

MENTAL HEALTH LEGISLATION AMENDMENT BILL 2013:

Explanatory Memorandum

Outline

An important stage in the mental health reform agenda in Western Australia is the introduction of the Mental Health Bill 2013 (referred to in this document as ‘the Act’) and the accompanying Mental Health Legislation Amendment Bill 2013 (referred to in this document as the ‘Amendment Act’).

The Amendment Act will:

- (a) repeal the *Mental Health Act 1996* (the 1996 Act), in addition to the legislation accompanying, or subsidiary to, the current Act;
- (b) make minor amendments to the 1996 Act to guarantee the workability and validity of certain actions taken under the 1996 Act, until the commencement of the Act;
- (c) promote a successful transition to the Act; and
- (d) promote the workability of various other pieces of legislation upon commencement of the Act.

It is essential that the Amendment Act be read in conjunction with the Act.

Long title

The long title is a formal description of the purposes of the Act, as denoted in the outline.

Part 1 Preliminary matters

Clause 1 sets out how the Amendment Act may be cited.

Clause 2 sets the dates for commencement of the Act, with Part 2 coming into operation before the remainder of the Amendment Act.

Part 2 Mental Health Act 1996 amended

Part 2 of the Amendment Act amends the 1996 Act to:

- (a) enable the Chief Psychiatrist to delegate his or her functions under the 1996 Act to any psychiatrist who meets the definition of psychiatrist under the 1996 Act, and to ensure that the actions of psychiatrists under previous delegations are valid;
- (b) provide for the appointment of a person to act in the position of the Chief Psychiatrist, and to validate any acts done by or in relation to a psychiatrist previously appointed to act in the office of the Chief Psychiatrist; and
- (c) ensure that the actions of medical practitioners under a blanket authorisation by a previous Chief Psychiatrist, which designated every medical practitioner to be an authorised medical practitioner for the purposes of sections 69 and 77 of the 1996 Act, are valid.

Clause 3 states that Part 2 of the Amendment Act amends the 1996 Act.

Clause 4 inserts a new section after section 15 of the 1996 Act, being 16A. Section 16A provides for the appointment of a psychiatrist to act in the position of Chief Psychiatrist during a vacancy in office, or when the Chief Psychiatrist is on leave or is otherwise unable to perform the functions of office. Under section 16A, the CEO of the Health Department will be responsible for appointment; determination of terms and conditions; and termination, if necessary. *Clause 4* provides that a psychiatrist cannot act in the position of Chief Psychiatrist for a continuous period of more than 12 months.

Clause 5 amends section 16 of the 1996 Act. Section 16 currently allows the Chief Psychiatrist to delegate any of his or her functions under the 1996 Act (other than the power of delegation) to another psychiatrist 'in the department'. The words 'in the department' limit the psychiatrists to whom the Chief Psychiatrist can delegate his or her functions to psychiatrists who are public sector employees employed under the *Public Sector Management Act 1994*. This precludes, for example, psychiatrists employed in authorised hospitals. The amendment enables the Chief Psychiatrist to delegate any of his or her functions under the 1996 Act (other than the power of delegation) to any medical practitioner who meets the definition of psychiatrist under the 1996 Act.

Clause 6 inserts section 17 into the 1996 Act. Section 9 of the *Health Legislation Administration Act* (HLA Act) gives a general power to certain officers, including the Chief Psychiatrist, to delegate any of their powers or duties under an Act to which the HLA Act applies. When the administration of the 1996 Act was transferred from the Minister for Health to the Minister for Mental Health in 2008, the 1996 ceased to be an Act to which the HLA Act applies. Consequently, the Chief Psychiatrist is currently unable to delegate his or her powers or duties under section 9 of the HLA Act. The inclusion of section 17 in the 1996 Act ensures that the 1996 Act is an Act to which the HLA Act applies, and allows the Chief Psychiatrist to delegate his or her powers or duties under the HLA Act.

