education or training (clause 172(5)(b)(vi)).

These matters are largely consistent with the matters set out in section 103(4) of the *Sentence Administration Act 2003*, which deals with community members of the Prisoners Review Board. The key difference is the addition of the attribute of knowledge and understanding of forensic mental health and disability.

Clause 172(6) provides that, in nominating persons as community members, the Minister must ensure at all times that at least one community member has knowledge and understanding of victims' interests and concerns, and that at least one community member is an Aboriginal person with knowledge and understanding of Aboriginal culture local to the State.

Clause 173 – Terms and conditions of appointment

Clause 173 deals with terms and conditions of members' appointments. It provides, at (1), that a member holds office for the period specified in the instrument of appointment, not exceeding five years, and, at (2), that a member is eligible for reappointment.

Clause 173(3) provides that, subject to Division 4, a member's office is held on the terms and conditions of appointment determined by the Minister or, in the case of the President, the Governor.

Clause 174 – Remuneration

Clause 174 deals with remuneration.

Clause 174(1) provides that the President is entitled to remuneration determined from time to time by the Governor on the recommendation of the Minister (clause 172(1)(a)). Members other than the President are entitled to remuneration determined from time to time by the Minister (clause 174(1)(b)).

Clause 174(2) provides that the Minister's recommendation as to, or determination of, remuneration under (1) is to be on the recommendation of the Public Sector Commissioner.

Clause 174(2) clarifies that any remuneration paid to a member who is a retired judge does not affect that member's entitlements under the *Judges' Salaries and Pensions Act 1950*.

Clause 174(3) provides that a member is not entitled to remuneration if they hold a full-time office or position that is remunerated out of funds appropriated by Parliament. This applies to the public service members who are employees of the Disability Services Commission or Department of Justice.

Clause 175 – Deputy President acting as President

Clause 175 deals with acting arrangements for the role of President.

Clause 175(1) defines ***unable to act*** to include the President being on leave, whether extended or not and whether for illness or not.

Clause 175(2) provides that if there is a vacancy in the role of President or the President is unable to act, the Deputy President, or the most senior Deputy if there is more than one, is to perform the functions of the President.

Clause 175(3) provides that questions of seniority are to be resolved by the President.

Clause 175(4) provides that, despite (2), a Deputy President who is not an experienced lawyer cannot decide a question of law.

Clause 175(5) provides that an act or omission by a Deputy acting in the President's place cannot be questioned on the ground that the occasion to act had not arisen, or had ceased.

Clause 176 – Leave of absence from office

Clause 176 deals with absence arrangements.

Clause 176(1) provides that the Minister may grant the President leave to be absent from that office on such terms and conditions the Minister considers appropriate.

Clause 176(2) provides that the President may grant members leave to be absent.

Clause 177 – Vacating office prematurely

Clause 177 deals with members vacating office before the end of their term of appointment. It provides that members cease to be members before the end of their term if they resign under clause 179 (clause 177(a)) or their appointment is terminated under clause 180 (clause 177(b)).

Clause 178 – Conditions for public service members

Clause 178 deals with conditions of appointment for public service members.

Clause 178(1) provides that members appointed under clause 171(1)(f) are members only while they are appointed or employed under section 9, or made available under section 10, of the *Disability Services Act 1993*.

Clause 178(2) provides that members appointed under clause 171(1)(g) and (h) are only members while they are employed in the department principally assisting in the administration of the Prisons Act or Young Offenders Act, as is relevant.

Clause 179 – Resignation of members

Clause 179 deals with resignations.

Clause 179(1) provides that a member may resign by giving the Minister a signed letter of resignation.

Clause 179(2) provides that a resignation takes effect on the later of receipt by the Minister and the day specified in the resignation letter.

Clause 180 – Terminating appointment of members

Clause 180 provides for the termination of members' appointments. Grounds for termination are set out at (1) and exist if the member:

- has been convicted of an indictable offence or offence committed under the law of another jurisdiction that would, if it had been committed in WA, be an indictable offence (clause 180(1)(a)); or
- is incapable of performing the functions of a member (clause 180(1)(b)); or
- has neglected to perform the functions of a member without reasonable cause (clause 180(1)(c)); or
- is incompetent (clause 180(1)(d)); or
- is unfit to be a member due to misconduct (clause 180(1)(e)); or
- ceases to have a particular status if the person was appointed to that office on the basis of having that status (clause 180(1)(f)).

These grounds are drawn from the grounds for termination of appointment of a member of the Mental Health Tribunal under the Mental Health Act, section 480.

Clause 180(2) provides that the Governor may terminate the appointment of the President if grounds for termination exist.

Clause 180(3) provides that the Minister may terminate the appointment of a member other than the President if grounds for termination exist.

Clause 180(4) clarifies that the termination of a public service member does not, of itself, affect the person's employment as a public service officer.

Clause 181 – Training of members

Clause 181 provides, at (1), that the President and Deputies are responsible for directing the education, training and professional development of Tribunal members, and, at (2), that the Minister must ensure that appropriate provision is made for this.

Division 5 – General powers of the Tribunal

This Division deals with the Tribunal's general powers.

Clause 182 – Exercise and performance of Tribunal's administrative powers and duties

Clause 182 provides, at (1), that the Tribunal may authorise the exercise of a power or performance of a duty that is of an administrative nature by a member, the registrar, or a member of the Tribunal's staff.

Clause 182(2) specifies that the power to give an authorisation is exercisable by the President or a Deputy and two other members.

Clause 182(3) provides that an authorisation must be in writing and be signed by each person exercising the power to authorise.

Clause 182(4) provides that a person who is authorised to exercise a power or perform a duty cannot delegate that power or duty.

Clause 182(5) provides that a person exercising a power or performing a duty under an authorisation, is taken to do so in accordance with the terms of the authorisation unless the contrary is shown.

Clause 183 – Tribunal may use experts

Clause 183 provides that the Tribunal may appoint a person with relevant knowledge and experience to assist the Tribunal in performing its functions by providing a report, advice or other professional services or by giving evidence in proceedings. The provision is drawn from section 107A of the *Sentence Administration Act 2003*.

Clause 184 – Tribunal may require examination of supervised person

Clause 184 provides, at (1), that, for the purpose of performing its functions, the Tribunal may:

- require a supervised person to be examined by a psychiatrist, psychologist or other appropriate expert (clause 184(1)(a));
- require a psychiatrist, psychologist or other appropriate expert to prepare and submit a report to the Tribunal (clause 184(1)(b));
- require a supervised person to appear before the Tribunal (clause 184(1)(c)).

Clause 184(2) clarifies that, for the purposes of clause 184(1)(c), the Tribunal may issue a warrant to have the person arrested.

A transitional provision is included to provide that if the Board had required a person to be examined under section 40 of the former Act, and that requirement had not been fully complied with before commencement day, that requirement has effect as if it were a requirement under this clause: Part 14 Division 2, clause 271.

Clause 185 – Issue of warrants by the Tribunal

Clause 185 provides, at (1), that the Tribunal's power to issue a warrant is exercisable by the President or a Deputy President, and, at (2), that a warrant must be signed by the person issuing it.

Clause 230 in Part 13 Division 6 deals with the issue and execution of warrants.

Clause 186 – Power to obtain information and records

Clause 186 sets out the Tribunal's powers to obtain information and records.

Clause 186(1) provides that for the purpose of performing its functions, the Tribunal may, by written notice, require a person to provide it with a statement of information (specified in the notice) (clause 186(1)(a)) and/or produce any record of information (however compiled, recorded or stored) specified in the notice (clause 186(1)(b)).

Clause 186(2) provides that a notice given under clause 186(1) must fix a time and date by which the information is to be provided or produced.

Clause 186(3) provides that the Tribunal may take possession of and retain (clause 186(3)(a)), or inspect and take a copy of (clause 186(3)(b)), a record produced in accordance with such notice.

The record may be retained for the period that is reasonably necessary for the performance of the Tribunal's functions.

Clause 187 – Extension of time in which to give report or other information

Clause 187 provides, at (1), that the Tribunal may grant an extension of time to a person who is required to give a report, record or other document, or otherwise give information, to the Tribunal, within a specified time (or before a certain time or event).

Clause 187(2) provides that the Tribunal may grant an extension of time after the period has expired or the time or event has passed.

Division 6 – Registrar, staff and facilities of Tribunal

This Division deals with the registrar, staff and facilities of the Tribunal.

Clause 188 – Registrar, staff and facilities to be made available

Clause 188(1) requires that there be a registrar of the Tribunal and clause 188(2) sets out the registrar's functions, including assisting the Tribunal generally in the performance of its functions.

Clause 188(3) states that the registrar performs their functions under the direction of the President.

Clause 188(4) requires the CEO to make an officer of the Department available to perform the functions of the registrar. Clause 188(5) requires the CEO to make other officers available to assist the Tribunal in the performance of its functions, under the direction of the registrar.

Clause 188(6) provides that the services and facilities of the Department (for example, physical premises) may be used for the Tribunal's purposes on the terms agreed to by the President and the CEO.

A transitional provision is included to provide that the person who held office as registrar of the Board immediately before commencement continues as registrar of the Tribunal, subject to this Act, until an officer other than the existing registrar is made available under clause 188(4): Part 14 Division 2, clause 273.

Division 7 – Miscellaneous

This Division deals with other miscellaneous matters relating to the Tribunal.

Clause 189 – Offences relating to information and records

Clause 189 contains a number of offences relating to information and records, which are:

- not swearing an oath or making an affidavit when required under clause 164(3) (clause 189(1));
- not answering a question under clause 164(4) (clause 189(2));
- not complying with a summons under clause 166 (clause 189(3));
- not complying with a notice under clause 186(1) (clause 189(4));

- knowingly giving the Tribunal information that is false or misleading in a material particular (clause 189(5)); and
- if, in purporting to comply with a requirement under Part 10 to produce a document or comply with a notice under clause 186(1) to provide or produce information, a person produces or provides a document or other information that the person knows is false or misleading in a material particular –
    - without indicating that it is false or misleading and, to the extent that the person can, indicating how (clause 189(6)(a)); and
    - if the person has or can reasonably obtain the correct information, without providing the correct information (clause 189(6)(b)).

Each of these offences attracts a penalty of $6,000.

Clause 189(7) provides that it is enough for a prosecution notice lodged against a person for an offence under (5) or (6) to state that the answer, document or other information was false or misleading to the person's knowledge, which stating which.

Clause 190 – Tribunal to notify Public Advocate of orders

Clause 190, at (1), provides that, within two working days after the Tribunal is notified of the making of a supervision order or interim disposition, it must notify the Public Advocate and give them the prescribed information (clause 190(1)(a)), and any other information that is agreed to be given from time to time (clause 190(1)(b)). This clause is to be read together with section 98 of the Guardianship and Administration Act.

Section 98 of the Guardianship and Administration Act requires the registrar of the Board to notify the Public Advocate if a person becomes a mentally impaired accused, so that the Public Advocate can investigate whether the person needs an administrator. Clause 346 in Part 15 Division 16 expands this to investigating whether the person needs a guardian or administrator.

Clause 190(2) provides that, as soon as practicable after exercising certain powers in respect of a supervised person, the Tribunal must give to the Public Advocate any information within its possession that it considers the Public Advocate may need to carry out their functions under sections 97(1)(a)-(e) or 98 of the Guardianship and Administration Act.

Section 97(1)(a)-(e) of the Guardianship and Administration Act sets out a range of Public Advocate functions, including making applications under that Act and attending State Administrative Tribunal hearings, acting as a guardian or administrator, participating in State Administrative Tribunal hearings, investigating complaints and allegations as to the need for, or inappropriateness of, guardianship and administration orders, seeking assistance on behalf of represented persons, and providing information and advice on the functions of guardians and administrators and making applications under that Act.

This clause applies when the following powers are exercised:

- determination of a place of custody under clause 61(1);
- designation of a supervising officer for a supervised person on a leave of absence order under clause 78(3); and

- designation of a supervising officer for a supervised person on a community supervision order under clause 85.

Clause 191 – Tribunal to report death of supervised person to coroner

Clause 191 provides that the Tribunal must, upon being notified of the death of a supervised person, immediately report the death to a coroner. Clause 99(3) provides that a supervising officer must immediately notify the Tribunal upon being informed that a supervised person has died. As a supervised person is a ***person held in care*** under the *Coroners Act 1996*, the death is a reportable death.

Clause 192 – Tribunal may request information from SAT about supervised person's guardian or administrator

Clause 192 provides, at (1), that the Tribunal may, for the purposes of the performance of its functions, make a request to the State Administrative Tribunal for:

- information as to whether a guardianship or administration order applies in respect of a supervised person (clause 192(1)(a)); and
- the name and contact details of a supervised person's guardian or administrator (clause 192(1)(b)); and
- a copy of a guardianship or administration order in respect of a supervised person (clause 192(1)(c)).

Clause 192(2) provides that the State Administrative Tribunal may comply with a request from the Tribunal, despite any other law.

This provision is drawn from section 448 of the Mental Health Act and has been included to facilitate the Tribunal's fulfilment of its obligations to give notice of particular proceedings, provide copies of orders and reasons for decision to a supervised person's guardian or administrator.

Clause 193 – Seal

Clause 193 requires that the Tribunal must have a seal.

Clause 194 – Orders

Clause 194 requires that an order of the Tribunal must be authenticated in accordance with the regulations.

Clause 195 – President may issue practice notes

Clause 195 provides that the President may from time to time issue, amend or revoke practice notes for regulating the Tribunal's practice and procedures. This may include to regulate the conduct of Tribunal proceedings, as set out in clause 160(5).

Clause 196 – Delegation by President

Clause 196 is a delegation power for the President.

Clause 196(1) provides that the President may delegate to another member, the registrar or a member of the Tribunal's staff any power or duty of the President that is of an administrative nature, other than the power to delegate under this clause or clause 182.

Clause 196(2) provides that a delegation must be in writing signed by the President, and clause 196(3) provides that a person to whom a power or duty has been delegated cannot further delegate that power or duty.

Clause 196(4) provides that a person exercising a power or performing a duty that has been delegated to them is taken to be doing so in accordance with the terms of that delegation unless the contrary is shown.

Clause 196(5) clarifies that the President's power to delegate does not limit the President's ability to perform a function through an officer or agent.

Clause 197 – Judicial notice and evidence of certain matters

Clause 197 deals with judicial notice. Judicial notice is a rule of evidence that allows a fact to be introduced into evidence if the truth of that fact cannot reasonably be doubted.

Clause 197(1) provides that a court, person, or body acting judicially must take judicial notice of the fact that a person is or was a member or the registrar (clause 197(1)(a)), the official signature of a person who is or was a member or the registrar (clause 197(1)(b)), and a seal of the Tribunal affixed to a document (clause 197(1)(c)).

Clause 197(2) provides that a court, person, or body acting judicially must presume that the seal of the Tribunal affixed to a document was properly affixed, unless the contrary is proved.

Clause 197(3) provides that evidence of an order of the Tribunal may be given by producing a copy of the order certified by the registrar to be a true copy.

Clause 198 – Annual report

Clause 198, at (1), requires the President to give a written report to the Minister before 1 October in each year. The President must report on the performance of the Tribunal's functions during the previous financial year (clause 198(1)(a)), matters relating to supervised persons (clause 198(1)(b)), and the operation of this Act insofar as it relates to supervised persons (clause 198(1)(c)).

Clause 198(2) provides that the Minister must table the report in Parliament within 12 sitting days after receiving it.

A transitional provision is included to require a final annual report of the Board under section 48 of the former Act to be given to the Minister, despite its repeal: Part 14 Division 2, clause 274.

Part 11 – Transfer into and out of the State

Part 11 deals with interstate and international transfers of persons to and from WA. It is drawn from Part 8A Division 4A of the *Criminal Law Consolidation Act 1935* (SA) and Part 7A of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Division 1 – Preliminary matters

Division 1 contains provisions dealing with preliminary matters, including overviews and definitions.

Clause 199 – Overview of Part

Clause 199 gives an overview of the matters dealt with in Part 11.

Clause 200 – Terms used

Clause 200 is a definitions provision, defining the following terms used in Part 11:

- ***corresponding law*** means a law of another State or a Territory that is prescribed to be a corresponding law for the purposes of Part 11;
- ***identified person*** has the meaning given in section 348 of the Mental Health Act;
- ***interim disposition***, in relation to a person, means an interim disposition determined by the Minister under clause 205(1) for the person;
- ***interstate supervision order*** means an order made under a corresponding law that corresponds or substantially corresponds to a supervision order;
- ***participating jurisdiction*** means another State or a Territory in which a corresponding law is in force.

Clause 201 – Informed consent

Clause 201 deals with informed consent. To consent to a transfer to or from WA, the Minister must be satisfied that the person or their guardian (if applicable) has given informed consent.

Clause 201(1) provides that, for the purposes of Part 11, a person gives informed consent to a transfer only if they give written consent after having been given an explanation of the process involved in the transfer, the reasons for it, and sufficient information to enable them to make a balanced judgment (clause 201(1)(a)), and any relevant questions asked by the person have been answered, and those answers have been understood (clause 201(1)(b)).

Clause 202 – Nature of proceedings under this Part

Clause 202 provides that proceedings in the Supreme Court under Part 11 are civil proceedings.

Division 2 – Transfer of persons from Western Australia

Division 2 deals with the transfer of supervised persons from WA to a participating jurisdiction.

