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The Health Legislation Amendment Bill 2001 and the amendments to the Mental Health Act 2000

On 14 March 2000 the Mental Health Bill 2000 was introduced into the Queensland Legislative Assembly by the Minister for Health, Hon WM Edmond MP. The purpose of the Bill was to replace the Mental Health Act 1974 with a more effective and accountable system of involuntary treatment and care for people with a mental illness. The Mental Health Act 2000 was assented to on 8 June 2000 but the majority of the Act has not yet been proclaimed into force.

On 11 September 2001, the Minister for Health, Hon WE Edmond MP, introduced the Health Legislation Amendment Bill which makes amendments to numerous Health portfolio Acts, including the Mental Health Act 2000. The amendments to the Mental Health Act, intended to rectify issues that have arisen during implementation planning, include:

- *Clarifying the strict test for release of forensic patients by the Mental Health Review Tribunal (MHRT) or the Mental Health Court (MHC) following questions raised by two Court of Appeal judges about the interpretation of s 204 of the new Act.*
- *Clarifying what information may be submitted to the Mental Health Court by a non-party such as a victim of crime*
- *Ensuring that when a decision is made to grant limited community treatment for a forensic patient, consideration be given to whether it should be conditional on the person not contacting certain people, including a victim of crime*
- *Enabling a non-contact order to be made by the Mental Health Review Tribunal when revoking a forensic order, or by the Mental Health Court on deciding not to make a forensic order for a person found to be of unsound mind or permanently unfit for trial.*

This Research Brief: summarises key changes introduced by the Mental Health Act 2000 in relation to matters including the determination of questions of criminal responsibility and fitness to stand trial, making provision for victims to provide information to the Mental Health Review Tribunal and the Mental Health Court, notification orders and the criteria for release of persons acquitted of offences on the ground of unsoundness of mind, and discusses in more detail the further amendments above, as proposed in the Health Legislation Amendment Bill 2001.

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1 INTRODUCTION

In 1993, community participation in the review of the Mental Health Act 1974 began with a series of Discussion Papers.[1] As a result of this consultation process, a Green Paper was released in 1994.[2] Specific reviews were also conducted in relation to the operation of the Mental Health Tribunal and the Patient Review Tribunal. A discussion paper on the Mental Health Act and the rights and interests of victims where the offender was mentally ill or had an intellectual disability was released in March 1999.[3] Finally, in October 1999, a Consultation Draft Bill incorporating the outcomes of the consultation process to that point was released to key stakeholders.

On 14 March 2000 the Mental Health Bill 2000 was introduced into the Queensland Legislative Assembly by the Minister for Health, Hon WM Edmond MP. The purpose of the Bill was to provide a more effective and accountable system of involuntary treatment and care for people with a mental illness, the 1974 Act having been criticised as cumbersome, difficult to interpret, and not reflecting contemporary mental health practice and thinking.[4] The Mental Health Act 2000 was passed on 30 May and assented to on 8 June 2000 but the majority of the Act has not yet been proclaimed into force.[5]

Recently, controversy has surrounded the operation of Queensland's mental health legislation following the release on leave back into the community of mentally ill offenders

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1 Queensland Health. Discussion Papers: *Review of the Mental Health Act*, May 1993, 'Background to the Review' (No 1), 'Defining Mental Illness' (No 2), 'Treatment of People with Mental Illness' (No 3) and 'The Forensic Provisions' (No 4).

2 Queensland Health, *Review of the Mental Health Act 1974*: Green Paper, 1994.

3 Queensland. Government. *Victims of Crime and the Mental Health Act*: Discussion Paper, March 1999.

4 Hon WM Edmond MP, Minister for Health, Second Reading Speech, Mental Health Bill 2000, *Queensland Parliamentary Debates*, 14 March 2000, pp 345-352 at p 345.

5 Sections 1-2, s 590 and Schedule 1, Part 1 commenced on the date of assent; section 436, which establishes the Mental Health Review Tribunal and Chapter 12 Part 2, which deals with the appointment of Tribunal members and staff, commenced on 4 June 2001; the remaining provisions have not yet been proclaimed into force; their automatic commencement under s 15DA(2) of the *Acts Interpretation Act 1954* has now been extended until 8 June 2002 (see Mental Health (Postponement) Regulation 2001, Subordinate Legislation No 46 of 2001, s 2): *Queensland Legislation Annotations* (Issue No 18, 2001) and *Update to Queensland Legislation Annotations*, Release No 7, 10 June 2001).

such as the killer of Janaya Clarke,[6] and the decision to discontinue proceedings, on the ground of unfitness for trial, of the 89 year old man charged with the murder of the two Mackay sisters.[7]

Serious questions have also been raised by two Court of Appeal judges about the interpretation that may be placed on certain provisions of the new Mental Health Act 2000.

On 11 September 2001, the Minister for Health, Hon WE Edmond MP, introduced the Health Legislation Amendment Bill which makes amendments to numerous Health portfolio Acts, including the Mental Health Act 2000. The amendments to the Mental Health Act, intended to rectify issues that have arisen during implementation planning, include:

- Clarifying the strict test for release of forensic patients by the Mental Health Review Tribunal (MHRT) or the Mental Health Court (MHC)
- Clarifying what information may be submitted to the Mental Health Court by a non-party such as a victim of crime
- Ensuring that when a decision is made to grant limited community treatment for a forensic patient, consideration be given to whether it should be conditional on the person not contacting certain people, including a victim of crime
- Enabling a non-contact order to be made by the Mental Health Review Tribunal when revoking a forensic order, or by the Mental Health Court on deciding not to make a forensic order for a person found to be of unsound mind or permanently unfit for trial.

This Research Brief:

- summarises key changes introduced by the 2000 Act in relation to matters including the determination of questions of criminal responsibility and fitness to stand trial, the role of victims in proceedings, notification orders and the criteria for release of persons acquitted of offences on the ground of unsoundness of mind, and

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6 Tony Koch, 'Family hides as tribunal frees killer', *Courier-Mail*, 16 June 2001, p 1; Tony Koch, 'Mum's trial by terror', *Courier-Mail*, 16 June 2001, p 25; 'Killer's parents lose their fight for help', *Courier- Mail*, 23 June 2001, p 4.

7 Nathan Scholz, 'Sisters' murder remain mystery', *Courier-Mail*, 3 July 2001, p 1; Kevin Meade, 'Mackay accused ruled unfit to stand trial', *The Australian*, 3 July 2001, p 4; Kevin Meade, 'Scarlet pimpernel finally free', *The Australian*, 3 July 2001, p 4; Mark Oberhardt, 'Homicide case takes legal twist', *Courier-Mail*, 11 July 2001, p 9.

- discusses in more detail the further amendments above, as proposed in the Health Legislation Amendment Bill 2001.

Other proposed amendments for example, to provide for the Mental Heath Review Tribunal to be able to approve electroconvulsive therapy for voluntary patients who do not have the capacity to give consent, and to provide the Director of Mental Health with greater flexibility to determine how information about the use of seclusion and mechanical restraint is to be reported, are not covered in this Brief.