Clause 7 inserts a number of validation provisions into the 1996 Act, being sections 217-219. Section 217 validates any acts done by or in relation to a psychiatrist appointed to act in the office of the Chief Psychiatrist under the 1996 Act prior to the day before the day on which *clause 4* comes into operation. Section 218 validates acts done by or in relation to a delegate acting under a delegation made under section 9 of the HLA Act from 23 September 2008 to the day before the day on which *clause 6* comes into operation. It also validates any delegations made under section 9 of the HLA Act during this period. The date of 23 September 2008 is the date on which the Barnett ministry was sworn in and the 1996 Act was first allocated to the Minister for Mental Health. Section 219 relates to the designation of authorised medical practitioners. On 13 September 1997, a former Chief Psychiatrist, Dr George Lipton, gazetted that every medical practitioner registered under the *Medical Act 1894* was designated as an authorised medical practitioner for the purposes of sections 69 and 70 of the 1996 Act. On 19 July 2013, the Chief Psychiatrist gazetted that certain medical practitioners were designated as authorised medical practitioners for the purposes of section 77 of the 1996 Act. On 27 October 2013, the Chief Psychiatrist gazetted that certain medical practitioners were designated as authorised medical practitioners for the purposes of sections 69 and 77 of the 1996 Act. Section 219 validates acts (including omissions) of authorised medical practitioners under sections 69 and 77 of the 1996 Act during these periods. Section 69 of the 1996 Act allows an authorised medical practitioner to confirm a community treatment order (CTO) in respect of a patient. Subsection (2) of section 219 validates acts done by a medical practitioner under section 69 of the 1996 Act between 13 November 1997 and 25 October 2013 (the day before the day on which the subsequent order authorising medical practitioners under section 69 commenced). Section 18 of the 1996 Act allows the Chief Psychiatrist to designate a medical practitioner to be an authorised medical practitioner for the purposes of section 77 of the 1996 Act. Section 77 allows an authorised medical practitioner to, at the request of a supervising psychiatrist, examine a patient who is the subject of a CTO and to provide a written report about the patient. Subsection (3) of section 219 validates requests made by a supervising psychiatrist under section 77(1) of the 1996 Act between 13 November 1997 and 19 July 2013. Subsection (4) of section 219 validates acts done by a medical practitioner for the purpose of complying with a request by a supervising psychiatrist under section 77(1) of the 1996 Act.

Part 3 *Mental Health Act 2013* amended

Clause 8 states that Part 3 amends the Act.

Clause 9 inserts two additional Parts into the Act, being Parts 28 and 29.

Part 28 repeals the following:

- the 1996 Act;
- the *Mental Health (Consequential Provisions) Act 1996*;
- the *Mental Health Regulations 1997*; and
- the *Mental Health (Transitional) Regulations 1997*.

Part 29 sets out the transitional arrangements in relation to the timeframes for transition from the 1996 Act to the Act. Examples of where transitional provisions are required include:

- administrative matters, for example ensuring that authorised hospitals under the 1996 Act continue as such;
- transitional arrangements in relation to referrals made under the 1996 Act, because timeframes for referrals are shorter under the Act than under the 1996 Act;
- transitional arrangements where a course of electroconvulsive therapy (ECT) has commenced pursuant to the current Act, exempting a person who performs ECT in accordance with the 1996 Act from the offence provision in the Act; and
- timeframes for review of involuntary status by the Mental Health Tribunal (MHT), which will replace the existing Mental Health Review Board and conduct more frequent reviews than under the 1996 Act.

Mental health services and others performing functions under the Act will need to be responsive to the changes required in transition from the 1996 Act to the Act.

However, in some cases immediate compliance will not be possible. For example, it would be unworkable and impractical for all involuntary patients to immediately be reviewed by the MHT within the new shorter timeframes, because of the MHT's initial limited capacity to do so. Further, this would mean that periodic reviews for patients who are involuntary on the date of commencement of the Act would need to be conducted within the same timeframe.

In circumstances where transitional arrangements are required and there is no relevant provision in the Amendment Act, transitional regulations can be drafted to assist.

Part 4 Amendment to other Acts

Division 1 - *Criminal Law (Mentally Impaired Accused) Act 1996* amended

Clause 10 states that Division 1 amends the *Criminal Law (Mentally Impaired Accused) Act 1996* (MIA Act).

Clause 11 relates to some definitions in section 3 of the MIA Act that refer to the 1996 Act. *Clause 11* amends the cross-references and inserts additional definitions necessary for the interpretation of the additional sections inserted by Division 1 of the Amendment Act.

Clause 12 amends section 5 of the MIA Act with respect to a person who is refused bail and detained in an authorised hospital. *Clause 12* amends the grounds for a hospital order under the MIA Act to make them consistent with the criteria for an inpatient treatment order under the Act, which will differ from the criteria for an involuntary treatment order under the 1996 Act. References to ‘involuntary patient’ in subsections 5(4) and (5) are replaced with ‘involuntary inpatient’, correcting what appears to have been an oversight in the preparation of the MIA Act. This change will also ensure that people on Community Treatment Orders (CTOs) can be made subject to a hospital order in circumstances where bail has been refused.

Clause 13 makes minor amendments to section 6 of the MIA Act with respect to the relationship between the MIA Act and the 1996 Act, so as to refer to the Act rather than the 1996 Act.