Clause 203 – Transfer of persons from Western Australia to a participating jurisdiction

Clause 203 provides for a supervised person to transfer from WA to a participating jurisdiction and provides, at (1), that a supervised person may be transferred to a participating jurisdiction

if the transfer is permitted under a corresponding law of that jurisdiction (clause 203(1)(a)) and the Minister makes an order under (2) authorising the transfer (clause 203(1)(b)).

Clause 203(2) provides that the Minister may make an order authorising the transfer if a relevant expert has certified that the transfer is for the benefit of the supervised person (clause 203(2)(a)) and the Minister is satisfied that the person, or their guardian, has given informed consent to the transfer (clause 203(2)(b)).

A relevant expert will differ depending on the supervised person. Clause 203(3) provides that, for the purposes of clause 203(2)(a), if the person is an identified person under section 348 of the Mental Health Act, the Chief Psychiatrist is the relevant expert. In any other case, the relevant expert will be a psychiatrist, psychologist or other appropriate expert.

Clause 203(4) provides that the effect of the supervision order to which the person is subject is suspended while the person is subject to an interstate supervision order.

Division 3 – Transfer of persons to Western Australia

Division 3 deals with the transfer of persons subject to an interstate supervision order from a participating jurisdiction into WA.

Clause 204 – Transfer of persons from a participating jurisdiction to Western Australia

Clause 204 provides for a person who is subject to an interstate supervision order to be transferred to WA. Clause 204(1) provides that a person may be transferred to WA if the transfer is permitted under a corresponding law of the participating jurisdiction in which the interstate supervision order was made (clause 204(1)(a)) and the Minister agrees to the transfer and determines an interim disposition for the person (clause 204(1)(b)).

Clause 204(2) provides that the Minister must not agree to the transfer of a person, or determine an interim disposition for the person, unless a relevant expert has certified that the transfer is for the benefit of the supervised person (clause 204(2)(a)) and the Minister is satisfied that:

- there are facilities or services available for the custody, treatment, care and support of the person in WA (clause 204(2)(b)); and
- the transfer is necessary for the maintenance or re-establishment of family relationships or relationships with people who can assist in supporting the person (clause 204(2)(c)); and
- the person or their guardian has given informed consent to the transfer (clause 204(2)(d)).

As with transfers from WA under clause 203, the relevant expert will differ depending on the person. Clause 204(3)(a) provides that if, in the Chief Psychiatrist's opinion, the person would be likely to become an identified person under section 348 of the Mental Health Act if they were to be transferred to the State, the Chief Psychiatrist is the relevant expert. Clause 204(3)(b) provides that, in any other case, the relevant expert will be a psychiatrist, psychologist or other appropriate expert.

Clause 204(4) provides that if the Minister determines an interim disposition, the Minister must immediately notify the Tribunal and the Chief Mental Health Advocate that the interim

disposition has been determined and give the Tribunal and the Chief Mental Health Advocate a copy of the interim disposition and the prescribed information.

Clause 204(5) clarifies that the Minister is not required to agree to a transfer of a person to WA.

Clause 204(6) provides that the reference in clause 204(2)(d) to a guardian of a person includes a person who is acting or appointed under a law of the participating jurisdiction as the person's guardian.

Clause 205 – Interim dispositions for persons transferred to Western Australia

Clause 205 deals with interim dispositions and provides, at (1), that the Minister may, for the purposes of clause 204(1)(b)(ii), determine an interim disposition that:

- the person be detained at a place of custody as if they were subject to a custody order (clause 205(1)(a)); or
- the person be released on conditions determined by the Minister as if the person were subject to a community supervision order (clause 205(1)(b)).

Clause 205(2) requires the Minister to seek the Tribunal's advice about the most appropriate interim disposition for the person.

Clause 205(3) provides that the Minister must not determine an interim disposition of custody unless, immediately prior to their transfer to WA, the interstate supervision order the person was subject to required the person to be detained in custody, regardless of whether they are permitted to be on leave (however described) at the time.

Clause 205(4) provides that if the interim disposition is custody, then on transfer to WA, the person must be detained in accordance with that interim disposition (clause 205(4)(a)), and Part 6, to the extent relevant, applies to and in relation to the interim disposition as if it were a custody order (clause 205(4)(b)). This will enliven the Tribunal's powers to review, and make leave of absence orders in respect of, the interim disposition.

Clause 205(5) provides that if the interim disposition is supervision in the community, then on transfer to WA, the person must be released subject to those conditions (clause 205(5)(a)), and Part 6, to the extent relevant, applies to and in relation to the interim disposition as if it were a community supervision order (clause 205(5)(b)). This will enliven the Tribunal's powers to review and vary the conditions of the interim disposition.

Clause 205(6) clarifies that, despite the application of Part 6 to and in relation to an interim disposition, the Tribunal is not required to comply with a review requirement under Part 6 Division 4, including when exercising a power under clause 73 (clause 205(6)(a)), and cannot cancel all conditions of the interim disposition or a leave of absence order (clause 205(6)(b)).

This bar to the Tribunal effecting unconditional release is due to the short-term duration of interim dispositions, noting that clause 206 requires all interim dispositions to be reviewed by the Supreme Court within six months after a person has been transferred to WA.

Clause 206 – Review of persons transferred to Western Australia

Clause 206 provides, at (1), for a review of an interim disposition by the Supreme Court, on application of the Minister, within six months after the person has been transferred to WA.

The purpose of the review is to determine the appropriate disposition for the person: clause 206(2).

Clause 206(3) provides that, on review, the court must make a custody order (clause 206(3)(a)), a community supervision order(clause 206(3)(b)), or an order that the person be unconditionally released (clause 206(3)(c)).

Clause 206(4) provides that the court cannot make an order under (3) that is more restrictive on the person's freedom than the interstate supervision order to which the person was subject unless satisfied, by acceptable and cogent evidence and to a high degree of probability, that it is necessary to do so to ensure the adequate protection of the community against an unacceptable risk that the supervised person will commit a serious offence. This mirrors the level of satisfaction required to make an extended custody order under Part 7.

Clause 206(5) provides that Part 5 applies, to the extent relevant, to the making of a custody order or community supervision order under this clause as though it was being made under Part 5. This is to ensure the considerations that must be taken into account when making an order and setting a limiting term, any statutory conditions, and referral of the supervision order to the Tribunal for administration under Part 6, operate in respect of a supervision order made under this clause.

Clause 206(6) clarifies that, for the purposes of (4), a reference to the commission of a serious offence includes a reference to the doing of an act or the making of an omission in any State or Territory that, if done within WA, would constitute a serious offence (clause 206(6)(a)), and the doing of an act or making of an omission outside Australia that, if done within WA, would constitute a serious offence (clause 206(6)(b)).

Clause 206(7) provides that it makes no difference whether a person doing an act or making an omission under (6) would be likely to be charged with an offence (clause 206(7)(a)), be found fit to stand trial if charged (clause 206(7)(b)) or, if tried, would be convicted (clause 206(7)(c)).

Clause 207 – Limiting term for custody order

Clause 207 deals with limiting terms for custody orders and provides, at (1), that it applies if the Supreme Court makes a custody order under clause 206(3).

Clause 207(2) provides that when the court sets a limiting term for the custody order under clause 50, it is to do so as if the offence that led to the interstate supervision order being made in respect of the person had been committed in WA (clause 207(2)(a)), and the maximum penalty for that offence were the maximum penalty attaching to that offence at the date of the person's transfer to WA (clause 207(2)(b)).

Clause 207(3) provides that if the offence no longer exists at the date of the person's transfer to WA, the court must determine whether there is an existing offence as at that date with which

the person could have been charged, had it existed at the time of the original charge (clause 207(3)(a)), and either:

- if such an offence exists, determine the limiting term by reference to the maximum penalty for that offence as at the date of the person's transfer to WA (clause 207(3)(b)(i)); or
- if no such offence exists, determine the limiting term as five years (clause 207(3)(b)(ii)).

Clause 207(4) provides that if there is not and was not an equivalent offence in WA, the court must set the limiting term for the custody order as five years.

Clause 207(5) states that the limiting term for the custody order is taken to have commenced when the interstate supervision order was made unless the court, after taking into account any time that the person had spent in custody in relation to the offence before the order was made, orders that the term be taken to have commenced on an earlier day.

Clause 208 – Court to make orders if person has been in custody longer than limiting term

Clause 208 provides, at (1), that it applies to a person in respect of whom the Supreme Court determines a limiting term under clause 207.

Clause 208(2) provides that, if the person has been subject to the interstate supervision order and the interim disposition for a cumulative period equal to or longer than the limiting term, the court must either:

- make an order discharging the person from the custody order (clause 208(2)(a)); or
- make an order under Part 7 Division 5 (an extended custody order or a community supervision order) (clause 208(2)(b)).

Clause 208(3) provides that the court must adjourn proceedings under (2) until the Minister applies for an extended custody order under Part 7 Division 5 (clause 208(3)(a)), or informs the court that an application will not be made (clause 208(3)(b)).

Clause 208(4) provides that, for the purposes of (3), the Minister may require the Tribunal to report, under clause 103, to the Minister on the need for an extended custody order in respect of the person.

Clause 208(5) provides that the interim disposition continues in respect of the person until an order is made under (2).

Division 4 – Interaction with other transfer related laws

Division 4 outlines how Part 11 of this Act interacts with Part 24 of the Mental Health Act, which provides for interstate transfer arrangements.

Clause 209 – Interaction with *Mental Health Act 2014*

Clause 209(1) provides that effect may be given to an order under clause 203(2) (a transfer out of WA) or an agreement under clause 204(1)(b) (an agreement to receive a person from a participating jurisdiction), whether or not an authorisation or approval is needed or given under Part 24 of the Mental Health Act.

Clause 209(2) provides that a supervised person or a person subject to an interstate supervision order cannot be transferred from or to WA under Part 24 of the Mental Health Act without the necessary agreement or order under this Part.

Clause 209(3) provides that (1) and (2) have effect despite the Mental Health Act.

Clause 210 – Interaction with *Prisoners (Interstate Transfer) Act 1983*

Clause 210 provides, at (1), that a supervised person, or a person subject to an interstate supervision order, cannot be transferred from or to WA under the *Prisoners (Interstate Transfer) Act 1983* without the necessary agreement or order under this Part.

Clause 210(2) provides that (1) has effect despite the *Prisoners (Interstate Transfer) Act 1983*.

Clause 211 – Persons subject to international supervision orders

Clause 211 deals with persons subject to international supervision orders. Its purpose, as set out at (1), is to ensure that people subject to international supervision orders who are transferred to WA are able to be appropriately dealt with under this Act.

Clause 211(2) defines ***foreign jurisdiction*** as a jurisdiction outside Australia, and ***international supervision order*** as an order under a law of a foreign jurisdiction determined under the regulations to correspond, or sufficiently correspond, to a supervision order.

Clause 211(3) provides that regulations may deal with the transfer of persons subject to international supervision orders to WA, including providing for determinations that orders under foreign jurisdictions correspond to supervision orders under this Act, and modifying Part 11 for the purposes of clause 211.

Clause 211(4) provides that Part 11 has effect with any other modification necessary or convenient to give effect to clause 211.

Part 12 – Appeals to Court of Appeal

Part 12 deals with appeals from certain court decisions, other than a court of summary jurisdiction, to the Court of Appeal.

Division 1 – Preliminary matters

Division 1 deals with preliminary matters and contains an overview and a definition provision.

Clause 212 – Overview of Part

Clause 212 gives an overview of the matters dealt with in Part 12.

Clause 213 – Terms used: deciding court

Clause 213 is a definition provision, defining ***deciding court*** to mean the court that made the decision against which an appeal is made.

Division 2 – Appeals to Court of Appeal

Division 2 deals with appeals to the Court of Appeal.

Clause 214 – Appeals against certain decisions

Clause 214 sets out which decisions can be appealed, and who appeals can be made by.

Clause 214(1) deals with a supervised person's right of appeal, with leave of the Court of Appeal. A supervised person may appeal against the following:

- a decision of a court (other than a court of summary jurisdiction) to confirm a custody order or community supervision order (following an application by the Tribunal for the order to be cancelled) – clause 74 (clause 214(1)(a));
- a decision of a court (other than a court of summary jurisdiction) to make a custody order (clause 214(1)(b)(i)), or determining the limiting term for a custody order (where a custody order is made following proceedings for breach of a condition of a community supervision order) – clause 89 (clause 214(1)(b)(ii));
- a decision under Part 7 to make an extended custody or community supervision order (clause 214(1)(c)(i)) or determining the term for an extended custody order (clause 214(1)(c)(ii));
- a decision on an application for an extended custody order under clause 110 to make a community supervision order (clause 214(1)(d));
- a decision, on review of an extended custody order under clause 121, to:
    - confirm the order (clause 214(1)(e)(i)); or
    - make a community supervision order (clause 214(1)(e)(ii));
- a decision under Part 11:
    - to make a custody order (clause 214(1)(f)(i)); or
    - determining the limiting term for a custody order (clause 214(1)(f)(ii)); or
    - to make a community supervision order (clause 214(1)(f)(iii)).

Clause 214(2) deals with the Minister's rights of appeal, with leave of the Court of Appeal. The Minister may appeal against the following:

- a decision of a court (other than a court of summary jurisdiction) to cancel a custody order or community supervision order (following an application by the Tribunal for the order to be cancelled) – clause 74 (clause 214(2)(a));
- a decision of a court (other than a court of summary jurisdiction) to confirm a community supervision order (following proceedings for breach of a condition of that order) – clause 89 (clause 214(2)(b));
- a decision under Part 7 to refuse to make an extended order (clause 214(2)(c)(i)), or determining the limiting term for an extended custody order (clause 214(2)(c)(ii));
- a decision on an application for an extended custody order under clause 110 to make a community supervision order (clause 214(2)(d));
- a decision, on review of an extended custody order under clause 121, to:
    - cancel the order (clause 214(2)(e)(i)); or
    - make a community supervision order (clause 214(2)(e)(ii));
- a decision under Part 11:
    - determining the limiting term for a custody order (clause 214(2)(f)(i)); or
    - to make a community supervision order (clause 214(2)(f)(ii)); or
    - that the person be released unconditionally or discharged from a custody order (clause 214(2)(f)(iii)).

Clauses 214(1)(a) and (2)(a) exclude decisions of courts of summary jurisdiction as appeals against those decisions are dealt with under Part 6 Division 7: see clause 93.

Clause 214(3) provides that, unless the Court of Appeal orders otherwise, an appeal against a decision cannot be commenced later than 21 days after the day on which the decision was made.

Clause 214(4) provides that an appeal is commenced by lodging an application for leave to appeal, that sets out the grounds of the appeal, with the Court of Appeal.

Clause 214(5) provides that the Court of Appeal may decide whether or not to give leave to appeal with or without written or oral submissions from the parties (clause 214(5)(a)) and before or at the hearing of, or when giving judgment on, the appeal (clause 214(5)(b)).

Clause 215 – Grounds of appeal

Clause 215 sets out the grounds of appeal. The grounds are that the deciding court made an error of law or fact, or both (clause 215(a)), or acted without, or in excess of, its jurisdiction (clause 215(b)).

Clause 216 – Dealing with appeal

Clause 216 outlines how appeals are to be dealt with.

Clause 216(1) provides that an appeal is by way of rehearing.

Clause 216(2) provides that the Court of Appeal has all the powers and duties of the deciding court (clause 216(2)(a)), and may draw inferences of fact not inconsistent with the findings of

the deciding court (clause 216(2)(b)), and may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit, or in another way (clause 216(2)(c)).

Clause 216(3) states that when dealing with an appeal, the Court of Appeal may make any order it considers appropriate.

Clause 216(4) provides that the Court of Appeal, in deciding the appeal, may do one of the following:

- confirm the decision (clause 216(4)(a));
- vary the decision (clause 216(4)(b));
- set aside the decision and make any decision that the deciding court could have made in the proceeding (clause 216(4)(c));
- set aside the decision and send the matter back to the deciding court for reconsideration, with or without the hearing of further evidence, in accordance with any directions or recommendations that the court considers appropriate (clause 216(4)(d)).

Clause 216(5) provides that if the Court of Appeal sends the matter back to the deciding court, it may give directions as to the constitution of the deciding court.

Clause 217 – Appeal does not stay decision

Clause 217 deals with the effect of an appeal on a decision. Clause 217(1) provides that an appeal against a decision does not affect the operation of that decision, or prevent the taking of action to implement it, unless the Court of Appeal orders otherwise.

Clause 217(2) provides that, without limiting (1), the Court of Appeal may do either or both of the following:

- by order, stay the operation of a decision, pending the determination of an application for leave to appeal against the decision, and the determination of any appeal (clause 217(2)(a));
- if the final determination of the appeal might result in an order that a supervised person be detained in custody, order that the person be detained in custody until the determination of the appeal (clause 217(2)(b)).

Clause 218 – Effect of decisions made on, or as a consequence of, appeal

Clause 218 deals with the effect of decisions made on, or as a consequence of, an appeal under this Part.

Clause 218(1) deals with a decision made on reconsideration by a deciding court as required under clause 216(4)(d). It provides that the fact that a decision is made on reconsideration does not prevent that decision from being open to appeal under this Part.

Clause 218(2) provides that the rest of clause 218 applies to or in relation to a decision under clause 214(1) or (2) (the ***original decision*** being appealed).

Clause 218(3) provides that the original decision, as confirmed or varied by the Court of Appeal under Part 12, or a decision of the Court of Appeal substituted for the original decision, is to be regarded as, and has effect as, a decision of the deciding court (clause 218(3)(a)).

Unless the Court of Appeal orders otherwise, that decision is to be regarded as having effect, or having had effect, from the time when the original decision had, or would have, had effect (clause 218(3)(b)).