2 CRIMINAL RESPONSIBILITY AND FITNESS TO STAND TRIAL

2.1 THE MENTAL HEALTH ACT 1974

Under the Mental Health Act 1974, the Mental Health Tribunal has a limited jurisdiction to determine whether a person was of unsound mind at the time an offence was committed, or is unfit to stand trial. The Patient Review Tribunal makes decisions about the management, continuing detention and release of patients who have been detained by order of the Mental Health Tribunal. The decisions of the Patient Review Tribunal are subject to appeal before the Mental Health Tribunal.[8]

2.1.1 The Concepts

Criminal responsibility is determined on the basis of the mental state of the accused at the time of the **offence**, while fitness to stand trial is determined on the basis of the mental state of the accused at the time of the **hearing**.[9]

Fitness for trial

"**Fit for trial**" is defined in s 28A of the Mental Health Act 1974 to mean "*fit to plead at the person's trial and to instruct counsel and to endure the person's trial, with serious adverse consequences to the person's mental condition being unlikely*".

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8 Discussion Paper: *Victims of Crime and the Mental Health Act*, pp 13-16.

9 Discussion Paper: *Victims of Crime and the Mental Health Act*, p 13.

Unsoundness of mind

"**Unsoundness of mind**" is defined in s 28A to mean "*that state of mental disease or natural mental infirmity described in section 27 of the Criminal Code*". Section 27(1) of the Code, which provides the defence of unsoundness of mind, is available where a person is deprived of one of three nominated capacities as a result of mental disease or natural mental infirmity.

The provision states that:

> *A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.*

Diminished responsibility

Diminished responsibility, which applies only to a murder charge, is defined in s 28A of the Mental Health Act 1974 to mean "*that state of abnormality of mind described in s 304A of the Criminal Code*".

Section 304A, in turn, provides that:

> *When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.*

To establish diminished responsibility, there only has to be a substantial **impairment** of one or more of the three capacities, rather than a **deprivation** of one or more of the capacities as required by s 27 of the Criminal Code.

Standard of proof

In terms of the **standard of proof**, the Tribunal decides the matters referred to it (eg whether a person alleged to have committed an indictable offence is unfit to stand trial because of mental illness, whether a person was of unsound mind at the time an alleged offence was committed) on the balance of probabilities: *R v Schafferius* [1987] 1 Qd R 381; *R v Walton* [1992] 2 Qd R 551.

2.1.2 The Mental Health Tribunal

While juries retain the power to decide questions about unsoundness of mind and fitness for trial of mentally ill people who have been charged with criminal offences,[10] in limited circumstances, these matters are referred to the Mental Health Tribunal: s 28D. In practice, since the establishment of the Mental Health Tribunal in 1984,[11] these questions are more usually decided by the Mental Health Tribunal when someone is charged with an indictable offence.[12]

Recently, in the case of Arthur Stanley Brown, the 89 year old defendant charged with the 1970 murders of Judith and Susan Mackay, controversy has surrounded the issue whether the Mental Health Tribunal has the jurisdiction to determine an accused's fitness to stand trial after a jury determination in the affirmative. This issue is discussed in more detail in Part 2.1.8 below in the light of the Court of Appeal's decision.

2.1.3 Constitution and powers of the Mental Health Tribunal

The Mental Health Tribunal under the 1974 Act is established by s 28(1).

The Mental Health Tribunal, which is constituted by one member, who is a judge of the Queensland Supreme Court: s 28B(2), conducts open hearings held in the Supreme Court building.[13] The Judge is assisted by two psychiatrists; however they are not a constituent part of the Tribunal: s 28B(2) &(2A).

The Mental Health Tribunal is declared to be a Commission of Inquiry to which the *Commissions of Inquiry Act 1950* applies: s 28C(4). The Tribunal has the power to order psychiatric, medical and other examinations: s 28E(1).

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[10] A jury may be asked to decide whether a person is incapable of understanding the proceedings at trial (s 613), whether a person is of unsound mind at the time of the trial (s 645); a jury may also be called upon to determine questions of criminal responsibility (s 647).

[11] See Act No 66 of 1984, s 27.

[12] Pamela Sweetapple (ed), *The Queensland Law Handbook*, 5th edn, 1997, p 411.

[13] Discussion Paper, *Victims of Crime and the Mental Health Act*, p 13.

2.1.4 Referrals to the Mental Health Tribunal

Who may refer a person to the Tribunal

A person may be referred to the Tribunal by the Director of Psychiatric Services after having been admitted to a psychiatric hospital for the treatment of mental illness. [14] Alternatively, a Crown Law officer can refer a person, a person can refer himself or herself, or the person's legal adviser or nearest relative can do so: s 28D(1). Section 28D provides that where there is reasonable cause to believe that a person alleged to have committed an indictable offence is mentally ill or was mentally ill at the time of the alleged offence, that person may be referred to the Tribunal by one of the nominated persons above. "Reasonable cause" would exist, for example, where a Crown Law Officer had knowledge that an accused person intends to raise the defence of insanity or diminished responsibility at trial: s 28D(2).[15]

Court's discretionary power to refer

Section 29 of the Mental Health Act 1974 gives a court the power to refuse to accept a guilty plea where it believes mental illness may be involved, and to order a plea of not guilty to be entered and to refer the accused to the Mental Health Tribunal.[16]

Effect of factual disputes

In some cases, the facts of the alleged offence or of the person's involvement may be so in dispute that the Mental Health Tribunal believes it would be unsafe to make a determination as to whether, at the time of the alleged offence, the person referred was suffering from unsoundness of mind or diminished responsibility. Where this is so, 33(2) of the Act provides that the Tribunal should refrain from doing so.

2.1.5 Consequences of Tribunal findings

Where an accused person is found to be fit for trial and not to be suffering from unsoundness of mind or diminished responsibility, he or she is returned to the criminal

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[14] See for example, *R v Schafferius* [1987] 1 Qd R 381.

[15] *R v Enright* 1990 1 Qd R 563.

[16] See for example, *R v Enright* [1990] 1 Qd R 563.

justice system: s 33.[17] Where a finding by the Mental Health Tribunal results in an accused person being brought to trial, the Act prohibits the publication of a report of the decision until after the trial: s 43D.

Where the accused person is found to be of unsound mind, or is found to be presently unfit to stand trial, the person is made liable to be detained in an institution for treatment of their mental illness: s 33A, s 34.

2.1.6 Accused has right to trial despite finding of lack of criminal responsibility

It is also possible, under s 43C of the Mental Health Act 1974, for a person who has been found by the Mental Health Tribunal (or the Court of Appeal, on appeal – see below) to be not criminally responsible because of unsound mind at the time of the alleged offence to nonetheless insist on being brought to trial for the offence.

