

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

MENTAL HEALTH AND RELATED SERVICES AMENDMENT BILL 2019

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This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) – namely the International Covenant on Civil and Political Rights done at New York on 16 December 1966.

OVERVIEW OF THE BILL

The Mental Health and Related Services Amendment Bill 2019 (the Bill) amends the *Mental Health and Related Services Act 1998* (the Act) to confer the jurisdiction of the Mental Health Review Tribunal (MHRT) under the Act onto the Northern Territory Civil and Administrative Tribunal (NTCAT). The MHRT will then cease to exist. The intention in drafting the Bill was to make as few substantive amendments to the jurisdiction.

There are no substantive changes made to the practice or procedure under the Act. The appointment and composition of members remains unchanged. While some powers and functions conferred on the MHRT by the Act are removed by the Bill that is because the *Northern Territory Civil and Administrative Act 2014* (NTCAT Act) has equivalent or more beneficial provisions than the Act. The Bill does not reform the process for making or approving procedures and forms under the Act. It preserves the need for a hearing of a review of an involuntary admission order that has been made.

The more significant changes in the Bill are to enable the Supreme Court to consider evidence in the NTCAT below when it is hearing an appeal.

The current requirement that the MHRT seek out and act on the wishes of the parties before publishing its reports has been removed and replaced with a positive obligation to take them into account. In the future the NTCAT will be able to do publish its reports under the Act only once it has considered the needs of the parties and if that is in the public interest. The Bill maintains the requirement to not hold a hearing in public under the Act unless the NTCAT orders otherwise.

HUMAN RIGHTS IMPLICATIONS

The Bill engages the right to equality before courts and tribunals referred to in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and the right to effective access to justice referred to in Article 13(1) of the Convention on the Rights of Persons with Disabilities (CRPD):

Fair trial and fair hearing rights – Article 14(1) of the ICCPR

Article 14 of the ICCPR provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals public order (order public) or national security in a democratic

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society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Article 13(1) of the CRPD provides that:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

Independent and impartial tribunal established by law

The Bill repeals and replaces the entirety of Part 15, Division 1 of the Act as to the establishment of the MHRT. While this may appear a substantive change, that is not the case as the new provisions contain much of the substance of the former repealed provisions.

The Bill provides that the members of the NTCAT exercising jurisdiction under the Act must as far as reasonably practical be constituted by members of diverse gender and from diverse backgrounds including Aboriginal and Torres Strait Islander backgrounds. This ensures that the NTCAT is impartial and does not suffer from bias.

New section 120(2) will ensure, by restating the many and various positions that a member nominated to constitute the NTCAT is not able to hold, that the members are impartial and will not potentially have come into contact with the person subject to the review or the application for involuntary detention beforehand.

Section 121 requires the NTCAT be comprised of three members, a legal member, medical member and community member in order to exercise a function under the Act. This mix of members aids in ensuring that the NTCAT is independent and impartial to the matters that will come before it.

What the new provisions of the Bill reference is that in the future members will be appointed under the provisions of the NTCAT Act, a process that involves for the President and Deputy President appointment by the Administrator and then publication of a Notice in the Gazette ensuring a robust and transparent process. This change advances the right to an independent and transparently appointed Tribunal from the former position where members were simply appointed by the Administrator without any requirement for publication.

The press and public may be excluded

The new section 135 to be inserted by the Bill empowers the NTCAT not to hold a hearing of the NTCAT under the Act in public unless the NTCAT orders otherwise. This is not a change in the process for proceedings under the Act, but is contrary to the usual practice of the NTCAT where hearings are to be conducted in public. The Act sets out the matters to be taken into consideration by the NTCAT when making a decision under the Act to hold a hearing in public in order to balance the interests of the person against the interests of the public or justice remain the same namely (from section 135(2) of the Act):

- (a) the consent has been obtained of the person who is the subject of the review or the involuntary detention application;
- (b) the privacy of the parties to the review or the involuntary detention application will not be adversely affected; and

CABINET-IN-CONFIDENCE

- (c) the public hearing will not result in serious harm to the health of the person who is the subject of the review or involuntary detention application or will not place the safety of other persons at risk.

Any judgement rendered in a criminal case or in a suit at law shall be made public

The Bill repeals section 141 of the Act which set out the process and consideration for the MHRT to prepare and publish a report of the reasons for its decisions. That provision required that the report not include the name of the person who is the subject of the decision or any other material that may disclose the identity of the person. It further provided that the President must only publish a report of the reasons for its decision after giving due consideration to the wishes of the person to ensure that the privacy of the parties to the proceedings will not be adversely affected by the publication nor will the health of the person be harmed nor place at risk the safety of other persons.