Clause 218(4) provides that despite clause 218(3)(a), the decision as confirmed, varied or substituted is not again open to appeal under this Part.

Part 13 – Miscellaneous

Part 13 deals with miscellaneous matters.

Division 1 – Preliminary matters

Division 1 contains a definitions provision.

Clause 219 – Terms used

Clause 219 is a definitions provision, defining the following terms:

- ***officer***, of a supporting agency, means an officer or employee in or of the agency (paragraph (a)), or, if the agency is the Police Force of WA, a police officer (paragraph (b)), or, if the agency is the police force of a participating jurisdiction, a member of that police force (paragraph (c));
- ***participating jurisdiction*** has the meaning given in clause 200 (refer to Part 11 of the Bill);
- ***person covered by this Act*** means a person who is an accused required to be detained at an authorised hospital under a hospital order (paragraph (a)), an unfit accused (paragraph (b)), or a supervised person (paragraph (c));
- ***public sector body*** has the meaning given in section 3(1) of the *Public Sector Management Act 1994*: an agency, ministerial office or non-SES organisation;
- ***relevant function*** means a function under a written law that is concerned with the assessment or management of, and provision of services to or in relation to, persons covered by this Act (paragraph (a)), or is necessary for or otherwise supports the performance of a relevant function (paragraph (b));
- ***supporting agency*** means any of the following:
    - the Minister;
    - the Department;
    - the Office of the Director of Public Prosecutions;
    - the Chief Mental Health Advocate;
    - the Chief Psychiatrist;
    - the Public Advocate;
    - the Public Trustee;
    - the Tribunal;
    - the Mental Health Tribunal established under the Mental Health Act;
    - the Community Services Department;
    - the departments of the Public Service principally assisting in the administration of the following Acts:
        - *Disability Services Act 1993*;
        - *Health Services Act 2016*;
        - *Housing Act 1980*;
        - Mental Health Act;
        - *Police Act 1892* (the department designated as the Police Service);
        - Prisons Act;
        - *Victims of Crime Act 1994*;
        - Young Offenders Act;
    - the Police Force of Western Australia;

- a prescribed public sector body, or public office;
- a prescribed body or public office of the Commonwealth, or of a participating jurisdiction.

Supporting agencies have a duty to cooperate and share information with other supporting agencies under Part 13 Division 4.

Division 2 – Electronic monitoring and curfew

This Division deals with electronic monitoring and curfew, either or both of which may be imposed as a condition of a community supervision order by a court under Part 5 or the Tribunal as a condition of a community supervision order or leave of absence order under Part 6. Electronic monitoring cannot be imposed on a supervised person who is a child, and cannot be imposed if the court or Tribunal has not first received a report from the CEO (Corrections) about the suitability of electronic monitoring for the person.

Clause 220 – Term used: approved electronic monitoring device

Clause 220 provides that an ***approved electronic monitoring device*** is an electronic monitoring device that has been approved by the CEO (Corrections) (clause 220(a)) and any equipment, wires or other items associated with such a device (clause 220(b)).

Clause 221 – Electronic monitoring

Clause 221 deals with electronic monitoring and provides, at (1), that the purpose of electronic monitoring of a supervised person is to enable their location to be monitored.

Clause 221(2) outlines what a community corrections officer may do if a supervised person is subject to electronic monitoring. A community corrections officer may:

- direct the person to wear an approved electronic monitoring device (clause 221(2)(a));
- direct the person to permit the installation of an approved electronic monitoring device at the place where the person resides or, if the person does not have a place of residence, at any other place specified by the community corrections officer (clause 221(2)(b));
- give any other reasonable direction to the person necessary for the proper administration of the electronic monitoring of the person (clause 221(2)(c)).

Clause 222 – Curfew

Clause 222 deals with curfew as a condition on a community supervision order or leave of absence order and provides, at (2), that the purpose of a curfew is to allow for the movements of a supervised person to be restricted for the protection of the community.

Clause 222(3) provides that a curfew is a requirement that a supervised person must remain at a specified place for specified periods, except as provided in (5). ***Specified***, in clause 222, is defined at (1) to mean specified by a supervising officer from time to time.

Clause 222(4) provides that a supervised person cannot be required by the curfew to remain at the specified place for periods that amount to less than two, or more than 12, hours in any one day.

Clause 222(5) sets out when a supervised person may leave the specified place during the specified period. This may only occur for the purposes of obtaining urgent medical or dental treatment (clause 222(5)(a)), averting or minimising a serious risk of death or injury to the person or another person (clause 222(5)(b)), obeying an order issued under a written law (such as a summons) which requires the person's presence elsewhere (clause 222(5)(c)), for a purpose approved of by a supervising officer (clause 222(5)(d)), or at a supervising officer's direction (clause 222(5)(e)).

Clause 222(6) provides that a supervising officer may give any reasonable direction to the person that is necessary for the proper administration of the curfew requirement.

Clause 222(7) provides that, without limiting (6), if a supervised person is authorised to leave the specified place under (5), the supervising officer may give directions as to when the person may leave (clause 222(7)(a)), the period of the authorised absence (clause 222(7)(b)), when the person must return (clause 222(7)(c)), the route and method of travel to be used by the person during the absence (clause 222(7)(d)), and the manner in which the person must report their whereabouts (clause 222(7)(e)).

Clause 223 – Enforcement of electronic monitoring and curfew

Clause 223 deals with the enforcement of electronic monitoring and curfew.

Clause 223(1) provides that a community corrections officer may direct the occupier of a place where an approved electronic monitoring device has been installed to give the device to a community corrections officer within a time specified by that officer (clause 223(1)(a)) and, at any time, enter a place where a device has been installed and retrieve it (clause 223(1)(b)).

Clause 223(2) provides that it is an offence to, without reasonable excuse, remove, interfere with, or interfere with the operation of, an approved electronic monitoring device required to be worn or installed under (2) in such a way as to prevent or impede the monitoring of the person's location. A penalty of imprisonment for 12 months or a fine of $12,000 applies.

Clause 223(3) provides that, to ascertain whether or not a supervised person who is subject to a curfew is complying with that curfew, a supervising officer may, at any time:

- enter or telephone a place specified under clause 223(3) in relation to the person (clause 223(3)(a)); and
- enter or telephone the person's place of employment or any other place where the person is authorised or required to attend (clause 223(3)(b)); and
- question any person at any place mentioned in paragraph clause 223(3)(a) or clause 223(3)(b).

Clause 223(4) provides that it is an offence to fail to comply with a direction given under clause 223(1)(a) (clause 223(4)(a)), to hinder a community corrections officer or supervising officer exercising powers under clause 223(1)(b) or clause 223(3) (clause 223(4)(b)), or to fail to answer a question put under clause 223(3)(c) (clause 223(4)(c)) or give an answer that is false or misleading in a material particular (clause 223(4)(d)). A penalty of imprisonment for 12 months or a fine of $12,000 applies.

Clause 223(5) provides that an act or omission of the person subject to the electronic monitoring or curfew that is a contravention of (2) or (4) does not constitute an offence under

clause 223 (clause 223(5)(a)), but is taken to be a failure to comply with a condition of the supervision order under which the electronic monitoring or curfew is imposed (if it is not otherwise) (clause 223(5)(b)).

Division 3 – Protection of information

This Division deals with the protection of information.

Clause 224 – Protection of information about persons covered by this Act

Clause 224(1) provides that it is an offence to directly or indirectly record, use or disclose information relating to a person covered by this Act that was obtained by the person when performing a function under it, unless permitted under (2) or (4). A penalty of a $2,500 fine applies.

Clause 224(2) outlines when information may be recorded, used or disclosed:

- for the purpose of performing a function that the person has under this Act (clause 224(2)(a)); or
- as required or allowed under this Act or another written law (clause 224(2)(b)); or
- to assist a court in a proceeding involving or about a person covered by this Act (clause 224(2)(c)); or
- under the order of a court or person or body acting judicially (clause 224(2)(d)); or
- for the purposes of State Administrative Tribunal proceedings under the Guardianship and Administration Act (clause 224(2)(e)); or
- for the purposes of Mental Health Tribunal proceedings under the Mental Health Act (clause 224(2)(f)); or
- for the purpose of giving information to a law enforcement body in connection with an offence allegedly committed by or against a person covered by this Act (clause 224(2)(g)); or
- for the purposes of the investigation of a suspected offence or disciplinary matter or the conduct of proceedings against a person for an offence or disciplinary matter (clause 224(2)(h)); or
- to protect the safety of an individual (clause 224(2)(i)); or
- if it is personal information – with the consent of the person to whom it relates (clause 224(2)(j)); or
- in prescribed circumstances (clause 224(2)(k)).

Clause 224(3) provides that the offence at (1) does not apply to the recording, disclosure or use of statistical or other information that could not reasonably be expected to lead to the identification of a person to whom it relates.

Clause 224(4) provides that if a supporting agency obtains information that relates to a person covered by this Act when performing a relevant function in relation to the person, the agency may record, use or disclose the information for the purposes of the performance of another relevant function the agency has in relation to the person, including a relevant function under another written law.

Division 4 – Cooperation and sharing of information between supporting agencies

This Division deals with the cooperation and sharing of information between supporting agencies in the performance of relevant functions. It is drawn from the supporting agency provisions in Part 3 of the HRSO Act.

Clause 225 – Cooperation between supporting agencies

Clause 225, at (1), provides a duty for supporting agencies to cooperate with each other in the performance of their own, and each other's, relevant functions. Clause 225(2) provides that the duty to cooperate includes a duty to provide reasonable assistance and support to other supporting agencies in connection with the exercise of their relevant functions.

Clause 225(3) provides that cooperation between supporting agencies may include the development of multi-agency management plans for persons covered by this Act (clause 225(3)(a)), and providing assistance and support to persons covered by this Act through joint programs (clause 225(3)(b)).

Clause 226 – Disclosure of information between supporting agencies

Clause 226 deals with the disclosure of information between supporting agencies.

Clause 226(1) provides that for the purpose of cooperating under clause 225, a supporting agency (the ***disclosing agency***) may disclose to another supporting agency (the ***recipient agency***) information about a person covered by this Act in the disclosing agency's possession or control, if the disclosure is, or could reasonably be expected to be, necessary or conducive to the performance of a relevant function of either agency in relation to the person.

Clause 226(2) provides that if an officer of a supporting agency discloses information in good faith under (1), no civil or criminal liability is incurred in respect of the disclosure (clause 226(2)(a)), the disclosure is not to be regarded as a breach of any duty of confidentiality or secrecy imposed by law (clause 226(2)(b)), and is not to be regarded as a breach of professional ethics or standards or as unprofessional conduct (clause 226(2)(c)).

Clause 226(3) provides that information disclosed under clause 226 must be treated as confidential by the recipient agency.

Clause 226(4) provides that an officer of the recipient agency must not, directly or indirectly, record, use or disclose information disclosed to the agency under clause 226 other than for the purposes of the performance of a relevant function in relation to the person covered by this Act (clause 226(4)(a)), or as required under a written law (clause 226(4)(b)). This an offence to which a penalty of a fine of $2,500 applies.

Clause 226(5) provides that (3) and (4) do not apply to the recording, disclosure or use of statistical or other information that could not reasonably be expected to lead to the identification of a person to whom it relates.

Division 5 – Interactions between supervision orders and sentences

This Division provides for the interaction between supervision orders and sentences.

Clause 227 – Interactions between supervision orders and sentences

Clause 227 deals with the interaction between supervision orders and sentences.

Clause 227(1) provides that ***custodial sentence*** means a sentence that requires the person subject to it to be detained, other than where a parole order, or a supervised release order, that is not suspended, has effect in relation to the person.

A ***sentence*** is:

- a sentence imposed by a court of WA, including an indefinite sentence imposed under section 98(1) of the *Sentencing Act 1995* or a sentence, direction or order referred to in the definition of ***Governor's pleasure detainee*** in section 4(2) of the *Sentence Administration Act 2003* (being a person in, or regarding as being in, strict or safe custody by virtue of an order made under (repealed) section 282 of *The Criminal Code*, a person subject to a sentence of detention imposed under section 297(5)(b) of *The Criminal Code*, or a person subject to a direction or sentence under (repealed) sections 661 or 662 of *The Criminal Code* (paragraph (a)); and
- a translated sentence as defined in the *Prisoners (Interstate Transfer) Act 1983* (paragraph (b)); and
- a sentence of detention under the Young Offenders Act (paragraph (c)); and
- a restriction order or interim supervision order under the HRSO Act (paragraph (d)).

Supervised release order has the meaning given in section 3 of the Young Offenders Act: an order made under section 132 of that Act for a person who is serving a sentence of detention to be released from custody subject to conditions.

Clause 227(2) provides that if a supervised person is subject to a sentence, the supervision order and sentence have effect concurrently (clause 227(2)(a)) and, subject to clause 227(2)(c), the supervision order prevails over the sentence to the extent of any inconsistency (clause 227(2)(b)).

Clause 227(2)(c) provides that in the case of a custodial sentence, the more restrictive of the supervision order and the sentence prevails to the extent of any inconsistency, unless a court orders otherwise.

Clause 227(3) provides that for the purposes of clause 227(2)(a), a court or the Tribunal may disregard that the person is under a sentence when required to be satisfied as to a matter or take a matter into account in relation to the person for the purposes of Part 6 or 7.

Clause 228 – Interactions between supervision orders and Commonwealth sentences

Clause 228 deals with the interaction between supervision orders and Commonwealth sentences.

Clause 228(1) provides that if a supervised person is subject to a sentence imposed under a law of the Commonwealth, the supervision order has effect concurrently with the sentence to the extent not inconsistent with the sentence or the law of the Commonwealth under which it was imposed.

Clause 228(2) provides that, for the purposes of (1), a court or the Tribunal may disregard that the person is under a Commonwealth sentence when required to be satisfied as to a matter or take a matter into account in relation to the person for the purposes of Part 6 or 7.

Division 6 – General

This Division contains other general provisions.

Clause 229 – Giving notice, information, summonses and other documents

Clause 229 deals with giving notice, information, summonses and other documents.

Clause 229(1) provides that ***electronic means*** includes an electronic database or document system or the use of any other means by which a document can be accessed electronically.

Clause 229(2) provides that regulations may make provision for and in relation to the giving of notice or information, or a summons or other document required or permitted to be given under this Act, including by electronic means (clause 229(2)(a)); the time at which the notice, information, summons or document is taken to have been given (clause 229(2)(b)); and the means of satisfying a requirement under this Act in relation to a document in writing (for example, a requirement that the original of a document be given or that a document be signed) if the document is given by electronic means (clause 229(2)(c)).

Clause 230 – Issue and execution of warrants

Clause 230 deals with the issue and execution of warrants. It is drawn from section 49 of the former Act.

Clause 230(1) provides that a warrant issued under this Act must be in the prescribed form (clause 230(1)(a)) and has effect according to its terms (clause 230(1)(b)). Clause 230(2) provides that, in the absence of evidence to the contrary, it is to be presumed that the person who issued the warrant was empowered to do so (clause 230(2)(a)) and the signature on the warrant is that of the person who issued it (clause 230(2)(b)).

Clause 230(3) provides that a warrant must be given effect by the person to whom it is directed as soon as practicable, and clause 230(4) provides that the warrant itself is sufficient authority for the person to whom it is directed to arrest the person concerned and hold them in custody for the purpose of taking them, as soon as practicable, to the place specified in the warrant.

Clause 230(5) provides that for the purposes of arresting a person under a warrant, the person to whom it is directed may stop any aircraft, train, vehicle or vessel in which the person is or is reasonably suspected to be by the person to whom the warrant is directed (clause 230(5)(a)), and that person may enter any place where the person is or is reasonably suspected to be (clause 230(5)(b)).

A transitional provision dealing with warrants issued under sections 37(2)(b) or 40(2) of the former Act that were in effect immediately before commencement day is included at Part 14 Division 2: clause 259.

Clause 231 – Protection from liability

Clause 231 is a protection from liability provision. It is drawn from section 50 of the former Act and provides, at (1), that an action in tort does not lie against a person for anything that the person has done in good faith in the performance or purported performance of a function under this Act (clause 231(1)(a)), or in assisting another person in the performance or purported performance of a function under this Act (clause 231(1)(b)).

Clause 231(2) provides that, despite (1), the State is not relieved of any liability that it might otherwise have had for another person having done anything described at (1).

Clause 231(3) provides that the protection given by (1) applies even though the thing done as described may have been capable of being done, whether or not this Act had been enacted.

Clause 231(4) provides that a reference in clause 231 to the doing of anything includes a reference to the omission to do anything.

Clause 232 – Regulations

Clause 232 is a general regulation-making power which provides that the Governor may make regulations prescribing all matters that are required or permitted, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

Clause 233 – Rules of court

Clause 233 is a general rule-making power which provides that a court may make rules in relation to any matter that is necessary or convenient for giving effect to this Act.

Clause 234 – Review of Act

Clause 234 is a review provision which, at (1), requires the Minister to review the operation and effectiveness of this Act and prepare a report based on that review as soon as practicable after the fifth anniversary of the day on which clause 234 comes into operation.

Clause 234(2) provides that the Minister must table the report of that review to be tabled in Parliament as soon as practicable after it is prepared.

Part 14 – Repeals and transitional provisions

Part 14 deals with repeals and transitional provisions.

Division 1 – Repeals

This Division deals with the repeal of the former Act and former Regulations.

Clause 235 – *Criminal Law (Mentally Impaired Accused) Act 1996* repealed

This clause provides that the former Act is repealed.