2.1.7 Appeals from decisions of the Mental Health Tribunal

Section 43A provides for an appeal to the Court of Appeal against a decision of the Mental Health Tribunal.[18] An appeal may be instituted by the person to whose mental condition the decision relates, or by the Attorney-General: s 43A(3). Such an appeal was instituted by the Attorney-General, on a question of law, in the unusual circumstances outlined below.

2.1.8 Jurisdictional Issues

Section 28 of the Mental Health Act 1974 directs that, unless otherwise indicated or provided, the provisions of Part 4 of the Act are not to be read and construed in substitution for, or in derogation from, the provisions of the Criminal Code. This direction arose for consideration in the context of the A-G's appeal against the Tribunal's determination in the case of Arthur Stanley Brown.

In October 1999, Brown was tried in the Supreme Court at Townsville for the 1970 murders of Judith and Susan Mackay. The jury could not agree upon a verdict, and a retrial was listed for 25 July 2000. When the court convened on that day, Brown's counsel sought a jury ruling under s 613 of the Criminal Code as to whether Brown was

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[17] See eg *Enright* [1990] 1 Qd R 563; *Schafferius* [1987] 1 Qd R 381.

[18] See eg *Farrah* [1997] 1 Qd R 460.

capable of understanding the proceedings at the trial so as to be able to make a proper defence. On Friday 28 July, the jury empanelled to try the issue found Brown was capable of understanding the proceedings and defending the charge, and the trial was adjourned to Monday 31 July to proceed before a fresh jury. However, on the Monday before any other steps were taken, Brown's wife referred the matter of Brown's mental condition to the Mental Health Tribunal, which found that Brown could not give proper instructions for his defence, as he was suffering from progressive dementia. The Attorney-General appealed against the decision of the Tribunal under s 43A(3)(b). The key issue on appeal was whether Part 4 of the Mental Health Act 1974 (especially s 28D) prevailed over the provisions of s 613 of the Criminal Code (ie whether it was within the Tribunal's jurisdiction to hear and determine the reference). The court found (McPherson JA and Wilson J concurring, Ambrose J dissenting) that the reference to the Tribunal of Mr Brown's mental condition was not authorised by the Act so as to give the Tribunal jurisdiction to consider and overrule a determination of a jury under s 613 of the Criminal Code. While a reference to the Tribunal may precede an investigation before a jury, a reference to the Tribunal may not follow a jury determination, which has primacy.[19]

2.1.9 The Patient Review Tribunal

The Patient Review Tribunal hears reviews for patients who have been detained on the ground of unsoundness of mind. Under the 1974 Act, there are several such tribunals (in practice, currently, five[20]), each servicing a different region of the state: ss 14(1) & (2). Each tribunal consists of three to six members: s 14(3). A patient who has been detained is not to be released, even on a leave of absence, unless a Patient Review Tribunal has found that the patient can be released "*having regard to the interests of the patient's own welfare and the protection of other persons*": s 36. The Patient Review Tribunal also looks at the case of persons found unfit to stand trial, to determine whether they are now sufficiently fit for prosecution to continue: s 34. Under the Mental Health Act 1974, if the patient remains unfit for trial for three years, proceedings are automatically discontinued: s 35(3).

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19 *The Attorney-General of Queensland v B* [2001] QCA 169 (judgment delivered 11 May 2001).

20 Discussion Paper, *Victims of Crime and the Mental Health Act*, p 18.

2.2 THE MENTAL HEALTH ACT 2000 AND HEALTH LEGISLATION AMENDMENT BILL 2001

The Mental Health Act 2000 replaces the several Patient Review Tribunals with a single Mental Health Review Tribunal, which has a president and other members: s 436 and panels appointed across the state.[21] The Mental Health Tribunal is replaced by a Mental Health Court: s 381 whose jurisdiction and procedures are described as more closely aligned to the wider court system.[22]

2.2.1 Reference to Mental Health Court

Chapter 7, Part 4 makes provision for references to the Mental Health Court. In summary, where there is reasonable cause to believe that a person believed to have committed an indictable offence is mentally ill or was mentally ill when the alleged offence was committed, the question of the person's mental condition may be referred to the Mental Health Court by:

- The person or his or her personal representative
- The Attorney-General
- The Director of Public Prosecutions
- The Director of Mental Health (if the person is being treated for a mental illness): ss 256 & 257.

When the reference is made, proceedings for the offence alleged to have been committed are suspended until the Mental Health Court makes its decision: s 259.

2.2.2 Hearing of reference by Mental Health Court

The Mental Health Act 2000 provides for the Mental Health Court to decide, upon a reference to it, whether the person the subject of the reference was:

- of unsound mind: s 267(1)(a)
- suffering from diminished responsibility (if the alleged offence is murder): s 267(1)(b)
- fit for trial: s 270.

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[21] Mental Health Bill 2000 (Qld), *Explanatory Notes in Queensland Acts 2000 Volume 1*, p 606.

[22] Mental Health Bill 2000 (Qld), *Explanatory Notes in Queensland Acts 2000 Volume 1*, p 608.

As under the 1974 Act, before a reference can be made to the Mental Health Court, there must be reasonable cause to believe that a person alleged to have committed an indictable offence is mentally ill or was mentally ill when the alleged offence was committed. As stated in the Explanatory Notes:

> *It is intended that reasonable cause to believe will be something more than suspicion. Further, it is expected, although not mandatory, that an opinion of an expert will be sought before a reference is made under this Part.*[23]

By contrast with s 28D(2) of the 1974 Act:

> *It is not intended that a reference be made by the Director of Public Prosecutions on the basis that the person may raise diminished responsibility at his or her trial.*[24]

Section 268 provides that the Mental Health Court must refrain from making a decision about unsoundness of mind or diminished responsibility if it is satisfied there is reasonable doubt that the person committed the offence.

The court itself is constituted by a Supreme Court judge sitting alone: s 382(1), assisted by two psychiatrists: s 382(2). Under the 1974 Act, the role of assisting psychiatrists was not specified in the legislation.[25] The new Act clarifies the role the assisting psychiatrists are to play by specifically setting out their functions in s 389 ie:

- To examine material received for a hearing in order to identify matters needing further examination and to make recommendations to the Mental Health Court about these matters
- To make recommendations about the making of court examination orders
- To assist the court by advising it on the meaning and significance of clinical evidence, and about clinical issues about the treatment and detention needs of people under the Act.

An assisting psychiatrist's functions are limited to matters within his or her professional expertise: s 389(2).

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23 Mental Health Bill 2000 (Qld), *Explanatory Notes in Queensland Acts 2000 Volume 1*, p 680.

24 Mental Health Bill 2000 (Qld), *Explanatory Notes in Queensland Acts 2000 Volume 1*, p 680.

25 "Comparative table: Mental Health Act 1974 and Mental Health Act 2000", p 14. www.health.qld.gov.au/mha2000/comparative_table.htm

2.2.3 Mental Health Court's power to make forensic orders

Ch 7, Part 7, Division 1 (ss 288 to 298) deals with the Mental Health Court's power to make forensic orders. Under those provisions, if on a reference to it, the Mental Health Court decides that a person charged with an indictable offence was of unsound mind when the alleged offence was committed or is unfit for trial and the sunfitness for trial is of a permanent nature, it may make an order (a "forensic order (Mental Health Court)") that the person be detained in an authorised mental health service for involuntary treatment or care: s 288 (1) (a) &(b) and (2).