Clause 14 makes minor amendments to section 23 of the MIA Act to ensure ease of reference.

Clause 15 amends section 24 of the MIA Act. Section 24 of the MIA Act sets out the circumstances in which the Mentally Impaired Accused Review Board can determine that a mentally impaired accused is to be detained in an authorised hospital. *Clause 15* ensures that the circumstances are in line with the criteria for an involuntary treatment order, and with the change in *clause 12*.

Clause 16 makes minor amendments to section 25 of the MIA Act with respect to cross-referencing and definitions.

Clause 17 corrects a grammatical error in section 31 of the MIA Act.

Clause 18 makes a minor amendment to section 32 of the MIA Act with respect to cross-referencing.

Division 2 - *Guardianship and Administration Act 1990* amended

Clause 19 states that Division 2 amends the *Guardianship and Administration Act 1990* (GAA Act).

Clause 20 removes the power of a person in charge of a hospital to make decisions on behalf of a person who comes within the scope of the 1996 Act.

Clause 21 amends section 110ZH of the GAA Act to clarify that provision of psychiatric treatment in the circumstances described in the definition of urgent psychiatric treatment in section 110ZH is governed by the Act and not by the GAA Act sections 110ZI and 110ZIA.

Clause 22 inserts a heading into the GAA Act Schedule 5. The heading creates Division 1, Transitional matters for the GAA Act, for ease of reference.

Clause 23 inserts a new clause into the new Division 1, stating that Division 1 does not apply in relation to the estate of a person to whom Division 2 applies. The existing clauses 1-6 in Schedule 5 of the GAA Act remain, constituting Division 2.

Clause 24 inserts Division 2 of Schedule 5 of the GAA Act. Division 2 relates to the interface between the GAA Act and section 49 of the *Public Trustee Act 1941* (Public Trustee Act) during the transition to the Act. The effect of the clause is that a person whose estate was being managed by the Public Trustee under Schedule 5 clauses 1 and 2 of the GAA Act is taken to be subject to an administration order appointing the Public Trustee as the administrator. The Public Trustee will have the same functions in relation to the person's estate as the Public Trustee currently has.

Division 3 - *Hospitals and Health Services Act 1927* amended

Clause 25 states that Division 3 amends the *Hospitals and Health Services Act 1927* (HHS Act).

Clause 26 makes minor amendments to section 2 of the HHS Act with respect to cross-referencing and to reflect that the Act allows a person to be detained at a place other than an authorised hospital.

Clause 27 makes a minor amendment to a cross-reference in section 4 of the HHS Act.

Clause 28 amends section 26DA of the HHS Act. Section 26DA provides that a licence may be endorsed by the CEO (as defined in the HHS Act) to allow persons to be received and admitted to the hospital under the 1996 Act and to be detained as involuntary patients under the 1996 Act. *Clause 28* inserts a prerequisite that the endorsement of the licence be on recommendation of the Chief Psychiatrist.

Clause 29 amends section 26FA of the HHS Act. Section 26FA provides that the CEO (as defined in the HHS Act) may cancel an endorsement under section 26DA of the HHS Act. *Clause 29* inserts a prerequisite that the CEO consult the Chief Psychiatrist before deciding whether or not to cancel an endorsement.

Clause 30 makes a minor amendment to a cross-reference in section 26P of the HHS Act.

Clause 31 makes a minor amendment to a cross-reference in section 26Q of the HHS Act.

Division 4 - Other Acts amended

Subdivision 1: *Anatomy Act 1930* amended

Clause 32 states that Subdivision 1 amends the *Anatomy Act 1930* (Anatomy Act).

Clause 33 amends some outdated terms in section 8 of the Anatomy Act, namely ‘inspector general of the insane’ and ‘hospitals for the insane’. The reference to the inspector general of the insane has become redundant, and the reference to hospitals for the insane has been replaced with ‘authorised hospital’.

Subdivision 2: *Bail Act 1982* amended

Clause 34 states that Subdivision 2 amends the *Bail Act 1982* (Bail Act).

Clause 35 makes minor amendments to terms used in Schedule 1 Part D clause 2 to make them consistent with the terms and concepts used in the Act.

Subdivision 3: *Carers Recognition Act 2004* amended

Clause 36 states that Subdivision 3 amends the *Carers Recognition Act 2004* (Carers Recognition Act).

Clause 37 makes a minor amendment to a cross-reference in section 5 of the Carers Recognition Act.

Subdivision 4: *Constitution Acts Amendment Act 1899* amended

Clause 38 states that Subdivision 4 amends the *Constitution Acts Amendment Act 1899* (CAA Act).