Clause 236 – *Criminal Law (Mentally Impaired Accused) Regulations 1997* repealed

This clause provides that the former Regulations are repealed.

Division 2 – Transitional provisions for *Criminal Law (Mental Impairment) Act 2022*

This Division deals with transitional matters as a result of the repeal of the former Act and commencement of the new Act.

Subdivision 1 – Preliminary matters

Subdivision 1 of Division 2 deals with preliminary matters.

Clause 237 – Terms used

Clause 237 is a definitions provision. It defines the following terms for the purpose of Part 14 Division 2:

- ***Board*** means the Board;
- ***commencement day*** means the day on which Part 2 comes into operation;
- ***existing custody order*** has the meaning given in clause 254(1);
- ***new provision*** means a provision of this Act;
- ***old provision*** means a provision of the former Act; and
- ***repealed Act*** means the former Act.

Clause 238 – *Interpretation Act 1984* not affected

Clause 238 provides that except to the extent that this Division or regulations made for the purposes of it provide differently, the *Interpretation Act 1984* applies to and in relation to the repeals effected by clauses 235 and 236.

This provision has been included to clarify that Part 14 Division 2, and any regulations made under it, are not intended to displace the application of the general transitional provisions under Part V of the *Interpretation Act 1984*, except to the extent that they provide differently. Section 3 of that Act provides that it applies to every written law unless express provision is made to the contrary.

Subdivision 2- General provisions

Subdivision 2 of Part 14 Division 2 deals with general transitional matters.

Clause 239 – Completion of things commenced before commencement day

Clause 239 provides that anything commenced under or for the purposes of an old provision before commencement day may, if there is a new corresponding provision, be continued on and after commencement day under that new provision.

Clause 240 – Continuing effect of things done before commencement day

Clause 240(1) provides that this clause applies to an act, matter or thing done or omitted to be done under, or for the purposes of, an old provision before commencement day, to the extent to which an act, matter or thing has any force or significance on and after commencement day.

Clause 240(2) provides that the act, matter or thing is, if there is a corresponding new provision, taken on and after commencement day to have been done or omitted under or for the purposes of that new provision.

Clause 241 – Continuation of duties of Board or registrar

Clause 241 provides that a duty under a written law to do a thing that the Board or registrar had immediately before commencement day becomes, on commencement day, a duty of the Tribunal or its registrar (as is relevant).

Clause 242 – References to repealed Act and old provisions

Clause 242 provides, at (1), that unless the contrary intention appears, a reference in a written law or other document or instrument to the repealed Act includes a reference to this Act.

Clause 242(2) provides that, unless the contrary intention appears, a reference in a written law or other document or instrument to an old provision includes, if there is a corresponding new provision, a reference to that new provision.

Clause 243 – Relationship of this Subdivision to other transitional provisions

Clause 243 provides that the provisions of Subdivisions 3 to 7 and of regulations made for the purposes of Part 14 Division 2 prevail over the provisions of Subdivision 2 to the extent of any inconsistency.

The provisions in this Subdivision are of a general nature. Other, more specific matters are dealt with in Subdivisions 3 to 7.

Subdivision 3 – Court proceedings

Subdivision 3 of Part 14 Division 2 deals with court proceedings.

Clause 244 – Proceedings generally

Clause 244 provides, at (1), that it applies to proceedings, or a step in proceedings, before a court under or for the purposes of an old provision immediately before commencement day.

Clause 244(2) provides that the proceedings or step may, if there is a corresponding new provision, be continued under or for the purposes of that new provision.

Clause 244(3) provides that the provisions of Subdivisions 3, 4 and 5 and any regulations made for the purposes of Part 14 Division 2 prevail over clause 244 to the extent of any inconsistency.

Clause 245 – Question of fitness raised under repealed Act s. 11

Clause 245 provides, at (1), that it applies if the question of fitness had been raised in respect of a person under section 11 of the former Act, but had not been decided before commencement day.

Clause 245(2) provides that the question is taken to have been raised under clause 28.

Clause 246 – Inquiries and appeals under repealed Act s. 12

Clause 246 provides, at (1), that it applies to a judicial officer's inquiry into the question of whether a person is not mentally fit to stand trial under section 12 of the former Act, if the inquiry was not completed before commencement day.

Clause 246(2) provides that the inquiry may be continued as if it were an inquiry under clause 29. An order made under section 12(2) of the former Act has effect as if it were an order made under clause 29(3): clause 246(3).

Clause 246(4) provides that for the purposes of clause 30, the proceedings are taken to have been adjourned on commencement day. This means that, upon commencement, a registrar of the court must immediately notify the Chief Mental Health Advocate and give them the prescribed information under clause 30.

Clause 246(5) provides that if an appeal under section 12(4) of the former Act was commenced but not completed before commencement day, the appeal may be completed as if it were an appeal against a decision made by a court under clause 29. This is an appeal by the prosecution or accused against a judicial officer's decision that the accused is not mentally fit to stand trial.

Part 15 Division 6 amends the Criminal Appeals Act to include a decision of a court of summary jurisdiction that an accused is fit or unfit to stand trial in the definition of decision in section 6 of that Act: clause 299. Clause 306 inserts new section 25A(a) into that Act to deal with appeals from superior courts.

Clause 247 – Adjournments and other matters under repealed Act s. 16 or s. 19

Clause 247 provides at (1) that (2) and (3) apply to proceedings adjourned under sections 16(2)(b) or 19(1)(b) of the former Act (to see whether an accused who has been found unfit will become fit to stand trial) if no order is made under section 16(5) or 19(4) of the former Act before commencement day. Sections 16(5) and 19(4) of the former Act set out the options available to the court if satisfied that an accused will not become mentally fit: to make orders to dismiss the charge and release the accused or to make a custody order.

Clause 247(2) provides that the proceedings are taken to have been adjourned under clause 35(2).

Clause 247(3) provides that for the purposes of clause 36, the proceedings are taken to have been adjourned on commencement day. This means that upon commencement, a registrar of

the court must immediately notify the Chief Mental Health Advocate and give them the prescribed information under clause 36.

Clauses 247(4) and (5) provide that if, immediately before commencement day, the court was required under sections 16(2) or (4) or 19(1) or (3) of the former Act to make an order in relation to a person, the court or judge must make an order under clause 37. That is, the court must make an order as to how the charge against the accused is to be dealt with.

Clauses 247(6) and (7) provide that if a prosecutor was required under section 16(7) or 19(6) of the former Act to provide copies of documents to the court and had not fully complied with that requirement before commencement day, the requirement, to the extent it was not fully complied with, has effect as a requirement under clause 47(3).

Clause 47(3) provides that a court, when making a supervision order, may require a prosecutor to provide copies of documents relevant to the nature and conduct of the offence and circumstances of its commission, and the person's character, antecedents, age and health: two matters to which the court is required to have regard.

Clause 248 – Previous finding of unfitness

Clause 248 provides, at (1), that it applies to an accused found not mentally fit to stand trial under the former Act.

Clause 248(2) provides that the accused is taken to have been found unfit to stand trial under Part 3 Division 2.

Clause 249 – Requirement to make order under repealed Act s. 22

Clause 249 provides, at (1), that it applies if, before commencement day, a person had been found not guilty of an offence on account of unsoundness of mind under section 20 of the former Act, or had been acquitted on account of unsoundness of mind under section 21 of the former Act, (clause 249(1)(a)) and the court had not made an order under section 22 of the former Act before commencement day (clause 249(1)(b)).

Clause 249(2) provides that in these circumstances, the court must make an order under Part 5.

Subdivision 4 – Orders and other things to continue

Subdivision 4 deals with the continuation of orders and other things that were in place before commencement day, to ensure that they continue.

Clause 250 – Purpose of Subdivision

Clause 250 explains that the purpose of Subdivision 4 in Part 14 Division 2 is to ensure that orders and other things to which it applies continue to have effect, subject to this Act, on and after commencement day, to the extent necessary.

Clause 251 – Hospital orders

Clause 251 provides, at (1), that it applies to a hospital order that was in effect under section 5 of the former Act immediately before commencement day. Clause 251(2) provides that the

hospital order has effect, according to its terms, as if it were a hospital order made under clause 19.

Clause 252 – Bail and custody under repealed Act s. 14

Clause 252 provides, at (1), that it applies to a grant of bail to, or remand in custody of, a person under section 14 of the former Act immediately before commencement day. Clause 252(2) provides that the grant of bail or remand in custody has effect, according to its terms, as though it were a grant or remand under clause 15.

Clause 253 – Existing community orders

Clause 253, at (1), defines ***community orders***, being community based orders, conditional release orders or intensive supervision orders under the *Sentencing Act 1995*. Section 22 of the former Act provides that a court may, if finding an accused not guilty on account of unsoundness of mind or acquitting them on account of unsoundness of mind, make a community order in respect of that accused.

Clause 253(2) provides that this clause applies to and in relation to community orders that were in effect under the former Act immediately before commencement day.

Clause 253(3) provides that the existing community order has effect, according to its terms, as if it were a community supervision order made under Part 5, and clause 54 (statutory conditions of community supervision order) has effect as if the order were made on commencement day.

Clause 253(4) provides that as soon as practicable after commencement day, a registrar of the court that made the existing community order must comply with clause 48 (that is, notify the Tribunal and the Chief Mental Health Advocate and give them a copy of the order and the prescribed information) (clause 253(4)(a)). The Tribunal must review the order under Part 6 Division 4 and provide a report as if the review had been requested by the Minister under clause 69(1) (clause 253(4)(b)).

Clause 253(5) provides that if the existing community order will expire within three months after commencement day, the Tribunal must, under clause 104, consider and report to the Minister as soon as practicable on the need for an extended community supervision order in respect of the person.

Clause 254 – Existing custody orders

Clause 254(1) defines ***existing custody order***, meaning a custody order under the repealed Act in effect immediately before commencement day, and provides that this clause applies to and in relation to a custody order under the former Act in effect immediately before commencement day.

Clause 254(2) provides that the existing custody order has effect as though it had been made under Part 5.

Clause 254(3) provides that the Tribunal must, as soon as practicable, review the existing custody order under Part 6 Division 4 and provide a report to the Minister as though the review had been requested by the Minister under clause 69(1) (clause 254(3)(a)).

Clause 254(3)(b) provides that the Tribunal must consider the need for an extended custody order in respect of the person in a report prepared under clause 254(3)(a), unless the person is a person described in clause 262(1) (a person who is subject to an existing custody order because they were acquitted on account of unsoundness of mind of murder or manslaughter).

Clause 254(4) provides that clauses 103(3) and (4) apply for the purpose of considering the need for an extended custody order under clause 254(3)(b).

Clause 254(5) provides that a report under section 33 of the former Act in relation to a person subject to an existing custody order immediately before commencement day has no effect on and after commencement day.

Clause 255 – Leave of absence orders

Clause 255 provides, at (1), that it applies to and in relation to an ***existing leave of absence order***, being an order under section 28 of the former Act that was in effect immediately before commencement day.

Clause 255(2) provides that if the existing leave of absence order provides for a continuous period of at least seven days' absence:

- it has effect, according to its terms, as a leave of absence order made under clause 73(1)(b); and
- has effect, on and after commencement day, until the earliest of the following:
    - the Tribunal replaces the order with a leave of absence order under clause 73(1)(b);
    - the Tribunal cancels the order under clause 73(1)(d)(i);
    - the existing custody order underlying the leave of absence order ceases to have effect under clause 265;
    - the expiry of the period of two months beginning on commencement day.

Clause 255(3) provides that if the existing leave of absence order is covered by (2), the Tribunal must, as soon as practicable, designate a supervising officer for the person under clause 99, review the order under Part 6 Division 4 and provide a report to the Minister as though the review had been requested by the Minister under clause 69(1).

Clause 255(4) provides that if the existing leave of absence order is not covered by (2):

- it has effect, according to its terms, as a leave of absence order under clause 73(1)(b); and
- has effect, on and after commencement day, until the earliest of the following:
    - the existing custody order underlying the leave of absence order ceases to have effect under clause 265;
    - the order ceases to have effect according to its terms;
    - the expiry of the period of two months beginning on commencement day.

Clause 256 – Absence without leave

Clause 256 deals with a person who was apprehended under section 31(3) of the former Act for being absent without leave. If, by the end of the day before commencement day, the person

had not been taken to the place from which they were absent, they must be dealt with under clause 83(3) (that is, they must be taken to the place of custody from which they are absent).

Clause 257 – Release orders

Clause 257 provides, at (1), that it applies to and in relation to release orders under section 35 of the former Act that were in effect immediately before commencement day.

Clause 257(2) provides that if the release order is to release the person unconditionally (under section 35(2)(a) of the former Act) on a day that is or is after commencement day (***release day***), the person is, on release day, discharged from the existing custody order.

Clause 257(3) provides that if the release order is an order that the person be released on conditions (under section 35(2)(b) of the former Act) on a day that is or is after commencement day (***release day***), the order has effect, according to its terms, on and after release day, as a leave of absence order under clause 73(1)(b).

Clause 257(4) provides that if the release order is an order that the person be released on conditions (under section 35(2)(b) of the former Act) on a day that was before commencement day, the order has effect, according to its terms, on and after commencement day, as a leave of absence order under clause 73(1)(b).

Clause 257(5) provides that if the release order has effect as a leave of absence order, the Tribunal must, as soon as practicable:

- designate a person as a supervising officer for the person under clause 99; and
- review the order under Part 6 Division 4 and provide a report as if the review had been requested by the Minister under clause 69(1).

Clause 257(6) provides that if, immediately before commencement day, the Board was required under section 36 of the former Act to give a copy of a release order to a person, the Tribunal must, as soon as practicable, give a copy of the order to each person mentioned in clause 76.

Clause 258 – Breaches of conditions of release orders

Clause 258 deals with breaches of conditions of release under section 37 of the former Act.

It provides, at (1), that if, before commencement day, a person is suspected of having breached a condition of a release order under section 35 of the former Act, and the Board had not dealt with the suspected breach under section 37 of the former Act before commencement day, and the release order has effect under clause 257 as a leave of absence order, the Tribunal must deal with the suspected breach under clause 81 (clause 258(2)).

Clause 259 – Warrants

Clause 259 provides, at (1), that it applies to warrants issued under section 37(2)(b) or section 40(2) of the former Act. These are warrants issued by the Board:

- for the arrest of an accused suspected of having breached a leave of absence order; and
- for the purposes of bringing an accused before the Board.

Clause 259(2) provides that these warrants have effect as though they were issued by the Tribunal under clause 82(1)(a) (warrant issued after cancellation of a leave of absence order) or clause 184(2) (warrant issued to have person arrested and brought before the Tribunal), as is relevant.

Subdivision 5 – Setting limiting term for existing custody orders

Subdivision 5 of Part 14 Division 2 deals with the setting of limiting terms on existing custody orders.

Clause 260 – Application of this Subdivision

Clause 260 provides that Subdivision 5 applies to and in relation to an existing custody order (being a custody order that was in effect immediately before commencement day).

Clause 261 – Application to set limiting term

Clause 261 deals with applications to set limiting terms on existing custody orders.

Clause 261(1) provides that as soon as practicable after commencement day, the Director of Public Prosecutions must apply to the court that made the existing custody order for the court to set a limiting term for that order.

Clause 261(2) provides that the court must hear and determine the application as soon as practicable.

Clause 261(3) provides that the Director of Public Prosecutions need not comply with (1) while the person subject to the existing custody order is not a resident of WA.

Clause 261(4) provides that clause 261 does not apply if clause 262 applies to the existing custody order.

Clause 262 – Limiting term in cases of murder and manslaughter

Clause 262 deals with setting limiting terms on existing custody orders which were made because the person had been acquitted on account of unsoundness of mind of murder or manslaughter. Section 3(2) of Appendix B to *The Criminal Code* provides that where the term ***murder*** is used, that reference is intended to include the crime that was called wilful murder under the Code as it was before the commencement of the *Criminal Law Amendment (Homicide) Act 2008*.

Clause 262(1) provides that in these cases, the limiting term for the order is the duration of the life of the person and that term has effect as if set by a court under clause 50.

Clause 262(2) provides that the person subject to the existing custody order, or the Director of Public Prosecutions, may apply to the court that made the existing custody order for the court to set a limiting term for the order.

Clause 263 – Procedural matters

Clause 263 deals with procedural matters for limiting term proceedings.

Clause 263(1) provides that if an application is made under clause 261 (to set a limiting term) or 262 (to set a limiting term for murder or manslaughter), the court must give the person subject to the existing custody order, the Director of Public Prosecutions, the CEO and the Tribunal a copy of the application and written notice of the date, time and place of the hearing of the application.

Clause 263(2) provides that if the person subject to the existing custody order or the Director of Public Prosecutions is given notice but does not attend the hearing, the court may either proceed with, or adjourn, the hearing, as it considers appropriate.

Clause 263(3) requires the CEO to notify each victim of the offence in respect of which the existing custody order was made as soon as practicable after receiving notice under (1). As with Part 9 Division 5, this obligation only extends to victims who have notified the CEO that they wish to be given notice of applications or review proceedings in relation to the person.

Clauses 263(4) and (5) provide that a victim may nominate a person to receive notice on their behalf, and notice to a victim who is a child must be given to a parent and any guardian of that child.

Clause 263(6) provides that a victim may do one or both of the following:

- give a victim impact statement to the court of the kind described in Part 9 Division 2 (that is, a statement containing particulars of harm suffered by the victim as a result of the offence, to assist the court in determining what order to make) (clause 263(6)(a));
- make a submission to the court of the kind described in Part 9 Division 4 (that is, a submission which states the victim's opinion of the effect on them if the person were to be released from custody) (clause 263(6)(b)).