In deciding whether to make such an order, the Mental Health Court must, under s 288(3), have regard to the seriousness of the offence, the person's treatment needs and the protection of the community.

If the Mental Health Court decides that a person is unfit for trial for their alleged offence, but the unfitness for trial is not of a permanent nature, the court must make a forensic order: s 288(1)(c) & (4).

2.2.4 Forensic orders following jury findings

Forensic orders may also be made by a court following jury findings that:

- Under s 613 of the Criminal Code, the person is not capable of understanding the proceedings at trial because the person is of unsound mind
- Under the Criminal Code s 645, the person is not of sound mind
- Under s 647 of the Criminal Code, the person is not guilty of the offence on the ground that the person was of unsound mind (see Chapter 7, Part 7, Division 2 (ss 299 to 301)).

In such cases, a court may make an order about the person being kept in custody in an authorised mental health service (a "forensic order (Criminal Code)"), or otherwise kept in custody (a "custody order").

Section 302 empowers the Minister for Health to order that a person the subject of a custody order be detained in a high security unit, or an authorised mental health service (where the Minister is satisfied that the person can be safely detained in an authorised mental health service that is not a high security unit).

The Minister is empowered to make such an order (a "forensic order (Minister)") where he or she is satisfied it is necessary for the person's proper treatment or care.

2.2.5 Tribunal Reviews of Forensic Orders

Chapter 6, Part 3 of the Mental Health Act 2000 (ss 200 to 207) deals with reviews by the Mental Health Review Tribunal of patients subject to forensic orders.

Timing of reviews

Section 200(1)(a) provides that the Mental Health Review Tribunal must review a forensic patient's mental condition within six months of the forensic order being made and thereafter at six monthly intervals. There is also provision for a patient to make an application for review: ss 200(1)(b) and 201(1)(a)(i). There is no limit on how many times a patient can apply to be reviewed (but applications are subject to rejection on the basis that they are frivolous or vexatious): s 200(2).

Review decisions

On review, the Tribunal is required to either confirm or revoke the forensic order for the patient: s 203(1).

Under s 203(2), where the Tribunal decides to confirm the forensic order, the Tribunal may make one or more of the following orders:

- An order that the patient receive limited community treatment subject to any reasonable conditions the Tribunal considers appropriate
- An order approving limited community treatment for the patient subject to any reasonable conditions the Tribunal considers appropriate
- An order revoking an order or approval for limited community treatment for the patient
- An order that the patient be transferred from one authorised mental health service to another such service.

Clause 110 of the Health Legislation Amendment Bill 2001 amends s 203 to provide that an order that a patient have limited community treatment: see 203(2)(a) or an order approving limited community treatment: see s 203(2(b) may be made subject to a condition that the patient must not contact a stated person (eg a victim of an offence alleged to have been committed by the patient; the patient's spouse, or a relative or dependent of the patient): **proposed new 203(3)**. **Proposed new s 203(4)** provides that, in deciding whether to make either of the above types of orders, the Tribunal must consider whether the order should be subject to a condition that the patient must not contact a stated person.

Restrictions on review decisions

Section 204(1) of the Mental Health Act 2000 provides that the Mental Health Review Tribunal must not revoke a forensic order, or order or approve limited community treatment, for a patient if it is satisfied the patient, because of the patient's mental illness, represents "*an unacceptable risk to the safety of the patient or others*".

Section 204(3) states that the Tribunal must not revoke a forensic order for a patient who has been found unfit for trial by a jury (under s 613 – want of understanding of accused person, or s 645 – accused person insane during trial) or by the Mental Health Court unless proceedings against the patient for the offence the subject of the finding have been discontinued.[26]

Section 204(4) provides that the Tribunal must nor order or approve limited community treatment for a patient referred to in s 204(3) above if it is satisfied there is an unacceptable risk the patient would, if the treatment were undertaken in the community:

- not return to the authorised mental health service when required, or
- commit an offence, or
- endanger the safety or welfare of the patient or others.

Following the enactment of the Mental Health Act 2000, in *R v Maloney*, a judgment delivered in September 2000, Court of Appeal judges Pincus JA and Thomas JA commented on s 204 in the following terms. Pincus JA said that s 204:

> *… appears to reverse the burden of proof, with respect to the question whether releasing the patient would create a danger to the safety of others. Assuming the new provisions become law, they might possibly make it easier for people who have been acquitted on account of unsoundness of mind to be released into the community. Of course, there is always the possibility that further relevant changes in the law might occur during the period of confinement of the person so acquitted; or there might during that period be a stiffening or relaxation of the authorities' attitude toward applications for release.*
>
> *Some jurors, concerned about the danger presented by a person who has committed a crime of violence and whose sanity is debatable, would no doubt be more inclined to acquit on account of unsoundness of mind if confident that there would be no release as long as any doubt about the safety of that course remained. Such jurors would, if the terms of s 204 of the Mental Health Act 2000 were explained to them, perhaps tend to favour conviction*

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[26] Mental Health Act 2000, Explanatory Notes, p 670.

> *rather than acquittal on account of unsoundness of mind, on the basis that the former verdict would provide more solid protection to the community.*[27]

In his judgment, Thomas JA said:

> *…the Mental Health Act 2000 has now been passed, although it has not yet been brought into operation. The scheme it introduces is expressed in curiously negative terms. Under s 204 the Tribunal must not revoke the relevant order –*
>
> *'if it is satisfied the patient, because of the patient's mental illness or intellectual disability, represents an unacceptable risk to the safety of the patient or others'.*
>
> *Surprisingly, that would seem to permit release by a tribunal which was uncertain or which held a view falling short of affirmative satisfaction of unacceptable risk to the safety of others.*

In response to a question without notice in Parliament on 19 June 2001 in which the comments of Justices Pincus and Thomas were referred to, Hon W Edmond MP stated:

> *I am aware of the learned judges' comments as asides. I understand that they were not precedents but they were comments regarded as asides. I am also aware that the briefings we have from other learned members of the legal profession do not agree with the judges' statements. However, because of my concern that there should be absolutely no doubt that the intention of the incoming laws are to strengthen those requirements, I have already asked my department to draft amendments that will make it absolutely clear.*
>
> *The wording is put in such a way that I actually queried it at the time it was being drafted. I was advised that that was the best wording from a legal point of view. … Those amendments will be before the House before such time as the act is implemented.*[28]

Clause 111 of the Health Legislation Amendment Bill 2001 amends s 204 in order to clarify the original policy intention of the test for release of forensic patients.[29] Section 204(1) is omitted and replaced with a provision which prohibits the Mental Health Review Tribunal from either revoking a forensic order for a patient, or ordering or approving limited community treatment for a patient, unless it is satisfied the patient does

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[27] *R v Maloney* [2000] Supreme Court of Queensland – Court of Appeal 355 (1 September 2000).