Clause 39 makes a minor amendment to Schedule V Part 1 Division 1 of the CAA Act to replace the Mental Health Review Board under the 1996 Act with the Mental Health Tribunal under the Act.

Clause 40 deletes reference to the Council of Official Visitors in Schedule V Part 1 Division 1 of the CAA Act. This refers to offices or places vacated in certain circumstances. This reference is not replaced with reference to the Mental Health Advocacy Service because the Chief Mental Health Advocate and other mental health advocates will come within the remit of Schedule V Part 2 Division 2 of the CAA Act.

Subdivision 5: *Coroners Act 1996* amended

Clause 41 states that Subdivision 5 amends the *Coroners Act 1996* (Coroners Act).

Clause 42 broadens the definition of ‘person held in care’ to include a person who is absent without leave from a hospital or other place under the Act. This will provide an additional safeguard under the Coroners Act around reporting, investigation and inquests with respect to the death of a person held in care.

Subdivision 6: *Court Security and Custodial Services Act 1999* amended

Clause 43 states that Subdivision 6 amends the *Court Security and Custodial Services Act 1999* (CSCS Act).

Clause 44 makes some minor amendments to section 3 of the CSCS Act to make the terms, concepts and cross-references in the CSCS Act consistent with those in the Act.

Clause 45 makes minor amendments to section 4 of the CSCS Act to make the terms, concepts and cross-references in the CSCS Act consistent with those in the Act.

Clause 46 makes a minor amendment to a cross-reference in section 76 of the CSCS Act.

Subdivision 7: *The Criminal Code* amended

Clause 47 states that Subdivision 7 amends *The Criminal Code*.

Clause 48 makes minor amendments to cross-references in section 149 of *The Criminal Code*.

Clause 49 makes a minor amendment to a cross-reference in section 336 of *The Criminal Code*.

Clause 50 makes a minor amendment to a cross-reference in section 337 of *The Criminal Code*.

Subdivision 8: *Criminal Investigation Act 2006* amended

Clause 51 states that Subdivision 8 amends the *Criminal Investigation Act 2006* (Criminal Investigation Act).

Clause 52 makes minor amendments to cross-references in section 142 of the Criminal Investigation Act.

Subdivision 9: *Cross-border Justice Act 2008* amended

Clause 53 states that Subdivision 9 amends the *Cross-border Justice Act 2008* (CBJ Act).

Clause 54 makes a minor amendment to a cross-reference in section 95 of the CBJ Act.

Subdivision 10: *Dangerous Sexual Offenders Act 2006* amended

Clause 55 states that Subdivision 10 amends the *Dangerous Sexual Offenders Act 2006* (DSO Act).

Clause 55 makes a minor amendment to a definition in section 3 of the DSO Act, replacing it with a cross-reference to a reference in the Act.

Subdivision 11: *Electoral Act 1907* amended

Clause 57 states that Subdivision 11 amends the *Electoral Act 1907* (Electoral Act).

Clause 58 amends section 40 of the Electoral Act in line with the change from the 1996 Act to the Act whereby a psychiatrist will no longer be able to restrict a person from voting.

Clause 59 amends section 51A of the Electoral Act to state that a person's name is taken to have been removed from an electoral roll if, immediately before Subdivision 11 of the Amendment Act commences, the person's name did not appear on the roll because it had been removed from the roll under section 51AA(1a) of the Electoral Act as in force before that day. This will ensure that a person who has had their name removed from the electoral roll pursuant to the 1996 Act is not required to comply with provisions in the Electoral Act about compulsory voting.

Clause 60 removes section 51AA(1a) of the Electoral Act which requires a person's name to be removed from the electoral roll pursuant to a notice provided under the 1996 Act, in line with the removal of the ability of a psychiatrist to restrict a person from voting.

Subdivision 12: *Gaming and Wagering Commission Act 1987* amended

Clause 61 states that Subdivision 12 amends the *Gaming and Wagering Commission Act 1987* (GWC Act).

Clause 62 removes an outdated provision in the GWC Act, section 12(11)(a), about a position automatically becoming vacant in the Gaming and Wagering Commission where a person is, pursuant to the *Mental Health Act 1962*, incapable of holding office under the GWC Act. It is noted that a person will be able to be removed by reason of any disability pursuant to section 12(11)(d) of the GWC Act, but there will no longer be a presumption that a person is incapable because they are within the scope of mental health legislation.

Subdivision 13: *Health and Disability Services (Complaints) Act 1995*

Clause 63 states that Subdivision 13 amends the *Health and Disability Services (Complaints) Act 1995* (HaDSC Act).