Clause 263(7) provides that Part 9 applies to a statement or submission made under clause 263(6) with any necessary modifications.

Clause 263(8) provides that a close family member or carer of the person subject to the existing custody order may make a submission to the court in relation to the treatment, care and support of the person, and clauses 22(3) to (5) apply in relation to the submission as if it were made under clause 22.

Clause 263(9) clarifies that the validity of a court's decision is not affected by a failure to notify a victim.

Clause 264 – Court to set limiting term

Clause 264(1) provides that if an application is made under clause 261, the court must set a limiting term for the existing custody order under clause 50.

Clause 264(2) provides that if an application is made under clause 262, the court may set a limiting term for the existing custody order under clause 50 that is not the duration of the life of the person if the court is satisfied that:

- a life term would be clearly unjust given the circumstances of the offence and the person (clause 264(2)(a)); and

- the person is unlikely to be a threat to the safety of the community when released from custody (clause 264(2)(b)).

Clause 264(3) provides that the limiting term is taken to have commenced on the day on which the existing custody order was made unless the court, after taking into account any time that the person had spent in custody in relation to the offence before the order was made, orders that the term be taken to have commenced on an earlier day.

Clause 265 – Where person subject to existing custody order has been, or soon will have been, in custody longer than limiting term

Clause 265 provides, at (1), that it applies to and in relation to an existing custody order for which a limiting term has been set under clause 264 that:

- expires on or before the day on which the limiting term is set (clause 265(1)(a)); or
- will expire within six months after the day on which the limiting term is set (clause 265(1)(b)).

Clause 265(2) provides that, if the limiting term expires before the day on which it was set, the existing custody order continues until an order is made under clause 265(4)(a) or (6).

Clause 265(3) provides that if the limiting term expires on the day it is set, or after that day, but before an order is made under clause 265(4)(a) or (6), then the existing custody order continues until such an order is made.

Clause 265(4) provides that if the proceedings under clause 264 are in a court other than the Supreme Court, the court must make an order discharging the person from the existing custody order (clause 265(4)(a)), or make an order referring the matter to the Supreme Court to be dealt with under (6) (clause 265(4)(b)).

Clause 265(5) provides that the court must adjourn proceedings under (4) until the Minister informs the court that the Minister intends to apply to the Supreme Court for an extended custody order under Part 7 Division 5 (clause 265(5)(a)) or the Minister informs the court that such an application will not be made (clause 265(5)(b)).

Clause 265(6) provides that if the proceedings under clause 264 are in the Supreme Court, or a matter is referred to it under (4), the Supreme Court must:

- make an order discharging the person from the existing custody order (clause 265(6)(a)); or
- make an order under Part 7 Division 5 (an extended custody order or community supervision order) (clause 265(6)(b)).

Clause 265(7) provides that the court must adjourn proceedings under (6) until the Minister applies to the court for an extended custody order under Part 7 Division 5 (clause 265(7)(a)) or informs the court that such an application will not be made (clause 265(7)(b)).

Clause 265(8) provides that the Minister may, for the purposes of (7), require the Tribunal to report, under clause 103, on the need for an extended custody order in respect of the person subject to the existing custody order.

Clause 265(9) provides that an order under (4)(a) or (6) has effect on the day on which it is made (clause 265(9)(a)), or, if the limiting term expires after the day on which the order is made, when the limiting term expires (clause 265(9)(b)).

Clause 265(10) provides that Part 12 has effect as if the list of decisions in clause 214(2) included a decision under clause 265(4)(a) or (6)(a) to discharge a person from an existing custody order. This has the effect that the Minister may appeal such a decision.

Clause 266 – Legal representation of person subject to existing custody order

Clause 266 deals with the legal representation of persons in limiting term proceedings, together with resolving any question of the person's ability to instruct a legal practitioner. This provision is in the same terms as clause 38 in Part 3 Division 3.

Clause 266(1) provides that the court may adjourn proceedings where it appears to the court that a person should have legal representation. This may be determined by the court on its own initiative or on application.

Clause 266(2) provides that if a person is unable to instruct their legal practitioner, the legal practitioner may exercise an independent discretion and, in the exercise of that discretion, must act in a way that they reasonably believe to be in the person's best interests.

Finally, clause 266(3) provides that if the person's ability to instruct their legal practitioner is in doubt, the question is to be determined by the court.

Clause 266 does not require the court to appoint a legal practitioner for the person. It merely serves as a mechanism for the court to adjourn proceedings for the express purpose of allowing the person to find legal representation.

This could be achieved through the provision of advocacy support from the Mental Health Advocacy Service, as a function of a mental health advocate is to assist CLMI identified persons to access legal services: see Part 8 Division 3, clause 134(1)(j).

Clause 267 – Functions of the Director of Public Prosecutions

Clause 267 provides that it is a function of the Director of Public Prosecutions to make applications under Part 14 Division 2 Subdivision 5. This has been included for clarity, given the list of functions of the Director set out in Part 3 of the *Director of Public Prosecutions Act 1991*.

Subdivision 6 – Matters relating to Board and its functions

Subdivision 6 deals with transitional matters relating to the Board and its functions.

Clause 268 – Proceedings generally

Clause 268, at (1), applies to proceedings, or a step in proceedings, before the Board under or for the purposes of a provision of the former Act immediately before commencement day.

Clause 268(2) provides that the proceedings or step may, if there is a corresponding new provision for it, be continued before the Tribunal under or for the purposes of that new provision.

Clause 268(3) provides that the provisions of Subdivisions 4, 5 and 6 and any regulations made for the purposes of Part 14 Division 2 prevail over clause 268 to the extent of any inconsistency.

Clause 269 – Places of custody

Clause 269 provides, at (1), that if, immediately before commencement day, the Board was required to determine a person's place of custody under section 25(1)(b) of the former Act, (2) applies.

Clause 269(2) provides that the Tribunal must, within five working days after commencement day, determine the place where the person is to be detained under Part 6 Division 3.

Clause 269(3) provides that if, immediately before commencement day, a person was detained at a place under section 25(2) of the former Act, the person is taken to be detained at that place under clause 61(3).

Clause 269(4) provides that the determination of a place of custody under section 25 of the former Act that was in effect immediately before commencement day has effect as if it were a determination by the Tribunal under Part 6 Division 3.

Clause 270 – Supervising officers

Clause 270 provides, at (1), that if a person was designated as a supervising officer under section 45(1) of the former Act immediately before commencement day, (2) applies.

Clause 270(2) provides that the designation has effect as if it were a designation under clause 99, until it is cancelled or replaced by a designation under clause 99 or is otherwise of no effect (clause 270(2)(a)), and is taken to be for each person in relation to whom the supervising officer was authorised to give directions under sections 28(4)(c) or 35(4)(c) of the former Act (clause 270(2)(b)). Those sections deal with conditions imposed on leave of absence and release orders under the former Act that require the person to comply with the lawful directions of a supervising officer under section 45.

Clause 270(3) provides that arrangements made by the Board under section 45(3) of the former Act (arrangements made for the purpose of or in connection with designating a person to be a supervising officer) that were in effect immediately before commencement day continue, under (4), to have effect, according to their terms, as though they were made by the Tribunal under clause 99(4).

Clause 271 – Examination required by Board

Clause 271 provides, at (1), that it applies if a requirement of the Board under section 40(1) of the former Act had not been fully complied with before commencement day.

Clause 271(2) provides that the requirement, to the extent relevant and not fully complied with, has effect as though it were a requirement of the Tribunal under clause 184(1).

Section 40 of the former Act provides that the Board may require a mentally impaired accused to be examined by a psychiatrist or other appropriate expert, require a report to be prepared and submitted, and require the accused to appear before it. Clause 184(1) is drafted in similar terms.

Clause 272 – Members of Board

Clause 272 deals with transitional arrangements for the members of the Board.

Clause 272(1) provides that the person who held the office of chairperson of the Board immediately before commencement day holds the office of President of the Tribunal until the earliest of the following:

- their current term of office as chairperson of the Prisoners Review Board under the *Sentence Administration Act 2003* section 103(1)(a) expires (clause 272(1)(a));
- they otherwise cease to hold that office (clause 272(1)(b));
- a person is appointed as the President of the Tribunal under clause 171(1)(a) (clause 272(1)(c)).

Clause 272(2) provides that, subject to (1), the President holds office on the same terms and conditions, including as to remuneration, as those on which they held office immediately before commencement day.

Clause 272(3) provides that the person who held the office of deputy chairperson of the Board immediately before commencement day is taken to have been appointed to be a Deputy President of the Tribunal under clause 171(1)(b).

Clause 272(4) provides that the person who held the office of member of the Board under section 42(1)(bb) of the former Act immediately before commencement day is taken to have been appointed as a member of the Tribunal under clause 171(1)(f). This is the Disability Services Commission member.

Clauses 272(5) and (6) deal with the psychiatrist and psychologist Board members, and their deputies, appointed under sections 42(1)(c) or (d) and 42(2) of the former Act. Those members are taken to have been appointed as members of the Tribunal under clauses 171(1)(d) (psychiatrists) or (e) (psychologists), as is relevant.

Clause 272(7) provides that a person who is a member of the Tribunal under clause 272, other than the President, holds office subject to this Act for the remainder of the person's term under the former Act and otherwise on the same terms and conditions, including as to remuneration, as those on which the person held office immediately before commencement day.

This clause deals with all members of the Board except the community members who, under section 42(1)(b) of the former Act, are the community members appointed to the Prisoners Review Board under section 103(1)(c) of the *Sentence Administration Act 2003*. As the Tribunal will not be required to draw its membership from the Prisoners Review Board, and certain criteria for appointment as a community member have changed, the existing community members will not carry over from the Board to the Tribunal on commencement. New appointments will be required.

Clause 273 – Registrar

Clause 273 provides that the person who held office as registrar of the Board immediately before commencement day continues as the registrar of the Tribunal, subject to this Act, until an officer is made available under clause 188(4) to perform the functions of the registrar of the Tribunal.

Subdivision 7 – Miscellaneous

Subdivision 7 of Part 14 Division 2 deals with other miscellaneous transitional matters.

Clause 274 – Final annual report to Minister

Clause 274 provides that, despite the repeal of the former Act, the person who was chairperson of the Board immediately before commencement day must prepare and give the Minister a report under section 48 of the former Act for the period beginning 1 July immediately before commencement day, and ending the day before commencement day.

Clause 275 – Records of Board

Clause 275 provides that the records of the Board become the records of the Tribunal on commencement.

Clause 276 – Tribunal to provide Chief Mental Health Advocate with details of supervised persons

Clause 276, at (1), requires the Tribunal, within seven working days after commencement day, to provide the Chief Mental Health Advocate with details of the following information in respect of each supervised person:

- any order under the former Act or this Act that has effect in respect of the supervised person (clause 276(1)(a)); and
- if applicable, the place where the supervised person is detained (clause 276(1)(b)); and
- the prescribed information (clause 276(1)(c)).

Clause 276(2) provides that the Chief Mental Health Advocate must comply with clause 128(2) – that is, inform all supervised persons of their right to request that they be contacted by a mental health advocate, and of the functions of a mental health advocate under this Act – as if clause 128(2) referred to being notified under clause 276(1).

An exception to this requirement applies where the supervised person is detained in a DSC declared place or authorised hospital. This is because the Mental Health Advocacy Service will have already been engaged with the person by virtue of Part 10 of the Declared Places Act or Part 20 of the Mental Health Act, as is relevant.

Clause 277 – Notice to Public Advocate

Clause 277 deals with notices that were required to be given to the Public Advocate under section 98 of the Guardianship and Administration Act as in force before commencement day. Notice must be given by the Tribunal within five working days after commencement day and, when given, is taken to have been given under clause 190(1).

Clause 278 – Declared places

Clause 278, at (1), provides that it applies to a place that, immediately before commencement day, was a DSC declared place as defined in section 24(5A) of the former Act.

Clause 278(2) provides that a declaration is taken to have been made, on commencement day, under clause 60 of the Bill, in relation to the declared place, and that it is taken to have been specified in that declaration that the place is to be controlled and managed by or on behalf of the Disability Services Commission under the Declared Places Act.

Subdivision 8 – Transitional regulations

Subdivision 8 of Part 14 Division 2 deals with the making of transitional regulations.

Clause 279 – Transitional regulations

Clause 279(1) provides that regulations may deal with all matters of a savings or transitional nature arising as a result of the enactment of this Act.

Clause 279(2) provides that regulations made for the purpose of clause 279 may:

- clarify or vary the application of the provisions of this Division (clause 279(2)(a)); and
- be expressed to have effect despite another written law (clause 279(2)(b)); and
- provide that a specified provision of a written law does not apply, or applies with specified modifications, to or in relation to a matter (clause 279(2)(c)).

Clause 279(3) provides that regulations made for the purposes of this provision may provide that a specified state of affairs is taken to have existed, or not to have existed, on and after a day that is earlier than the day on which the regulations are published in the *Government Gazette*.

Clause 279(4) provides that regulations made for the purposes of this provision prevail over Subdivisions 3 to 7 of Part 14 Division 2 to the extent of any inconsistency.

Clause 279(5) provides that if the regulations contain a provision referred to in (3), the provision does not operate to:

- affect in a manner prejudicial to any person (other than the State or a public authority) the rights of that person existing before the regulations were published (clause 279(5)(a)); or
- impose liabilities on any person (again, other than the State or a public authority) in respect of anything done or omitted to be done before the regulations were published (clause 279(5)(b)).

Clause 279(6) provides that regulations made for the purposes of this provision must be made within the period that is reasonably necessary to deal with savings and transitional matters that arise as a result of the enactment of this Act.

Part 15 – Consequential amendments to other Acts

Part 15 consequentially amends other Acts.

In this Part of the Explanatory Memorandum the *Criminal Law (Mental Impairment) Act 2022*, as this Act will be known once enacted, is referred to as the new Act.

Division 1 – *Bail Act 1982* amended

Division 1 amends the *Bail Act 1982* (Bail Act).

Clause 280 – *Bail Act 1982* amended

Clause 280 provides that Division 1 amends the Bail Act.

Clause 281 – Schedule 1 Part C amended

Clause 281 amends Schedule 1 Part C to the Bail Act to replace references to the former Act and clarify ambiguous language.

Division 2 – *Children's Court of Western Australia Act 1988* amended

Division 2 amends the Children's Court Act.

Clause 282 – *Children's Court of Western Australia Act 1988* amended

Clause 282 provides that Division 2 amends the Children's Court Act.

Clause 283 – Section 21 amended

Clause 283 amends section 21 of the Children's Court Act. Section 21 of that Act imposes limitations on the exercise of certain jurisdiction by the Children's Court. Section 21(4) provides that when constituted by JPs only, the Court may not sentence a child to detention or to be imprisoned, or make an order declaring a child to be in need of care or protection. Section 21(4) is amended to insert new (c), which provides that the Court constituted by JPs only cannot exercise jurisdiction under the new Act.

A new subsection 21(4A) is also inserted to provide that, if the question of fitness is raised during criminal proceedings before the Court constituted by JPs only, the Court must refer the question to the Court constituted by a judge or magistrate. New subsection 21(4B) clarifies that (4A) has effect subject to section 31 of the new Act.

Section 31 of the new Act deals with determining the question of fitness if a charge is to be dealt with on indictment, including where an accused is before the Children's Court charged with an indictable offence that is to be dealt with on indictment by the District or Supreme Court due to section 19B(1) or 19C(1) of the Children's Court Act, or an accused is before the Children's Court charged with an indictable offence that is to be dealt with by the Magistrates Court due to section 19D of that Act.

Division 3 – *Community Protection (Offender Reporting) Act 2004* amended

Division 3 amends the *Community Protection (Offender Reporting) Act 2004* (CPOR Act).

Clause 284 – *Community Protection (Offender Reporting) Act 2004* amended

Clause 284 provides that Division 3 amends the CPOR Act.

Clause 285 – Section 3 amended

Clause 285 amends section 3 of the CPOR Act (a definitions provision) to:

- delete "mentally impaired accused";
- insert ***detainee under the CLMI Act*** – meaning a person subject to a custody order or an interim or extended custody order or an interim disposition;
- insert new paragraph (c) in the definition of ***community order*** – to mean a community supervision order or an interim or extended community supervision order or an interim disposition;
- replace paragraph (a) of the definition of ***government custody*** and replace it with new (a) – "custody as a prisoner, detainee or detainee under the CLMI Act";
- delete paragraph (d) of the definition of ***sentence*** and replace it with new (d) – "a custody order or an interim or extended custody order under the *Criminal Law (Mental Impairment) Act 2022*, or an interim disposition under section 204(1)(a) of that Act; and"; and
- delete "mentally impaired accused" from the definition of ***strict government custody*** and replace it with "detainee under the CLMI Act".

Clause 286 – Section 4 amended

Clause 286 amends section 4 of the CPOR Act. Section 4 of the CPOR Act outlines what constitutes a "finding of guilt" for the purposes of that Act. That section is amended to insert new paragraph (1)(ca) – "a finding under the *Criminal Law (Mental Impairment) Act 2022* section 41(2)(c) or an equivalent finding under provisions of the laws of a foreign jurisdiction;".

The inclusion of a finding under section 41(2)(c) of the new Act – that the accused committed the offence charged or another offence which, on the charge, the accused might be found to have committed – ensures that this finding is treated as a finding of guilt for the purposes of the CPOR Act. This is consistent with the existing treatment of a finding of not guilty on account of unsoundness of mind (mental impairment) under section 27 of *The Criminal Code*.