[28] Question without notice from Miss F Simpson MP to Mrs W Edmond MP, *Queensland Parliamentary Debates*, 19 June 2001, p 1515.

[29] Hon W Edmond MP, Second Reading Speech, Health Legislation Amendment Bill 2001, *Queensland Parliamentary Debates*, 11 September 2001, p 2570.

not represent an unacceptable risk to the safety of the patient or others, taking into regard to the patient's mental illness.[30]

Section 204(4) is amended to provide that the Tribunal must not order or approve limited community treatment for a patient referred to in s 204(3) unless it is satisfied there is not an unacceptable risk that the patient would, if the treatment were undertaken in the community,

- Not return to the authorised mental health service when required, or
- Commit an offence, or
- Endanger the safety or welfare of the patient or others.

As stated by the Minister in her *Ministerial Media Release* of 11 September 2001:

> *The changes clarify issues raised by two Justices of the Court of Appeal who suggested that in certain interpretations the Mental Health Act could make it easier for people acquitted on the basis of unsoundness of mind to be released into the community.*
>
> *"The amendment will overcome any uncertainty and reinforces our intention to provide strict safeguards to ensure that all decisions balance the rights and treatment needs of the patient with the safety of the community," Ms Edmond said.*
>
> *"This change ensures that the emphasis is on public safety."* [31]

Notice of Decision

Section 205 of the Mental Health Act 2000 requires that the Mental Health Review Tribunal give a copy of its decision upon a review of a forensic patient's mental condition to the parties to the proceeding, the administrator of the patient's treating health service, the Director of Mental Health, and if the review was carried out upon the application of a person other than those just mentioned, the applicant.

Clause 112 of the Health Legislation Amendment Bill 2001 amends s 205 to add the patient's allied person to the list of persons to be given a copy of the review decision. Chapter 9, Part 1 of the Mental Health Act 2000 provides for an involuntary patient to choose an allied person to help the patient to represent his or her views and interests.

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[30] or intellectual disability.

[31] Hon W Edmond MP, 'Community and patient safety the priority in health legislation', *Ministerial Media Release*, 11 September 2001.

The allied person can be chosen from a list that include the patient's personal guardian/attorney, an adult close friend or relative, or adult carer.

The Mental Health Act 2000 requires that a forensic patient's allied person is to be notified of a hearing by the Mental Health Review Tribunal (s 202(1)(d)); accordingly, the allied person should receive notice of the decision made by the Tribunal upon review.[32]

2.2.6 Review by Tribunal of mental condition of persons to decide fitness for trial

These matters are dealt with in Chapter 6, Part 4 (ss 208-219) of the Mental Health Act 2000.

In cases where:

- the Mental Health Court decides upon a reference to it that a person charged with an offence is unfit for trial but not permanently unfit, or
- a jury makes a finding under s 613 of the Criminal Code (want of understanding of accused person) or under s 645 (accused person insane during trial), and the proceedings against the person have not been discontinued or the person has not been found fit for trial,

the Tribunal must review the patient's fitness for trial at least once every three months for a period of 12 months from the date of the Mental Health Court's decision or the jury's finding. If the person remains unfit for trial after 12 months, the Tribunal must then conduct a review of the patient's fitness at least once every six months unless proceedings for the offence are discontinued (see ss 208 & 209(1).

A patient may also, at any time, make an application for a review: s 210. There is no limit placed on how many times a patient can apply to be reviewed. The Tribunal must review the person's mental condition if such an application is made: s 209(2). However, the application can be dismissed if the Tribunal is satisfied that the application is frivolous or vexatious: s 209(3).

Notice of review hearing

Section 211 provides that the Mental Health Review Tribunal must give written notice of the hearing for a review to the parties to the proceeding, the administrator of the authorised mental health service responsible for the person's treatment or care, the

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32 Health Legislation Amendment Bill 2001 (Qld), Explanatory Notes, p 50.

Director of Mental Health and, if the person is a forensic patient, the patient's allied person.

Clause 113 of the Health Legislation Amendment Bill 2001 amends s 211 by adding the applicant for the review to the above list: **proposed new s 211(1)(e)**. As, under s 210, any person may make an application for a review, the applicant could be someone other than those individuals mentioned in existing paragraphs (a) to (d).[33]

Decision on review

On the review, the Tribunal is required to decide whether the person is fit for trial: s 212(1).

Where the Tribunal decides that a person is fit for trial, the person must be returned to court within seven days of that decision being made so that proceedings can be recommenced: s 218.

Under s 212(2), if, on the last review required to be conducted under s 209(1)(a) (this is the provision that requires the Tribunal to review a person's mental condition at least once every three months for the year starting on the day of the court's decision or jury's finding) and any subsequent review, the Tribunal decides the person is unfit for trial and **considers** that the person is unlikely to be fit for trial in a reasonable time, the Tribunal must give a written report to the Attorney-General about the person's mental condition.

Clause 114 of the Health Legislation Amendment Bill 2001 amends s 212 to impose a clear requirement on the Mental Health Review Tribunal to **decide** whether a person is likely to be fit for trial in a reasonable time on the last review within the first twelve months of the Mental Health Court's or jury's decision and on subsequent reviews: **proposed new s 212(2)** & **(3)**. The requirement to provide a report to the Attorney-General remains where the Tribunal decides that the person is unlikely to be fit for trial in a reasonable time: **proposed new s 212(3)**.

Notice of decision

Section 213(1) of the Mental Health Act 2000 requires the Mental Health Review Tribunal to give a copy of its decision on a review to the parties to the proceeding, the administrator of the authorised mental health service responsible for the person's treatment or care, the Director of Mental Health, and the Attorney-General.

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[33] Health Legislation Amendment Bill 2001 (Qld), Explanatory Notes, p 50.

Clause 115 amends s 213. The specific reference to the Attorney-General as a person who must be given a copy of the decision is omitted, as the A-G is, under s 450(1)(c), a party to the proceeding, and thus is already covered by s 213(1)(a). Under **proposed new s 213(1)**, the persons to whom the Tribunal must give a copy of its decision upon review will be:

- The parties to the proceeding
- The administrator of the authorised mental health service responsible for the person's treatment or care
- The Director of Mental Health
- If the person the subject of the review is a forensic patient – the patient's allied person
- If the review was carried out upon the application of a person other than those mentioned above, the applicant.