The Bill engages with this right that a judgment rendered shall be made public positively by presuming that the NTCAT will now publish a final decision under the Act. The new section 141A provides that before deciding to publish a decision the NTCAT must take into account similar considerations as repealed as to whether or not the privacy of the parties will be adversely affected by the publication, whether the publication will result in serious harm to the health of the person or will place at risk the safety of other persons and that the publication of the decision is in the public interest. The ability of the NTCAT to be able to consider that publication of the decision is in the public interest engages further with this right and will enable the development of relevant jurisprudence in relation to the Act. The obligation to not disclose identifying information about involved persons will also be re-inserted into the Act by new section 141A(2).

Self-incrimination

Article 14(3) of the ICCPR provides minimum guarantees in relation to the determination of criminal charges brought against a person. Article 14(3)(g) provides a right against self-incrimination in respect of not being compelled to testify against oneself.

Matters under this Act are not criminal, although they may result in the involuntary detention of a person in order to prevent them from causing harm to themselves or others in the community.

The proposed amendment to section 137(2) seeks to provide witnesses who may be giving evidence in a matter under the Act the same privilege against self-incrimination that would be available if the witness gave evidence in a Territory Court. This is of particular relevance in respect of the potential for a person subject to an involuntary detention order to provide evidence in an NTCAT proceeding that may prove to be self-incriminating in any subsequent criminal proceeding perhaps relating to their conduct whilst suffering a psychotic episode.

The proposed amendment to section 137(2) balances the tension between civil and criminal proceedings over the same subject matter in a fair, reasonable and objective manner.

While the new section 137(2) removes the ability for a person to refuse to provide evidence on the grounds that it may incriminate them, it deliberately retains the protection sought under Article 14(3)(g) through prohibiting the use of evidence obtained during the NTCAT proceeding against the person in subsequent criminal proceedings.

Right to legal assistance

Article 14(3)(d) of the ICCPR sets out the right in a criminal matter to appear at a trial, to seek to defend yourself or engage legal assistance and if unable to afford legal assistance to have it assigned without cost if the person does not have sufficient means to pay for it.

CABINET-IN-CONFIDENCE

As noted above, matters under this Act are not criminal, although they may result in the involuntary detention of a person in order to prevent them from causing harm to themselves or others in the community.

In this respect the Bill engages positively with this human right. The Bill omits sections 131(1) and (2) of the Act. Section 131 is a general right of appearance or to have a legal practitioner or another appear. That this section is omitted is not a negative engagement with this right as by omitting section 131(1), the mirror and more comprehensive provision of the NTCAT Act, section 130 will apply. Section 131(2) is then reinserted into the Act and engages positively with this right as it ensures that if a person is unrepresented at the hearing and the NTCAT considers the person should be represented at the hearing, the NTCAT must appoint a legal practitioner to represent the person. Following provisions confirm that the NTCAT may order the Territory to pay all or part of the costs of the legal practitioner so appearing.

Examination of witnesses

Article 14(3)(e) of the ICCPR provides, again in a criminal context, the right to examine or have examined the witnesses against a person and obtain the attendance and examination of witnesses on the persons behalf.

Again, matters under the Act are not criminal, although they may result in the involuntary detention of a person in order to prevent them from causing harm to themselves or others in the community.

The Bill omits section 133 from the Act, which provided for the calling and production of evidence before the MHRT. In this respect the Bill engages positively with this human right and will ensure a more robust manner in which it may be exercised. By repealing section 133 of the Act, what will instead apply will be section 89 of the NTCAT Act which permits the NTCAT to issue a summons for a party to produce evidence or appear to give evidence. Section 90 of the NTCAT Act then goes on to create an offence for a failure to comply with a summons, an offence not created under the Act. Section 91 of the NTCAT Act provides for the production, copying or keeping of evidence and section 92 provides that a witness may be required to take an oath before giving evidence. Again these are matters not otherwise provided for in the Act and so will afford a better protection of this right to examine a witness and obtain evidence.

Freedom from interference with privacy

Article 17(1) of the ICCPR provides that persons shall not ‘...be subjected to arbitrary or unlawful interference with ...privacy...’. The Bill omits section 139 of the Act which created an offence if a person who is a member of the MHRT, Registrar or Deputy Registrar, authorised officer or person employed to provide administrative support to the MHRT disclosed information obtained in the course of their duties.

The Bill engages positively with this human right as by omitting section 139 of the Act, it will enable section 149 of the NTCAT Act with its more comprehensive provisions to operate.

CONCLUSION

This Bill is compatible with human rights. Where it does engage with human rights it does so in a positive manner increasing the protections provided.