Clause 287 – Section 70 amended

Clause 287 deletes section 70(1)(c) of the CPOR Act and replaces it with new (c): when a reportable offender ceases to be subject to a custody order or an interim or extended custody order or equivalent interim disposition under the new Act, and is not immediately made subject to another.

Section 70 of the CPOR Act requires a supervising authority to notify the Commissioner of Police of certain events.

Clause 288 – Section 85A amended

Clause 288 amends section 85A of the CPOR Act. This amendment is to correct grammatical and numbering errors in the CPOR Act and is not related to the new Act.

Division 4 – *Coroners Act 1996* amended

Division 4 amends the *Coroners Act 1996* (Coroners Act).

Clause 289 – *Coroners Act 1996* amended

Clause 289 provides that Division 4 amends the Coroners Act.

Clause 290 – Section 3 amended

Clause 290 amends section 3 of the Coroners Act (a definition provision) to insert the word "or" after paragraph (ca) and insert new paragraphs (e) and (f) into the definition of ***person held in care***. The new paragraphs refer to a person subject to a hospital order and a person subject to a supervision order under the new Act. This expansion of the definition will ensure that a coroner who has jurisdiction to investigate a death must hold an inquest if the death was caused, or contributed to, while the deceased was subject to a hospital order or supervision order under the new Act.

Clauses 99(3) in Part 6 Division 8 and clause 191 in Part 10 Division 7 require a supervising officer to immediately notify the Tribunal, and the Tribunal to immediately notify a coroner, of the death of a supervised person.

Division 5 – *Court Security and Custodial Services Act 1999* amended

Division 5 amends the *Court Security and Custodial Services Act 1999* (CSCS Act).

Clause 291 – *Court Security and Custodial Services Act 1999 amended*

Clause 291 provides that Division 5 amends the CSCS Act.

Clause 292 – Section 3 amended

Clause 292 amends section 3 of the CSCS Act (a definitions provision) at the definition of ***custodial place*** to replace the reference to the former Act with a reference to the new Act.

Clause 293 – Section 4 amended

Clause 293 amends section 4 of the CSCS Act to replace a reference to the former Act with a reference to the new Act.

Clause 294 – Section 16 amended

Clause 294 amends section 16(2)(b) of the CSCS Act to replace references to the former Act and Declared Places Act with references to the new Act and the Declared Places Act as renamed.

Clause 295 – Section 96 amended

Clause 295 amends section 96 of the CSCS Act to replace the reference to the Declared Places Act with a reference to the Declared Places Act as renamed.

Clause 296 – Schedule 2 amended

Clause 296 amends Schedule 2 to the CSCS Act at Division 1 clause 5 to delete the reference to hospital or custody orders under the former Act and replace it with a reference to a hospital order, custody order, interim custody order, extended custody order or equivalent interim disposition under the new Act.

The heading to clause 5 is also replaced to read "Power to move persons with mental impairment".

Division 6 – *Criminal Appeals Act 2004* amended

Division 6 amends the Criminal Appeals Act.

Clause 297 – *Criminal Appeals Act 2004* amended

Clause 297 provides that Division 6 amends the Criminal Appeals Act.

Clause 298 – Section 4 amended

Clause 298 amends section 4 of the Criminal Appeals Act (a definitions provision) to insert a definition of ***limiting term*** by reference to section 9(1) of the new Act.

Clause 299 – Section 6 amended

Clause 299 amends section 6 of the Criminal Appeals Act. That section, a definitions provision, defines a decision of a court of summary jurisdiction that can be appealed under Part 2 of that Act.

Clause 299 amends section 6 to insert the following decisions:

- a decision under section 29 of the new Act that an accused is fit, or unfit, to stand trial;
- an order under section 37(2)(a) of the new Act to discharge an accused from a charge (instead of ordering that a special proceeding be held), or a refusal to make such an order;
- a finding under section 41(2)(c) of the new Act (a finding at a special proceeding that the accused committed the offence charged or another offence which, on the charge, they might be found to have committed);
- an order under Part 5 of the new Act or a refusal to make such an order (a custody order, community supervision order, or unconditional release order); and
- the setting of a limiting term on a custody order under section 50(2) of the new Act.

Clause 300 – Section 8 amended

Clause 300 amends section 8 of the Criminal Appeals Act. Section 8 of that Act deals with grounds of appeal. It is amended to provide that that an appeal may be made on the ground that a court of summary jurisdiction imposed a sentence, or set a limiting term, that was inadequate or excessive.

Clause 301 – Section 11 amended

Clause 301 amends section 11 of the Criminal Appeals Act. That section applies when the Supreme Court gives leave to appeal against a decision, and outlines the effect this has on sentences, disqualifications, orders etc.

Generally, any sentence imposed or order made is suspended until the appeal is concluded. Exclusions to this general provision are set out in subsection 11(6) of the Criminal Appeals Act. Clause 301 amends that subsection to provide that a custody order or community supervision order under the new Act is not suspended pending the conclusion of an appeal.

Clause 302 – Section 12 amended

Clause 302 amends section 12 of the Criminal Appeals Act. That section allows the Supreme Court to make any order it thinks fit that suspends or continues a decision being appealed, any sentence imposed, or order made, and any statutory consequence of the decision.

New subsection (5A) is inserted into section 12 to provide that if an appellant or respondent to an appeal is subject to a custody order or community supervision order under the new Act, that order must not be suspended under section 12.

Clause 303 – Section 14 amended

Clause 303 amends section 14 of the Criminal Appeals Act. That section sets out the Supreme Court's powers in deciding an appeal under Part 2.

Clause 303 amends paragraph (g) of section 14(1) to update terminology and references to the former Act, as well as to remove the reference to "mak[ing] or refus[ing] to make an order" under the former Act after a decision to acquit an accused of a charge on account of unsoundness of mind (mental impairment). The orders referred to in paragraph (g) are orders under section 22 of the former Act.

Clause 303 also inserts new paragraph (ga), which provides that if the appeal is against a decision that an accused is fit or unfit, or a finding at a special proceeding that the accused committed the offence charged or another offence which, on the charge, they might be found to have committed, the court may exercise any power that the Court of Appeal may exercise under section 32A.

Section 32 of the Criminal Appeals Act deals with appeals commenced in superior courts against an acquittal on unsoundness of mind (mental impairment) and new section 32A, which is inserted by clause 310, deals with decisions on appeal under new section 25A(a) or (b). New section 25A is inserted by clause 306 and deals with rights of appeal where an accused has been found fit or unfit to stand trial by a superior court.

Clause 303 also inserts new paragraph (gb), which provides that if the appeal is against an order or refusal to make an order under Part 5, or decision as to the setting of a limiting term, the court may exercise any power that the Court of Appeal may exercise under section 32B. Section 32B, which deals with decisions on appeal under new section 25A(c) or (d), is inserted by clause 310.

Clause 304 – Section 24 amended

Clause 304 amends section 24 of the Criminal Appeals Act. That section outlines a prosecutor's rights of appeal against a decision of a judge of a superior court in relation to a charge of an indictable offence.

The amendments change terminology from "other than a judgment of acquittal on account of unsoundness of mind" to "other than on account of mental impairment", consistent with updates to that terminology across the statute book.

Clause 305 – Section 25 amended

Clause 305 amends section 25 of the Criminal Appeals Act. That section deals with rights of appeal if an accused is acquitted of a charge in an indictment on account of unsoundness of mind (mental impairment).

Section 25 is amended to:

- delete subsection 25(2) and replace it with a new section (2) which provides that an accused may appeal to the Court of Appeal against the acquittal;
- delete "any or all of the following decisions" from subsection 25(3) and replace that with "the acquittal if";
- delete the words "the acquittal if" from paragraphs (a) and (aa) of subsection 25(3); and
- replace paragraphs (b) and (c) with new paragraph (b) in subsection 25(3) to provide that an acquittal on account of mental impairment may be appealed by the prosecutor if it was entered after a finding under section 41(2)(b) of the new Act (that is, a finding at a special proceeding).

The word "or" is inserted after paragraphs (a) and (aa) for clarity. The section heading is also replaced to refer to rights of appeal if acquittal on mental impairment.

Clause 306 – Section 25A inserted

Clause 306 inserts new section 25A, "Rights of appeal relating to *Criminal Law (Mental Impairment) Act 2022*", into Part 3 of the Criminal Appeals Act.

New section 25A provides that an accused or the prosecutor may appeal to the Court of Appeal against one or more of the following decisions of a judge of a superior court in relation to a charge of an indictable offence:

- a decision under section 29 of the new Act that the accused is fit or unfit to stand trial;
- a finding under section 41(2)(c) of the new Act (that the accused committed the offence charged, or another offence which, on the charge, they might be found to have committed);
- an order under Part 5 of the new Act or a refusal to make such an order;
- the setting of a limiting term on a custody order under section 50(2) of the new Act.

Clause 307 – Section 30 amended

Clause 307 amends section 30 of the Criminal Appeals Act. That section applies in the case of an offender's appeal against a conviction and is amended at subsection (5) to replace references to the former Act with references to the new Act.

Part 4, at clause 44(2), provides that when a court is required to deal with a person under this Act because of section 30(5) of the Criminal Appeals Act, the court must make an order under Part 5 in respect of the accused.

Clause 308 – Section 31 amended

Clause 308 amends section 31 of the Criminal Appeals Act. That section applies in the case of an appeal commenced by an offender under section 23 or a prosecutor under section 24(1) against the sentence imposed or any order made as a result of a conviction on indictment or a conviction by a court of summary jurisdiction in respect of which the offender was committed for sentence, or a refusal by a superior court to make an order that might be made as a result of such a conviction.

Clause 308 amends section 31 to:

- expand subsection 31(4) at paragraph (a) to reference a different order being made; and
- amend subsection 31(5) to refer to orders as well as sentences.

The section heading is also expanded to refer to orders as well as sentences.

Clause 309 – Section 32 amended

Clause 309 amends section 32 of the Criminal Appeals Act. That section applies in the case of an appeal in relation to a charge of which an accused has been acquitted on account of unsoundness of mind (mental impairment). References to a "section 27 finding" are replaced with references to a "mental impairment finding" and references to an "offender" are also replaced with references to an "accused".

Clause 309(7) also deletes subsection 32(9) of the Criminal Appeals Act.

Clause 310 – Sections 32A and 32B inserted

Clause 310 inserts new sections 32A and 32B into the Criminal Appeals Act.

New section 32A is titled "Decision on appeal under s. 25A(a) or (b)". It applies in the case of an appeal commenced under section 25A against a decision or finding that:

- the accused is fit or unfit to stand trial; or
- the accused committed the offence charged, or another offence which, on the charge, the accused might be found to have committed.

Unless, under subsection 32A(3), the Court of Appeal allows the appeal, it must dismiss it.

Subsection 32A(3) provides that the Court of Appeal may allow the appeal if, in its opinion, the decision or finding should be set aside because, having regard to the evidence, it is

unreasonable or cannot be supported, because of a wrong decision on a question of law by the judge, or there was a miscarriage of justice.

Subsection 32A(4) provides that despite subsection 32A(3), even if a ground of appeal might be decided in favour of the appellant, the Court of Appeal may dismiss an appeal if it considers that no substantial miscarriage of justice has occurred.

Subsection 32A(5) provides that if an appeal against a decision on fitness is allowed, the Court of Appeal must set aside the decision and do one or more of the following:

- order that the question of fitness be dealt with again by the court that made the decision, with or without orders to that court about how or by whom it is to be constituted and as to how it must deal with the question;
- decide the question of fitness;
- order a trial or a new trial;
- order that a special proceeding take place under Part 3 Division 3 of the new Act.

Subsection 32A(6) provides that if an appeal against a finding at a special proceeding that the accused committed the offence is allowed, the Court of Appeal must set aside the finding and must:

- enter a judgment of acquittal, other than on account of mental impairment; or
- order that a special proceeding take place under Part 3 Division 3 of the new Act; or
- if the accused could have been found to have committed some other offence, and the court is satisfied that the judge must have been satisfied, on the evidence available, of facts that prove the accused did the acts or made the omissions that constitute that other offence, make a finding under section 41(2)(c) of the new Act that the accused committed that other offence and deal with the accused under the new Act; or
- if the court is satisfied that the accused should have been found not guilty of the offence charged on account of mental impairment, enter a judgment of acquittal on account of mental impairment, and deal with the accused under the new Act; or
- if the accused could have been found to have committed some other offence, and the court is satisfied that the judge must have been satisfied, on the evidence available, of facts that prove the accused did the acts or made the omissions that constitute that other offence, and the court is satisfied that the accused should have been found not guilty on account of mental impairment, enter a judgment of acquittal of that other offence on account of mental impairment, and deal with the accused under the new Act.

Part 4 provides, at clause 44(2), that if a court must deal with an accused under this Act because of section 32A(6) of the Criminal Appeals Act, the court must make an order under Part 5 in respect of the accused.

Clause 310 also inserts new section 32B into the Criminal Appeals Act. This new section 32B, titled “Decision on appeal under s. 25A(c) or (d)”, applies in the case of an appeal commenced under section 25A against the following:

- an order under Part 5 of the new Act or a refusal to make such an order;
- the setting of a limiting term on a custody order under section 50(2) of the new Act.

Section 32B(2) provides that unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.

Section 32B(3) provides that the Court of Appeal may allow the appeal if, in its opinion, in the case of an appeal against an order under Part 5 or setting of a limiting term, a different order should have been made or a different limiting term set; or in the case of an appeal against a refusal to make an order under Part 5, that an order should have been made.

Section 32B(4) provides that if the Court of Appeal allows an appeal against the making of a Part 5 order or setting of a limiting term, it must set aside the order or limiting term and may instead make a new order, or set a new limiting term that is either longer or shorter than the term set aside, or may send the charge back to the court that made the order or set the limiting term to be dealt with further.

Section 32B(5) provides that if the Court of Appeal allows an appeal against a refusal to make a Part 5 order, it may make any order that should have been made or may send the charge back to the court that refused to make the order to be dealt with further.

Clause 311 – Section 41A inserted

Clause 311 inserts new section 41A into Part 4 of the Criminal Appeals Act. That Part contains general provisions applicable to any appeal.

New section 41A is titled “Custody orders under *Criminal Law (Mental Impairment) Act 2022*”. It is drawn from section 41(6) of the Criminal Appeals Act, which requires an appeal court, when deciding an appeal in relation to a person sentenced to imprisonment, to notify the CEO as defined in the Prisons Act of the results of that appeal.

Section 41A(1) defines ***custody order*** and ***Tribunal*** by reference to the definition of those terms under the new Act.

Section 41A(2) provides that the section applies if, under the Criminal Appeals Act, an appeal court decides to make, confirm, vary or set aside a custody order.

Section 41A(3) provides that an appeal court must give a memorandum setting out the effect of its decision to the Tribunal.

Section 41A(4) provides that if the appeal court sets aside a custody order in relation to a person and does not replace it with another, the person who was subject to the custody order must be released as soon as practicable after the Tribunal receives the memorandum, unless the person is required to be held in custody or detained for some other reason.

Section 41A(5) provides that the memorandum from the appeal court is part of the records of the Tribunal and evidence of the matters stated in it.

Clause 312 – Section 46A amended

Clause 312 amends section 46A in Part 5A of the Criminal Appeals Act, which deals with prosecuting acquitted accused.

Section 46A is amended to insert a new subsection (3) which provides that in Part 5A, unless the contrary intention appears, a reference to a conviction of, or to being convicted of, an

offence includes (respectively) a reference to a finding of having committed, or to being found to have committed, the offence under section 41(2)(c) of the new Act. That is, a finding of committed the offence charged or another offence which the accused, on the charge, could be found to have committed.

Clause 313 – Various references to "unsoundness of mind" amended

Clause 313 replaces references to "unsoundness of mind" throughout the Criminal Appeals Act with references to "mental impairment".

Division 7 – *Criminal Injuries Compensation Act 2003* amended

Division 7 amends the *Criminal Injuries Compensation Act 2003* (CIC Act).

Clause 314 – *Criminal Injuries Compensation Act 2003* amended

Clause 314 provides that Division 7 amends the CIC Act.

Clause 315 – Section 15 amended

Clause 315 amends section 15(1)(b) of the CIC Act to delete the word "mentally". The effect is that the section now refers to a person who has been "found unfit to stand trial", consistent with the phrasing in the new Act. A similar amendment is made to the heading of section 15, where the words "accused not mentally fit" are replaced with "accused unfit".

Division 8 – *Criminal Investigation (Identifying People) Act 2002* amended

Division 8 amends the *Criminal Investigation (Identifying People) Act 2002* (CIIP Act).

Clause 316 – *Criminal Investigation (Identifying People) Act 2002* amended

Clause 316 provides that Division 8 amends the CIIP Act.

Clause 317 – Section 67 amended

Clause 317 amends section 67 of the CIIP Act to delete "not mentally fit" and replace that phrase with "unfit", consistent with the phrasing in the new Act.

Division 9 – *Criminal Procedure Act 2004* amended

Division 9 amends the Criminal Procedure Act.

Clause 318 – *Criminal Procedure Act 2004* amended

Clause 318 provides that Division 9 amends the Criminal Procedure Act.

Clause 319 – Section 126 amended

Clause 319 amends section 126(5)(e) of the Criminal Procedure Act to delete the words "not mentally fit" and replace that phrase with "unfit", consistent with the phrasing used in the new Act.

Clause 320 – Section 130 amended

Clause 320 amends section 130 of the Criminal Procedure Act to delete the word "mental" so it now refers to "an accused's fitness to stand trial", consistent with the phrasing used in the new Act. The heading of section 130 is amended in the same terms.