The effect of the amendment is to ensure consistency across the scheme of notifications in the Act by ensuring that similar persons to those under other reviews are given notice of the Mental Health Review Tribunal's decision consequent upon a hearing of a person's mental condition to decide the person's fitness for trial.[34]

Discontinuation of proceedings

Under the Mental Health Act 1974, there is a three year time limit on bringing a matter to trial. In addition the Criminal Code imposes various limitation periods. Under changes proposed during the course of the review of the 1974 Act, it was reported that it had been suggested that a Crown Law officer should have the power to re-commence proceedings at any time if a person charged with an offence is subsequently found to be fit for trial.[35] Commenting on this, Keith Williams, Executive Director of the Queensland Association for Mental Health, stated that:

> *The proposed change to the Mental Health Act would potentially enable a matter to be brought to trial after the limitations period under the Criminal Code had lapsed. This proposal appears to be in conflict with both the Commonwealth Disability Discrimination Act and the Anti-Discrimination Act Qld, as a person with mental illness would then be treated detrimentally when*

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34 Health Legislation Amendment Bill 2001 (Qld), *Explanatory Notes*, p 51.

35 Keith Williams, Executive Director of the Queensland Association for Mental Health, 'Lessons we should have learnt – Mental health and human rights', <http://www.adcq.qld.gov.au/newsletter/issue_02/story3.html>

compared with a person where the matter had not proceeded to trial for some other reason.[36]

Section 215 of the Mental Health Act 2000 sets out the circumstances in which proceedings are now to be automatically discontinued. If the Attorney-General has not ordered proceedings to be discontinued or the Tribunal has not found a person fit for trial, proceedings for the offence are deemed to be discontinued in the case of offences which attract a maximum penalty of life imprisonment, after 7 years and for all other offences, after three years from the date of the original finding.

Section 217 gives the Attorney-General the power to discontinue proceedings at any time.

3 THE ROLE OF VICTIMS IN PROCEEDINGS

3.1 THE MENTAL HEALTH ACT 1974

As explained in the 1999 *Discussion Paper on Victims of Crime and the Mental Health Act*:

… the Mental Health Act as it currently stands does not specifically provide for any role for victims of crime. The role of the Mental Health Tribunal (MHT) is to make determinations on the state of mind of the accused, where it is clear that aside from their state of mind, the person would be liable to be convicted of the offence. This process requires an examination of matters that are not primarily relevant to victims of crime. The expressed concerns of victims of crime has been with the objective facts of an offence, the effect the offence has had upon them, and questions of guilt or innocence.

The role of the Patient Review Tribunal (PRT) is to determine whether the patient should be released into the community, after a period of detention. This involves a consideration of the need to provide appropriately for the care and treatment of patients who come within its ambit. This also involves a consideration of the need to protect the community, which involves a consideration of the safety of the victim. The needs of the victim are therefore taken into account when making decisions whether to release a person who is

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[36] Keith Williams, Executive Director of the Queensland Association for Mental Health, 'Lessons we should have learnt – Mental health and human rights', <http://www.adcq.qld.gov.au/newsletter/issue_02/story3.html>

mentally ill. The victim, however, is not the primary focus of the proceedings.[37]

3.2 THE MENTAL HEALTH ACT 2000 AND HEALTH LEGISLATION AMENDMENT BILL 2001

Among key reforms introduced by the Mental Health Act 2000 to take into account the concerns of victims of crime where the offender has a mental illness are provisions made for victims to provide information to the Mental Health Review Tribunal and the Mental Health Court:

> *Victims can provide information to the Mental Health Review Tribunal and the Mental Health Court that is relevant to the determination of the body, and if it is not already before the body. Therefore, information from the victim that may not have been relevant to the police investigation will now be available to the court. Reasons for allowing or not allowing this material to be put before the tribunal/Mental Health Court must be provided to the victim. Note that this information is not the same as a "victim impact statement". Victim impact statements are only relevant when sentencing a person who has been found guilty of the offence – which does not occur if the person is found to be of unsound mind.*[38]

3.2.1 Submission of non-party material to the Mental Health Court

The new Mental Health Act 2000 makes provision in s 284 for the Mental Health Court, in making a decision upon a reference to it, to receive material in evidence from a person who is not a party to the hearing of the reference. The material must be sworn and not otherwise part of the brief of evidence before the court, and the court must be satisfied that the material is relevant to the decision: s 284(1). An example of relevant material is a statement by a victim of an offence that is not otherwise before the court about the mental condition of the alleged offender when the offence was committed.[39]

The material has to be submitted to the court by a party to the proceeding (eg through the prosecutor): s 284(2).

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[37] Queensland Health. Mental Health Unit. Mental Health Act Review Project, *Victims of Crime and the Mental Health Act*, Discussion Paper, March 1999, p 21.

[38] Queensland Health. "Mental Health Act 2000" http://www.heath.qld.gov.au/mha2000/overview.htm downloaded 2 October 2001.

[39] This is the specific example given in s 284.

Although the Act makes provision for material to be received in evidence from a non-party, the person does not have a right of appearance, unless otherwise ordered by the court: s 284(3).

Section 285 provides that, in its decision on the reference, the Mental Health Court must give reasons for receiving, or refusing to receive, in evidence, material that has been submitted under s 284.

To ensure that it is clear, on the face of the legislation, what material may be submitted by a non-party to the Mental Health Court, **Clause 127** of the Health Legislation Amendment Bill 2001 amends s 284(1) by adding to the example given of what is meant by relevant material the following:

- a statement by the victim of an offence that is not otherwise before the court about the risk the victim believes the alleged offender represents to the victim or the victim's family.

Such material may clearly be relevant to a decision by the Mental Health Court as to whether to approve limited community treatment or to make a forensic order.[40]

The example given in the current legislation to the effect that the victim of an offence may submit relevant material to the court through the prosecutor is omitted under the amending Bill: **cl 127(3)**.

3.2.2 Submission of non-party material to the Mental Health Review Tribunal

In a hearing before the Mental Health Review Tribunal, the Tribunal may take into account material submitted by a person who is not a party to the proceeding. As is the case with the Mental Health Court, the material must not otherwise be before the Tribunal, and it must be relevant to the decision under consideration: s 464(1).

Clause 133 of the Health Legislation Amendment Bill 2001 amends s 464 by inserting **proposed new s 464(1A)**, which provides that as well, for a decision about the making of a non-contact order in favour of a person mentioned in s 228C(3) of the Mental Health Act 2000, the Tribunal must take into account material giving the person's views as required under s 228C(3).

Under **Clause 133**, s 464, paragraphs (1A) to (3) will then be re-numbered as s 464(2) to (4).

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[40] Health Legislation Amendment Bill 2001, Explanatory Notes, p 53.

In deciding what weight to place on the material, the Tribunal must take into account:

- Whether the person the subject of the proceeding has had sufficient opportunity to examine and reply to the material
- Material previously submitted by the person
- For a forensic patient, the circumstances of the offences leading to the patient becoming a forensic patient
- Any other matter the Tribunal considers appropriate: existing 464(2), to be renumbered as 464(3).

Again, as is the case with the Mental Health Court, the person submitting material does not have a right of appearance before the Tribunal unless otherwise ordered by the Tribunal: s 464(3); re-numbered 464(4). Like the Mental Health Court, the Mental Health Review Tribunal must give reasons for taking or not taking into account material submitted under s 464: see s 465.