Clause 64 amends section 3A of the HaDSC Act to require it to be read with Part 6 of the *Disability Services Act 1993* and Part 19 Divisions 3 and 4 of the Act.

Subdivision 14: *Health Legislation Administration Act 1984* amended

Clause 65 states that Subdivision 14 amends the *Health Legislation Administration Act 1984* (HLA Act).

Clause 66 amends section 3 of the HLA Act in line with *clause 67*.

Clause 67 amends provisions in section 6 of the HLA Act in relation to the Chief Psychiatrist who, under the Act, will no longer be appointed pursuant to the HLA Act.

Subdivision 15: *Juries Act 1957* amended

Clause 68 states that Subdivision 15 amends the *Juries Act 1957* (Juries Act).

Clause 69 makes a minor amendment to a cross-reference in section 5 of the Juries Act.

Subdivision 16: *Land Administration Act 1997* amended

Clause 70 states that Subdivision 16 amends the *Land Administration Act 1997* (Land Administration Act).

Clause 71 makes a minor amendment to a definition in section 21 of the Land Administration Act.

Subdivision 17: *National Health Funding Pool Act 2012* amended

Clause 72 states that Subdivision 17 amends the *National Funding Pool Act 2012* (NHFP Act).

Clause 73 makes a minor amendment to a cross-reference in section 16 of the NHFP Act.

Subdivision 18: *Parliamentary Commissioner Act 1971* amended

Clause 74 states that Subdivision 18 amends the *Parliamentary Commissioner Act 1971* (Parliamentary Commissioner Act).

Clause 75 replaces an outdated reference in section 17A of the Parliamentary Commissioner Act to the Director of Psychiatric Services, replacing it with reference to the CEO as defined in section 3 of the HLA Act.

Subdivision 19: *Perth Theatre Trust Act 1979* amended

Clause 76 states that Subdivision 19 amends the *Perth Theatre Trust Act 1979* (Perth Theatre Trust Act).

Clause 77 removes an outdated provision in the Perth Theatre Trust Act, being section 6(1)(e), about a position automatically becoming vacant in the Perth Theatre Trust where a person is incapable pursuant to the *Mental Health Act 1962*. It is noted that a person will be able to be removed from office on other grounds pursuant to section 7 of the Perth Theatre Trust Act, but there will no longer be a presumption that a person is incapable because they are within the scope of mental health legislation.

Subdivision 20: *Protective Custody Act 2000* amended

Clause 78 states that Subdivision 20 amends the *Protective Custody Act 2000* (Protective Custody Act).

Clause 79 makes a minor amendment to a cross-reference in section 4 of the Protective Custody Act.

Clause 80 makes a minor amendment to a cross-reference in section 10 of the Protective Custody Act.

Subdivision 21: *Public Trustee Act 1941* amended

Clause 81 states that Subdivision 21 amends the *Public Trustee Act 1941* (Public Trustee Act).

Clause 82 replaces some outdated terms in section 12 of the Public Trustee Act, namely ‘idiot, or lunatic, or of unsound mind’ with reference to a person who has a mental disability as defined in the as defined in the GAA Act.

Clause 83 makes a minor amendment to cross-referencing in section 49 of the Public Trustee Act in line with *clause 24*.

Clause 84 replaces some outdated terms in section 54 of the Public Trustee Act, namely ‘any insane patient, insane person, or represented person’ with reference to a person with mental illness under the Act or a represented person.

Subdivision 22: *Spent Convictions Act 1988* amended

Clause 85 states that Subdivision 22 amends the *Spent Convictions Act 1988* (Spent Convictions Act).

Clause 86 makes a minor amendment to a cross-reference in Schedule 3 clause 1(7) of the Spent Convictions Act and updates the Schedule to include the Mental Health Commission. The impact of the latter amendment is that a person employed, seconded or being considered for employment, whether paid or unpaid or as a student, at the Mental Health Commission must disclose a spent conviction. Without the amendment this would only apply to the Department of Health.

Subdivision 23: *University Medical School, Teaching Hospitals, Act 1955* amended

Clause 87 states that Subdivision 23 amends the *University Medical School, Teaching Hospitals, Act 1955* (UMS Act).

Clause 88 makes minor amendments to cross-references in section 5 of the UMS Act.

Subdivision 24: *Young Offenders Act 1994* amended

Clause 89 states that Subdivision 24 amends the *Young Offenders Act 1994* (Young Offenders Act).

Clause 90 makes a minor amendment to a definition in section 179 of the Young Offenders Act.