Division 10 – *Cross-border Justice Act 2008* amended

Division 10 amends the *Cross-border Justice Act 2008* (CBJ Act).

Clause 321 – *Cross-border Justice Act 2008* amended

Clause 321 provides that Division 10 amends the CBJ Act.

Clause 322 – Part 9 heading replaced

Clause 322 replaces the heading to Part 9 of the CBJ Act to read "Persons with mental impairment" instead of "Mentally impaired accused", consistent with the replacement of that term across the statute book.

Division 11 – *Declared Places (Mentally Impaired Accused) Act 2015* amended

Division 11 amends the Declared Places Act.

Clause 323 – *Declared Places (Mentally Impaired Accused) Act 2015* amended

Clause 323 provides that Division 11 amends the Declared Places Act.

Clause 324 – Long title replaced

Clause 324 replaces the long title of the Declared Places Act to update language and replace the reference to the former Act with a reference to the new Act.

Clause 325 – Section 1 amended

Clause 325 amends section 1 of the Declared Places Act to provide its new title: the *Declared Places (Mental Impairment) Act 2015*.

Clause 326 – Section 3 amended

Clause 326 amends section 3 of the Declared Places Act (a definitions provision) to:

- delete the definitions of ***Board***, ***mentally impaired accused***, ***MIA Act*** and ***resident***;
- insert new definitions of ***CLMI Act***, ***resident***, ***supervised person***, and ***Tribunal*** in alphabetical order; and
- replace references to the former Act with references to the new Act.

Clause 327 – Section 18 replaced

Clause 327 replaces section 18 of the Declared Places Act to update language in line with the new Act. That section deals with the functions of the CEO (being the chief executive officer of the Disability Services Commission) as to residents of declared places.

Clause 328 – Section 19 amended

Clause 328 amends section 19 of the Declared Places Act, which deals with the CEO's functions as to declared places. The section is amended to update language in line with the new Act.

Clause 329 – Section 20 amended

Clause 329 amends section 20 of the Declared Places Act to replace a reference to the Board with a reference to the Tribunal.

Clause 330 – Section 53 amended

Clause 330 amends section 53 of the Declared Places Act, which deals with advocate functions, to expand the reference to "enduring guardian or guardian" in paragraph (l) to include administrators as defined in section 9(1) of the new Act. This mirrors the liaison function for mental health advocates in clause 134(1)(i).

Clause 331 – Section 57 amended

Clause 331 amends section 57 of the Declared Places Act to replace references to the Board and the former Act with references to the Tribunal and the new Act. A transitional provision for section 57 of the Declared Places Act, new section 66, is inserted by clause 332.

Clause 332 – Part 12 replaced

Clause 332 replaces Part 12 of the Declared Places Act. The former Part 12 contained consequential amendments to other Acts. The new Part 12 contains a transitional provision for section 57 of the Declared Places Act that is required for the new Act. Section 57 deals with the Board and CEO giving each other information about residents and provides that the CEO must, on the written request of the Board, prepare and give the Board a report.

New Part 12 in the Declared Places Act provides that, if the CEO was required to prepare and give a report to the Board under section 57(2) as in force before commencement day, but had not given that report before commencement day, the CEO must prepare and give that report to the Tribunal.

Division 12 – *Disability Services Act 1993* amended

Division 12 amends the *Disability Services Act 1993* (DS Act).

Clause 333 – *Disability Services Act 1993* amended

Clause 333 provides that Division 12 amends the DS Act.

Clause 334 – Section 3 amended

Clause 334 amends section 3 of the DS Act (a definitions provision) to replace the reference to the Declared Places Act with a reference to the Declared Places Act as renamed.

Clause 335 – Section 12 amended

Clause 335 amends section 12 of the DS Act, which deals with the functions of the Disability Services Commission. Section 12(1)(m) is amended to update references to the DSC declared place and the new Act.

Clause 336 – Section 21 amended

Clause 336 amends section 21(5A) of the DS Act to update the reference to the Declared Places Act as renamed.

Division 13 – *Electoral Act 1907* amended

Division 13 amends the *Electoral Act 1907* (Electoral Act).

Clause 337 – *Electoral Act 1907* amended

Clause 337 provides that Division 13 amends the Electoral Act.

Clause 338 – Section 18 amended

Clause 338 amends section 18 of the Electoral Act. That section lists people who are disqualified from voting and being on the electoral roll. Section 18(1)(cd), which deals with persons who are, or are taken to be, mentally impaired accused under the former Act, is replaced to refer to supervised persons under the new Act.

Clause 339 – Section 59 amended

Clause 339 amends section 59 of the Electoral Act. That section requires the Electoral Commissioner to be informed about certain prisoners and detained persons. This includes a requirement for the registrar of the Board to, on a monthly basis, forward to the Electoral Commissioner a list of all people who became, or ceased to be, mentally impaired accused persons.

The section is amended to replace references to the ***registrar, MIARB***, and mentally impaired accused with references to the Mental Impairment Review Tribunal registrar and supervised persons.

New subsection (5) is inserted to clarify that references to supervised persons include references to mentally impaired accused. This is included to ensure that there is no interruption in the provision of information from the registrar to the Electoral Commissioner caused by commencement of the new Act.

Clauses 339(8) and (9) are transitional provisions which will delete the definition “mentally impaired accused” from the Electoral Act one month after commencement.

Division 14 – *Evidence Act 1906* amended

Division 14 amends the Evidence Act.

Clause 340 – *Evidence Act 1906* amended

Clause 340 provides that Division 14 amends the Evidence Act.

Clause 341 – Section 100A amended

Clause 341 amends section 100A of the Evidence Act to replace the reference to the former Act with a reference to the new Act.

Clause 342 – Section 106A amended

Clause 342 amends section 106A of the Evidence Act to replace the reference to the former Act with a reference to the new Act.

Division 15 – *Fines, Penalties and Infringement Notices Enforcement Act 1994* amended

Division 15 amends the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (FPINE Act).

Clause 343 – *Fines, Penalties and Infringement Notices Enforcement Act 1994* amended

Clause 343 provides that Division 15 amends the FPINE Act.

Clause 344 – Section 52C amended

Clause 344 amends section 52C of the FPINE Act. That section outlines when a person is taken to be "in custody" for the purpose of a fine expiation order. The section is amended to replace the reference to a custody order under the former Act with a reference to a custody order, interim custody order or extended custody order or an interim disposition of custody under the new Act. This has the effect of allowing a person detained under one of these orders to expiate a fine under the FPINE Act.

Division 16 – *Guardianship and Administration Act 1990* amended

Division 16 amends the Guardianship and Administration Act.

Clause 345 – *Guardianship and Administration Act 1990* amended

Clause 345 provides that Division 16 amends the Guardianship and Administration Act.

Clause 346 – Section 98 replaced

Clause 346 replaces section 98 of the Guardianship and Administration Act. That section requires the registrar of the Board to notify the Public Advocate if a person becomes a mentally impaired accused, and the Public Advocate to subsequently investigate whether the person is in need of an administrator and take such other appropriate action.

New section 98 contains updated language to refer to supervised persons, the Tribunal and the new Act. It must be read with section 190 of the new Act, which requires the Tribunal to notify the Public Advocate. The obligation to notify is contained in the new Act and the Public Advocate's duty to investigate is retained in the Guardianship and Administration Act.

Section 98 is expanded to require the Public Advocate to investigate whether the person is in need of a guardian or administrator. The previous section 98(1) only referred to an administrator.

A transitional provision is included to deal with notices that were required to be provided immediately before commencement: see Part 14 Division 2, clause 277.

Division 17 – *High Risk Serious Offenders Act 2020* amended

Division 17 amends the HRSO Act.

Clause 347 – *High Risk Serious Offenders Act 2020* amended

Clause 347 provides that Division 17 amends the HRSO Act.

Clause 348 – Section 6 amended

Clause 348 amends section 6 of the HRSO Act. The reference to a person being found "not mentally fit" to stand trial is replaced to read "unfit", consistent with the phrasing of the new Act.

Clause 349 – Section 79 amended

Clause 349 amends section 79 of the HRSO Act, which deals with "mentally unfit offenders". The amendments to this section update language from "not mentally fit" to "unfit", consistent with the phrasing of the new Act. The section heading is amended in the same terms.

Division 18 – *Juries Act 1957* amended

Division 18 amends the *Juries Act 1957* (Juries Act).

Clause 350 – *Juries Act 1957* amended

Clause 350 provides that Division 18 amends the Juries Act.

Clause 351 – Section 5 amended

Clause 351 amends section 5 of the Juries Act. That section outlines persons who are not eligible or not qualified to serve on a jury or who are excused from jury service. The section is amended to insert the new defined terms of ***CLMI Act*** and ***person covered by the CLMI Act*** into the Juries Act. A person covered by the CLMI Act is a person who is:

- required under section 19 of the new Act to be detained at an authorised hospital; or
- an unfit accused; or
- a supervised person.

Paragraphs (d)(iii) and (iv) of section 5(3) are deleted and a new section 5(3)(d)(iii) is inserted which refers to a person covered by the CLMI Act. This has the effect of providing that a person covered by the CLMI Act is not qualified to serve as a juror at a trial.

Division 19 – *Magistrates Court Act 2004* amended

Division 19 amends the *Magistrates Court Act 2004* (Magistrates Court Act).

Clause 352 – *Magistrates Court Act 2004* amended

Clause 352 provides that Division 19 amends the Magistrates Court Act.

Clause 353 – Section 11A inserted

Clause 353 inserts new section 11A into the Magistrates Court Act. It provides that when constituted by one or more JPs only, the Magistrates Court cannot exercise jurisdiction under the new Act and, if the question of fitness is raised during proceedings when the court is constituted by one or more JPs only, the court must refer the question to the court constituted by a magistrate.

New section 11A has effect subject to section 31 of the new Act, which deals with determining the question of fitness if a charge is to be dealt with on indictment.

This amendment is in the same terms as the amendments made to section 21 of the Children's Court Act at Part 15 Division 2 of the new Act.

Division 20 – *Mental Health Act 2014* amended

Division 20 amends the Mental Health Act.

Clause 354 – *Mental Health Act 2014* amended

Clause 354 provides that Division 20 amends the Mental Health Act.

Clause 355 – Section 4 amended

Clause 355 amends section 4 of the Mental Health Act (a definitions provision). The terms ***mentally impaired accused***, ***Mentally Impaired Accused Review Board***, and ***MIA Act*** are deleted and the new terms ***CLMI Act***, ***Mental Impairment Review Tribunal*** and ***supervised person*** are inserted.

The definition of ***mental health service*** is amended at paragraph (b)(ii) to narrow the exclusion to a DSC declared place under the new Act.

Amendments to reflect changes in terminology from "a mentally impaired accused required under the MIA Act to be detained at an authorised hospital" to "a supervised person required under the CLMI Act to be detained at an authorised hospital" are made to the definitions of:

- patient;
- patient's psychiatrist; and
- voluntary patient.

Put simply, this refers to a person subject to a custody order whose place of custody is an authorised hospital.

Finally, paragraph (b) of the Note to the definition of ***voluntary patient*** is replaced to refer to a supervised person who is released from an authorised hospital under a leave of absence order under the CLMI Act. The purpose of paragraph (b) in this Note is to make it clear that a supervised person who is required to be detained in an authorised hospital under a custody order, and is therefore expressly not a voluntary patient, can be a voluntary patient if a leave of absence order applies to them.

Clause 356 – Section 82 replaced

Clause 356 replaces section 82 of the Mental Health Act. That section excludes supervised persons subject to custody orders detained in an authorised hospital from the operation of Part 7 of the Mental Health Act, which deals with matters relating to detention for examination or treatment. Supervised persons living in the community, however, may be included within the operation of Part 7 of the Mental Health Act if they are detained for examination or treatment under that Act. Part 2 Division 2 of the new Act provides that a supervised person living in the community under a supervision order may be made an involuntary patient.

The section is replaced to update terminology in line with the new Act.

Clause 357 – Section 105 amended

Clause 357 amends section 105 of the Mental Health Act. That section deals with granting involuntary inpatients leave of absence from a hospital and is amended, at (2), to insert new paragraph (f), which requires that if the involuntary inpatient is a supervised person, the Tribunal is to be consulted about whether or not to make the order and what period and conditions would be appropriate if an order were to be made.

Clause 358 – Section 127 amended

Clause 358 amends section 127 of the Mental Health Act. That section deals with what psychiatrists must do if an involuntary community patient breaches a community treatment order. It is amended at (2) to insert new paragraph (c), which requires the supervising psychiatrist to notify the Tribunal if the involuntary community patient is a supervised person.

Clause 359 – Section 145 amended

Clause 359 amends section 145 of the Mental Health Act. That section deals with notifying particular persons and bodies of the making, revocation or expiry of an involuntary treatment order. It is amended at (4) to delete current paragraph (c), which refers to a mentally impaired accused and the Board, and replace it with new (c), which refers to a supervised person and the Tribunal.

A transitional provision for section 145 of the Mental Health Act is inserted by clause 387 – new section 679.

Clause 360 – Part 9 Division 4 inserted

Clause 360 inserts a new Division 4 into Part 9 of the Mental Health Act. Part 9 deals with notifiable events. New Division 4, which contains new section 145A, deals with notifying the Tribunal of certain events when those events occur in respect of a supervised person. The Tribunal must be notified when a supervised person:

- is absent without leave (section 97);
- has a leave of absence order made in respect of them (section 105);
- has a leave of absence order in relation to them extended, or its conditions varied (section 106); and
- has a leave of absence order in relation to them cancelled (section 110).

In each case, the Tribunal must be notified.

Clause 361 – Section 177 amended

Clause 361 amends section 177 in Part 13 of the Mental Health Act. Part 13 deals with provision of treatment generally and, at Division 2, deals specifically with involuntary patients and mentally impaired accused.

Section 177(b) is replaced with updated terminology.

The heading to Part 13 Division 2 is replaced at clause 388(1).

Clause 362 – Section 185 amended

Clause 362 amends section 185 of the Mental Health Act, which deals with the application of Part 13 Division 3 (Treatment, support and discharge planning). Section 185(b) is replaced with updated terminology.

Clause 363 – Section 196 amended

Clause 363 amends section 196 of the Mental Health Act, which deals with the performance of electroconvulsive therapy (ECT) on children over 14 years who are involuntary patients or mentally impaired accused.

Section 196 and its heading are amended to update terminology.

Clause 364 – Section 198 amended

Clause 364 amends section 198 of the Mental Health Act, which deals with the performance of ECT on adult involuntary patients and mentally impaired accused.

Section 198 and its heading are amended to update terminology.

Clause 365 – Section 199 amended

Clause 365 amends section 199 of the Mental Health Act, which deals with the performance of emergency ECT on adult involuntary patients or mentally impaired accused.

Section 199 and its heading are amended to update terminology.

Clause 366 – Section 200 amended

Clause 366 amends section 200 of the Mental Health Act, which deals with reports to the Board. If ECT is performed on a mentally impaired accused person, the Board must be notified as soon as practicable.

Section 200 and its heading are amended to update terminology.

A transitional provision for section 200 of the Mental Health Act is inserted by clause 387 – new section 679.

Clause 367 – Section 201 amended

Clause 367 amends section 201 of the Mental Health Act, which deals with statistics about ECT, including where ECT is performed on mentally impaired accused children and adults.

Section 201 and its heading are amended to replace terminology. An additional amendment is made to insert new paragraph (ha) into section 201(3) to expressly capture supervised persons who are required to undergo treatment as defined in section 4 of the Mental Health Act as a condition of a community supervision order, interim or extended community supervision order, equivalent interim disposition, or a leave of absence order, and new paragraph (hb) to deal with persons under paragraph (ha) who are children.

This separate category has been included to ensure that the performance of ECT on all supervised persons is expressly captured, regardless of whether they otherwise fall within the definition of “patient” under the Mental Health Act.

Clause 368 – Section 204 amended

Clause 368 amends section 204 of the Mental Health Act, which deals with records of emergency psychiatric treatment. If emergency psychiatric treatment is provided to a person, the medical practitioner who performed it must immediately file a record of the provision of the treatment and, if the person is a mentally impaired accused, give a copy of the record to the Board.

Section 204 is amended to update terminology.

A transitional provision for section 204 of the Mental Health Act is inserted by clause 387 – new section 679.

Clause 369 – Section 209 amended

Clause 369 amends section 209 of the Mental Health Act, which deals with reports to the Chief Psychiatrist about the performance of psychosurgery on a patient. If the patient is a mentally impaired accused, a report must also be given to the Board.

Section 209 and its heading are amended to update terminology.

A transitional provision for section 209 of the Mental Health Act is inserted by clause 387 – new section 679.

Clause 370 – Section 224 amended

Clause 370 amends section 224 of the Mental Health Act, which deals with reports to the Chief Psychiatrist about the release of a person from seclusion under an oral authorisation or seclusion order. If the person is a mentally impaired accused, a report must also be given to the Board.

Section 224 and its heading are amended to update terminology.

A transitional provision for section 224 of the Mental Health Act is inserted by clause 387 – new section 679.

Clause 371 – Section 240 amended

Clause 371 amends section 240 of the Mental Health Act, which deals with reports to the Chief Psychiatrist about the release of a person from restraint under an oral authorisation or bodily restraint order. If the person is a mentally impaired accused, a report must also be given to the Board.

Section 240 and its heading are amended to update terminology.

A transitional provision for section 240 of the Mental Health Act is inserted by clause 387 – new section 679.