The position in various other Australia jurisdictions has previously been outlined in QPL *Legislation Brief* 2/00 "The Queensland Mental Health Bill 2000: Reforms to Victims' Rights in Relation to Proceedings and Notification Orders" by Cathy Green.[41]

4 NOTIFICATION ORDERS

4.1 MENTAL HEALTH ACT 1974

The Mental Health Act 1974 does not specifically provide for any role for victims of crime. [42]

4.2 MENTAL HEALTH ACT 2000 AND HEALTH LEGISLATION AMENDMENT BILL 2001

A major change introduced by the Mental Health Act 2000 is that it enables victims to be notified of certain decisions and hearings about a patient[43] (see Chapter 6, Part 5 of the 2000 Act (ss 220 to 228)). Sections 220 and 221 gives the Mental Health Review

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41 See pp 9-10.

42 Discussion Paper: *Victims of Crime and the Mental Health Act*, p 21.

43 Mrs W Edmond MP, Mental Health Bill 2000, Second Reading Speech, 14 March 2000, pp 345-353 at p 351.

Tribunal the discretionary power to make what is known as a notification order about a patient for whom a forensic order has been made subsequent to a finding of unsoundness of mind by a jury under s 647 (acquittal on the ground of insanity) or by the Mental Health Court.

The Health Legislation Amendment Bill 2001, **Clause 116**, amends s 220 of the 2000 Act to ensure that Part 5 of Chapter 6 also applies to a forensic patient who has been found by the Mental Health Court to be permanently unfit for trial (ie that notification orders can be made in relation to such patients).

Either upon application to it or upon its own initiative, the Mental Health Review Tribunal may make an order about a patient to the effect that a particular person is to be given notice of one or more of the following:

- When a review for the patient is to take place
- A review decision
- An approval that the patient move out of Queensland
- An order that the patient be transferred to another authorised mental health service
- The patient's transfer to another state under an interstate agreement: s 221(1)(a) to (e).

Section 223 of the Mental Health Act 2000 sets out restrictions that apply when a decision about a notification order is being made. The Tribunal must be satisfied that the person for whom the order is to be made has a sufficient personal interest in being given notice of the matter under the order. Under the Mental Health Act 2000, examples of people who may have a sufficient personal interest are:

- Victims of criminal offences committed, or alleged to have been committed, by the patient
- A patient's personal attorney or guardian
- A patient's spouse, or a relative or dependent of the patient.

The Health Legislation Amendment Bill 2001, **Clause 117**, amends s 223 so that the examples given of persons who have a sufficient personal interest will now be as follows:

1. A victim of an offence alleged to have been committed by the patient or, if the victim has died as a result of the offence, a relative of the victim
2. Someone who was with the victim when the offence was allegedly committed
3. A personal attorney or personal guardian of the patient
4. The spouse or a relative or dependent of the patient.

The purpose of the amendment is to clarify that notification orders (introduced by the 2000 Act) and non-contact orders (introduced by the 2001 amending Bill and discussed in Part 4.2.5 of this Brief) may be made in favour of similar persons.

Section 223(3) of the Act provides that, in making a decision whether a person has a sufficient personal interest, the Tribunal must consider:

- Whether the patient represents a risk to the safety of the person for whom the order is to be made
- Whether it is likely the patient will come into contact with the person
- The nature and seriousness of the offence which led to the patient becoming a forensic patient.

These considerations are not intended to be exclusive and the Tribunal may take account of any other matter. Furthermore, the Tribunal does not have to be satisfied of all or any of the matters listed; it must simply consider the matters.[44]

Where the Tribunal is satisfied that an application for a notification order about a patient is frivolous or vexatious, it must refuse the order: s 223(1).

4.2.1 Matters to be considered in deciding whether to make a notification order

Under s 224, where the Tribunal is satisfied that it may make a notification order about a patient (ie where it is satisfied there is a person with a sufficient personal interest), the Tribunal must, in deciding to make the order, consider the following matters:

- where an application has been made for the order, the grounds of the application
- whether, as a consequence of the order, the patient's treatment or rehabilitation is likely to be adversely affected
- the patient's views
- other matters the Tribunal considers appropriate.

4.2.2 Conditions attached to notification order

Section 225 empowers the Tribunal to impose conditions on the notification order as it considers appropriate. The person for whom the order is made must comply with those conditions. The maximum penalty for a breach of this provision is 40 penalty units (ie

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[44] Mental Health Bill 2000 (Qld), *Explanatory Notes in Queensland Acts 2000 Volume 1*, p 674.

currently $3000). As an example, the Tribunal may make it a condition that the person for whom the order is made is not to disclose to anyone else information received about the patient during the course of the hearing or as a result of the notification order.[45]

4.2.3 Giving notice of notification order or decision to refuse

Under s 226, if the Tribunal decides to make a notification order about a patient, it is required to give a copy of the order to:

- The patient,
- The person for whom the order is made or the applicant for the order,
- The administrator of the patient's treating health service, and
- The Director of Mental Health.

If the Tribunal decides to refuse an application for a notification order, the Tribunal must give written notice to the same persons as set out above.

The Tribunal must also give written reasons for the decision to the patient and the person for whom the order is made or the applicant for the order: s 226(4) & (5).

In practical terms, where the Tribunal makes a notification order, it is the responsibility of the executive officer to give any notices required under the order: s 227.

4.2.4 Variation or revocation of notification orders

Section 228 of the Mental Health Act 2000 makes provision for notification orders to be varied or revoked. Either the patient about whom an order is made, the Director of Mental Health or the person for whom a notification order is made may apply to the Tribunal for this to be done: s 228(1). The same procedural steps apply to an application for a variation or revocation of a notification order as apply to the original application for an order: s 228(2).

Where the application to vary or revoke a notification order is made by the patient or the Director of Mental Health, the Tribunal is required to give notice, in writing, of its decision, and the reasons for it, to the person for whom the order was made.

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[45] Mental Health Bill 2000 (Qld), *Explanatory Notes in Queensland Acts 2000 Volume 1*, p 674.

4.2.5 Other Jurisdictions

The position in various other jurisdictions has previously been outlined in QPL *Legislation Brief* 2/00 "The Queensland Mental Health Bill 2000: Reforms to Victims' Rights in Relation to Proceedings and Notification Orders" by Cathy Green.[46]

5 NON-CONTACT ORDERS

5.1 POWER OF MENTAL HEALTH REVIEW TRIBUNAL TO MAKE NON-CONTACT ORDERS

Clause 119 of the Health Legislation Amendment Bill 2001 inserts a **proposed new Part 5A** (**proposed new ss 228A to 228G**) into the Mental Health Act 2000, to apply in circumstances, where upon the review of the mental condition of a person charged with a personal offence, the Mental Health Review Tribunal decides to revoke a forensic order made for the person. The part makes provision for non-contact orders to be made when the Tribunal decides to revoke a forensic order.