Clause 372 – Section 241 amended

Clause 372 amends section 241 of the Mental Health Act, which deals with the physical examination of a person when they are admitted or received into a hospital or authorised hospital in particular circumstances.

Section 241 is amended to update terminology.

Clause 373 – Section 242 amended

Clause 373 amends section 242 of the Mental Health Act, which deals with reports to the Chief Psychiatrist about the provision of urgent non-psychiatric treatment. If urgent non-psychiatric treatment is provided to a patient who is a mentally impaired accused, a report must also be given to the Board.

Section 242 is amended to update terminology, and also require a report to be made to the Chief Psychiatrist if the person is an accused required to be detained at an authorised hospital under section 19 of the new Act (a hospital order).

The heading to Division 2 of Part 15 is amended at clause 388(2).

A transitional provision for section 242 of the Mental Health Act is inserted by clause 387 – new section 679.

Clause 374 – Section 243 amended

Clause 374 amends section 243 of the Mental Health Act, which deals with the application of Subdivision 1 of Part 16 Division 1 of that Act; specifically, the explanation of patients' rights. Section 243(a)(iii) is replaced to update terminology.

Clause 375 – Section 249 amended

Clause 375 amends section 249 of the Mental Health Act, which deals with restrictions on access to medical records and other documents. It currently provides that a person is not entitled to have access to medical records or other documents if they are a mentally impaired accused detained in an authorised hospital under a custody order under the former Act, and the medical record or other document came into existence under, or for the purposes of, the Prisons Act.

Section 249 is amended at (3) to update terminology and reference the Young Offenders Act. The effect of this amendment is to provide that a person is not entitled to have access to

medical records or other documents if they are a supervised person detained at an authorised hospital under a custody order and the medical record or other document came into existence under, or for the purposes of, either the Prisons Act or the Young Offenders Act.

New subsection (4) is inserted which provides that, if a relevant document relating to a supervised person that is in the possession or control of the person in charge of, or a staff member of, a mental health service, is to be provided to the Tribunal under the CLMI Act, and the supervised person is not entitled to have access to that document under section 248(1) of the Mental Health Act, then the person in charge of the mental health service must ensure that the Tribunal is aware of that. Under section 71 of the new Act, the Tribunal must give supervised persons, their representatives and legal practitioners copies of any reports to which the Tribunal intends to have regard when making a decision following a review. Section 71(4) is subject to any restriction on access to documents under section 249 of the Mental Health Act.

Clause 376 – Section 258 amended

Clause 376 amends section 258 of the Mental Health Act, which deals with the application of Subdivision 2 of Part 16 Division 1 (General rights of inpatients).

Section 258 is amended to update terminology.

Clause 377 – Section 288 amended

Clause 377 amends section 288 of the Mental Health Act, which deals with involuntary patients or mentally impaired accused persons who have capacity to consent to a carer or close family member receiving information about, and being involved in, their treatment and care.

Section 288 and its heading are amended to update terminology.

Clause 378 – Section 289 amended

Clause 378 amends section 289 of the Mental Health Act, which deals with involuntary patients or mentally impaired accused persons who do not have capacity to consent to a carer or close family member receiving information about, and being involved in, their treatment and care.

Section 289 and its heading are amended to update terminology.

Clause 379 – Section 348 amended

Clause 379 amends section 348 of the Mental Health Act, which defines an “identified person” for the purposes of the Mental Health Advocacy Service under that Act.

The definition of identified person is amended to replace paragraphs (e) to (g) with updated terminology. Paragraph (j) is amended to refer to paragraphs (a), (b), (c), (e), (g), (h) or (i).

A Note is inserted at the end of section 348 to indicate that mental health advocacy services can also be provided under Part 8 of the new Act, and that provision of advocacy services can shift between the two Acts. The Note directs readers to section 139 of the new Act, which provides for continuity of advocacy between both Acts.

Clause 380 – Section 357 amended

Clause 380 amends section 357 of the Mental Health Act, which deals with a mental health advocate's duty to contact an identified person. Section 357 is amended as follows:

- at 357(1), the reference to "paragraphs (b) or (c)" is expanded to include (e);
- subsections 357(4) and (5) are replaced to update terminology;
- the references to paragraphs (e) and (g) in subsections (6) and (8) are deleted.

A transitional provision for section 357 of the Mental Health Act is inserted by clause 387 – new section 680.

Clause 381 – Section 409 amended

Clause 381 amends section 409 of the Mental Health Act, which deals with obtaining approval from the Mental Health Tribunal to perform ECT on certain persons.

Section 409 is amended to update terminology.

Clause 382 – Section 423 amended

Clause 382 amends section 423 of the Mental Health Act, which deals with the Mental Health Tribunal issuing service providers with compliance notices.

Section 423 is amended at (3) to correct a drafting error – the words "a compliance notice with a service provider" should read "a service provider with a compliance notice".

Clause 383 – Section 515 amended

Clause 383 amends section 515 of the Mental Health Act, which lists people whose treatment and care the Chief Psychiatrist is responsible for overseeing.

Section 515 is amended at (1)(c) to update terminology. New paragraph (ca) is inserted at (1), which deals with patients who are supervised persons required to undergo treatment as defined in section 4 of the Mental Health Act as a condition of a community supervision order, interim or extended community supervision order, equivalent interim disposition, or a leave of absence order.

This separate category has been included to ensure that the Chief Psychiatrist has oversight of treatment and care provided to supervised persons interacting with the Mental Health Act.

Clause 384 – Section 520 amended

Clause 384 amends section 520 of the Mental Health Act, which deals with the Chief Psychiatrist's ability to review any decision of a psychiatrist about the provision of treatment to involuntary patients or mentally impaired accused persons.

Section 520 is amended at (1)(b) and (7)(b) to update terminology and through the insertion of new (1)(c), which deals with patients who are supervised persons required to undergo treatment as defined in section 4 of the Mental Health Act as a condition of a community supervision order, interim or extended community supervision order, equivalent interim disposition, or a leave of absence order.

This separate category has been included to ensure that the Chief Psychiatrist can review a psychiatrist's decision to provide treatment to all supervised persons interacting with the Mental Health Act.

Clause 385 – Section 527 amended

Clause 385 amends section 527 of the Mental Health Act, which deals with actions the Chief Psychiatrist may take on receipt of a report in relation to a notifiable incident.

Section 527 is amended to insert new paragraphs (iia) and (iib) into (1)(b). These new paragraphs provide that, on receipt of a report, if the incident involves a supervised person, the Chief Psychiatrist may refer the incident to the CEO of the Department or, if the incident involves a resident under the Declared Places Act, to the CEO of the Department principally assisting in the administration of the Disability Services Act.

Clause 386 – Section 536 amended

Clause 386 amends section 536 of the Mental Health Act, which provides that the Chief Psychiatrist may request a list of all mentally impaired accused persons detained at an authorised hospital under a custody order from the Board.

Section 536(1) is replaced to update terminology and to expand the list that may be requested to include supervised persons required to undergo treatment as defined in section 4 of the Mental Health Act as a condition of a community supervision order, interim or extended community supervision order, equivalent interim disposition, or a leave of absence order.

This separate category has been included to ensure that the Chief Psychiatrist can request a list of all supervised persons interacting with the Mental Health Act.

Section 536 is also amended at (2) to update terminology and the section heading is replaced for the same reason.

Clause 387 – Part 30 inserted

Clause 387 inserts new Part 30 into the Mental Health Act: Transitional matters for *Criminal Law (Mental Impairment) Act 2022*.

New Part 30 consists of new sections 678-680 and deals with certain functions of the Board and mental health advocate duties to contact identified persons.

If, immediately before commencement day, a person was required to perform any of the following functions in respect of the Board:

- notify it of the making, revocation or expiry of an involuntary treatment order (section 145);
- report about the performance of a course of ECT on a mentally impaired accused (section 200);
- report about the provision of emergency psychiatric treatment to a mentally impaired accused (section 204);
- report about the performance of psychosurgery on a mentally impaired accused (section 209);

- report when a mentally impaired accused is released from seclusion (section 224);
- report when a mentally impaired accused is released from restraint (section 240); or
- report about the provision of urgent non-psychiatric treatment to a mentally impaired accused (section 242),

the person must perform the function in respect of the Tribunal as soon as practicable.

If, immediately before commencement day, an ***identified person*** under paragraphs (e), (f) or (g) of section 348 was required to be visited or otherwise contacted by an advocate under section 357 within a specified time, an advocate must visit or otherwise contact the person within that specified time.

Clause 388 – Various headings amended

Clause 388 amends the headings of Part 13 Division 2 and Part 15 Division 2 to the Mental Health Act to update terminology.

Division 21 – *National Disability Insurance Scheme (Worker Screening) Act 2020* amended

Division 21 amends the *National Disability Insurance Scheme (Worker Screening) Act 2020* (NDIS Act).

Clause 389 – *National Disability Insurance Scheme (Worker Screening) Act 2020* amended

Clause 389 provides that Division 21 amends the NDIS Act.

Clause 390 – Section 7 amended

Clause 390 amends section 7 of the NDIS Act. That section deals with what constitutes a "conviction" for the purposes of that Act. It is amended to insert new paragraph (e) – "a finding under the *Criminal Law (Mental Impairment) Act 2022* section 41(2)(c) or an equivalent finding under a law of another jurisdiction."

The inclusion of a finding under section 41(2)(c) of the new Act – that the accused committed the offence charged or another offence which, on the charge, the accused might be found to have committed – ensures that this finding is treated as a conviction for the purposes of the NDIS Act. This is consistent with the existing treatment of a finding of not guilty on account of unsoundness of mind (mental impairment) under section 27 of *The Criminal Code*.

Division 22 – *Parliamentary Commissioner Act 1971* amended

Division 22 amends the *Parliamentary Commissioner Act 1971* (PCA).

Clause 391 – *Parliamentary Commissioner Act 1971* amended

Clause 391 provides that Division 22 amends the PCA.

Clause 392 – Section 19H amended

Clause 392 amends section 19H of the PCA at (2) to insert new paragraph (e) – "a finding under the *Criminal Law (Mental Impairment) Act 2022* section 41(2)(c) or an equivalent finding under a law of another State, a Territory or the Commonwealth."

The inclusion of a finding under section 41(2)(c) of the new Act – that the accused committed the offence charged or another offence which, on the charge, the accused might be found to have committed – ensures that this finding is treated as a reportable conviction for the purposes of the PCA. This is consistent with the existing treatment of a finding of not guilty on account of unsoundness of mind (mental impairment) under section 27 of *The Criminal Code*.

Division 23 – *Prisoners (Release for Deportation) Act 1989* amended

Division 23 amends the *Prisoners (Release for Deportation) Act 1989* (PRD Act).

Clause 393 – *Prisoners (Release for Deportation) Act 1989* amended

Clause 393 provides that Division 23 amends the PRD Act.

Clause 394 – Section 6A inserted

Clause 394 inserts new section 6A, "Persons under custody orders under *Criminal Law (Mental Impairment) Act 2022*", into the PRD Act. New section 6A applies to a person required to be detained under a custody order under the new Act who is not otherwise a prisoner under the PRD Act (a ***CLMI Act person***).

New section 6A provides that the PRD Act has effect in relation to CLMI Act persons as if references to prisoners included CLMI Act persons, references to prisons included references to places where CLMI Act persons are required to be detained under custody orders, references to the Prisoners Review Board include the Tribunal, and a reference to detention during the Governor's pleasure in relation to a CLMI Act person was a reference to being required to be detained under a custody order.

The effect of new section 6A is to ensure the PRD Act can operate in respect of CLMI Act persons if necessary.

Division 24 – *Prisons Act 1981* amended

Division 24 amends the Prisons Act.

Clause 395 – *Prisons Act 1981* amended

Clause 395 provides that Division 24 amends the Prisons Act.

Clause 396 – Section 67 amended

Clause 396 amends section 67 of the Prisons Act, which deals with mail sent by prisoners. Section 67(1) is amended to insert new (e), referring to the Chief Mental Health Advocate or the Mental Health Advocacy Service. The effect is that mail sent by a prisoner addressed to either the Chief Mental Health Advocate or the Mental Health Advocacy Service cannot be opened or read.

Clause 397 – Section 113 amended

Clause 397 amends section 113 of the Prisons Act, which deals with exchanging information. It is amended to ensure that information about prisoners who are CLMI identified persons under Part 8 of the new Act can be disclosed to the Chief Mental Health Advocate or a mental health advocate for the purposes of the performance of their respective functions under the new Act.

Division 25 – *Restraining Orders Act 1997* amended

Division 25 amends the Restraining Orders Act (RO Act).

Clause 398 – *Restraining Orders Act 1997* amended

Clause 398 provides that Division 25 amends the RO Act.

Clause 399 – Section 44E amended

Clause 399 amends section 44E of the RO Act. That section deals with the use of closed circuit television or screening arrangements and is amended at (3)(c) to replace the reference to the former Act with a reference to the new Act.

Division 26 – *Security and Related Activities (Control) Act 1996* amended

Division 26 amends the *Security and Related Activities (Control) Act 1996* (SRAC Act).

Clause 400 – *Security and Related Activities (Control) Act 1996* amended

Clause 400 provides that Division 26 amends the SRAC Act.

Clause 401 – Section 4B amended

Clause 401 amends section 4B of the SRAC Act, which deals with what constitutes a finding of guilt for the purposes of that Act. Section 4B is amended to insert new paragraph (e) – "a finding under the *Criminal Law (Mental Impairment) Act 2022* section 41(2)(c) or an equivalent finding under provisions of the laws of another jurisdiction."

The inclusion of a finding under section 41(2)(c) of the new Act – that the accused committed the offence charged or another offence which, on the charge, the accused might be found to have committed – ensures that this finding is treated as a finding of guilt for the purposes of the SRAC Act. This is consistent with the existing treatment of a finding of not guilty on account of unsoundness of mind (mental impairment) under section 27 of *The Criminal Code*.

Division 27 – *Sentence Administration Act 2003* amended

Division 27 amends the *Sentence Administration Act 2003* (SAA).

Clause 402 – *Sentence Administration Act 2003* amended

Clause 402 provides that Division 27 amends the SAA.

Clause 403 – Section 98 amended

Clause 403 amends section 98 of the SAA to insert a reference to the new Act. This reflects that community corrections officers appointed under the SAA are needed for the purposes of the new Act – to perform the functions of a supervising officer under clause 54(2) and enforce an electronic monitoring condition under Part 13 Division 2.

Clause 404 – Section 119 amended

Clause 404 amends section 119(1) of the SAA. That section deals with the use and disclosure of information by departmental staff for certain purposes. It is amended to insert new paragraph (bb) to provide that information may be disclosed under sections 224(4) or 226(1) of the new Act. Those sections deal with the recording, use and disclosure of information about persons covered by the new Act and disclosure of information between supporting agencies for the purposes of the performance of relevant functions by those agencies.

Division 28 – *Working with Children (Criminal Record Checking) Act 2004* amended

Division 28 amends the *Working with Children (Criminal Record Checking) Act 2004* (WWC Act).

Clause 405 – *Working with Children (Criminal Record Checking) Act 2004* amended

Clause 405 provides that Division 28 amends the WWC Act.

Clause 406 – Section 8 amended

Clause 406 amends section 8 of the WWC Act. That section deals with what constitutes a "conviction" for the purposes of that Act. It is amended to insert new paragraph (e) – "a finding under the *Criminal Law (Mental Impairment) Act 2022* section 41(2)(c) or an equivalent finding under provisions of the laws of another jurisdiction."

The inclusion of a finding under section 41(2)(c) of the new Act – that the accused committed the offence charged or another offence which, on the charge, the accused might be found to have committed – ensures that this finding is treated as a conviction for the purposes of the WWC Act. This is consistent with the existing treatment of a finding of not guilty on account of unsoundness of mind (mental impairment) under section 27 of *The Criminal Code*.

Division 29 – *Young Offenders Act 1994* amended

Division 29 amends the Young Offenders Act.

Clause 407 – *Young Offenders Act 1994* amended

Clause 407 provides that Division 29 amends the Young Offenders Act.

Clause 408 – Section 16 amended

Clause 408 amends section 16 of the Young Offenders Act, which deals with exchanging information. It is amended to ensure that information about detainees who are CLMI identified persons under Part 8 of the new Act can be disclosed to the Chief Mental Health Advocate or a mental health advocate for the purposes of the performance of their respective functions under the new Act.

Division 30 – Various Acts amended

Division 30 makes amendments to various Acts.

Clause 409 – Various references to *Criminal Law (Mentally Impaired Accused) Act 1996* amended

Clause 409 amends a number of Acts to replace references to the former Act with references to the new Act.

Clause 410 – Various references to *Declared Places (Mentally Impaired Accused) Act 2015* amended

Clause 410 amends a number of Acts to replace references to the Declared Places Act with references to the Declared Places Act as renamed.

Clause 411 – Various references to "Mentally Impaired Accused Review Board" amended

Clause 411 amends a number of Acts to replace references to the Board with references to the Tribunal.

Clause 412 – Various references to "unsoundness of mind" amended

Clause 412 amends a number of Acts to replace references to "unsoundness of mind" with references to "mental impairment".

Schedule 1 – Serious offences

Schedule 1 contains a list of serious offences, including offences that are serious in all circumstances, being certain offences under the *Bush Fires Act 1954*, *Children and Community Services Act 2004*, *The Criminal Code*, *Prostitution Act 2000*, and *Road Traffic Act 1974,* and offences that are serious if committed in specified circumstances, being certain offences under *The Criminal Code* and the *Prostitution Act 2000*.

The Schedule mirrors Schedule 1 to the HRSO Act.