Proposed new s 228B provides that, despite being satisfied the person does not represent an unacceptable risk to the safety of others, the Tribunal may make a non-contact order against the person requiring any one or more of the following:

- That the person not contact the victim of the alleged offence or, if the victim has died as a result of the alleged offence, a relative of the victim, for a stated time
- That the person not contact someone who was with the victim when the alleged offence occurred (an "associate"), for a stated time
- That the person not go to a stated place, or within a stated distance of a stated place, for a stated time.

The maximum period for which a non-contact order can be made is two years: **proposed new s 228B(2)**.

The proposed new legislation states that the Tribunal's decision to make a non-contact order against the person must be made as part of a review but is separate from, and not material to, the decision to revoke the forensic order: **proposed new s 228B(5)**.

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[46] See pp 15-16.

5.1.1 Restrictions on non-contact orders

Proposed new s 228C provides that a non-contact order against a person is only able to be made in favour of another person for whom a notification order is already in force against the first person.

A non-contact order is not to be made unless it is appropriate in all the circumstances: **proposed new s 228C(2)** and, in deciding whether it is appropriate to make an order, the Tribunal must consider the views of these people:

- The victim of the alleged offence or, if the victim has died as a result of the alleged offence, a relative of the victim, in whose favour the Tribunal is considering making the order
- The victim's associate in whose favour the Tribunal is considering making the order
- The person against whom the order would be made.

The Tribunal must also consider the following factors:

- The viability of making the order in circumstances in which contact between the person against whom the order would be made and the victim, associate or relative may be unavoidable (eg where both parties live in a small remote community)
- The person's criminal history within the meaning of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld)
- The terms of any other order relating to the person and the victim, associate or relative (eg orders made under the Cth *Family Law Act* or the *Domestic Violence (Family Protection) Act 1989* (Qld).

Where the Tribunal decides to make a non-contact order against a person, each interested person for the order must be given a copy of the order and the written reasons for the decision: **proposed new s 228D(a) & (b)**. The Commissioner of Police must be given a copy of the order: **proposed new s 228D(a)**. The person against whom the order is made must be given a written notice advising that they have 28 days from receipt of the notice in which to appeal to the Mental Health Court against the decision, and stating how to go about making an appeal: **proposed new s 228D(c)**.

A copy of the non-contact order, and the tribunal's reasons for making the order, is to be filed in the Magistrate's Court nearest to the person the subject of the order: **proposed new s 228E**.[47]

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[47] And see the Health Legislation Amendment Bill 2001, Explanatory Notes, p 51.

The Bill makes provision for non-contact orders to be varied or revoked, upon application by an interested person for the non-contact order, or a person acting on behalf of the person against whom the order is made: see **proposed new s 228F** which explains the steps to be followed in making such an application. A person seeking a variation or a revocation of a non-contact order must apply to a Magistrates Court. **Proposed new s 228F(6)** allows the Magistrates Court to vary or revoke a non-contact order only if it is satisfied there has been a material change in the circumstances of an interested person that justifies this response (eg if, due to the victim's workplace being re-located, the victim finds him or herself working in the same building where the person against whom the order is made works). In deciding whether to vary or revoke the non-contact order, the Magistrates Court must consider the reasons for the decision to make the order: **proposed new s 228F(7)**.

It is an offence to contravene a requirement of a non-contact order. The maximum penalty for a breach is 40 penalty units ($3,000) or one year's imprisonment. A Magistrate's Court which convicts a person of a breach of a non-contact order may, in addition to or instead of sentencing the person for the offence, make an order varying the non-contact order: **proposed new s 228G (2)**.

5.2 POWER OF THE MENTAL HEALTH COURT TO MAKE NON-CONTACT ORDERS

Clause 131 of the Health Legislation Amendment Bill 2001inserts a **proposed new Chapter 7, Part 8A** into the Mental Health Act. Part 8A of Chapter 7 is intended to apply if, upon a reference to it, the Mental Health Court decides that a person charged with a personal offence was of unsound mind when the alleged offence was committed, or is unfit for trial for the alleged offence and the unfitness is permanent in nature, and does not make a forensic order for the person. **Proposed new Part 8A** empowers the Mental Health Court to make a non-contact order in addition to its decision not to make a forensic order for a person found to be of unsound mind or permanently unfit for trial. The amendments contained in Part 8A are equivalent to the amendments proposed for the Mental Health Review Tribunal as outlined above

APPENDIX A –NEWSPAPER ARTICLES

Title **Homicide case takes legal twist (Arthur Brown).**
Author **Mark Oberhardt**
Source **Courier-Mail**
Date Issue **11/07/01**
Page **9**

The Mental Health Tribunal did not have the power to overrule a jury decision that Arthur Stanley Brown - the man charged with the murder of the Mackay sisters - was fit to stand trial, according to details of a Court of Appeal verdict released yesterday. The hearing of the appeal was in February and the decision was issued in May, but Queensland's Mental Health laws are so strict the reasons for the decision could not be released until yesterday. In a further twist in a long legal battle, the ruling was superseded last week when the Crown dropped charges, including murder, against Brown. However, the appeal and the ruling stand as an important test case.

In October last year, Brown faced a Supreme Court trial in Townsville on charges of murdering Judith Elizabeth Mackay, 7, and her sister Susan Deborah McKay, 5, on August 26, 1970. The trial heard the girls were last seen waiting for a school bus and their bodies were found two days later in a dry creek bed, west of Townsville. They had been sexually assaulted, stabbed and strangled. The jury failed to reach a verdict and Brown was listed for retrial this month.

At this trial, Brown's lawyer sought a jury ruling under section 613 of the Criminal Code on whether his client was "able to make a proper defence". The jury found Brown was capable of understanding the proceedings and defend the charge. However, in the meantime Brown's wife referred his case to the Mental Health Tribunal for consideration under the Mental Health Act. In its judgment, the tribunal found Brown had progressive dementia and could not give proper instructions for his defence. He was ordered detained as a restricted patient at the Townsville Hospital but granted leave to live at home provided he continued to undertake treatment.

On September 14, the tribunal found Brown unfit for trial but the decision was suppressed until the month-long appeal period elapsed. The Attorney-General filed his appeal on the grounds the tribunal did not have the jurisdiction to make that ruling. The appeal was verified in a 2-1 judgment. The Court of Appeal's Justice Bruce McPherson and Justice Margaret Wilson agreed the appeal should be upheld. Justice Brian Ambrose said it should have been dismissed. In a written judgment, Justice McPherson said that during the appeal hearing, there had been discussion about the relative merits of having a jury or panel of experts determine fitness to plead.

"That is a policy matter . . . a jury verdict under Section 613 of the Code remains the procedure prescribed by law for determining such questions," he said. Justice Wilson said she rejected the submissions by Brown's lawyers that there could be a valid and effective reference to the tribunal during the course of a trial. She said she concluded the tribunal lacked the

jurisdiction to over-rule the jury. However, Justice Ambrose said as Brown had not been called on to plead to five of the counts he faced, he could not see there was a legal impediment to the tribunal making a determination.

Title **Mackay accused ruled unfit to stand trial.**
Author **Kevin Meade**
Source **Australian**
Date Issue **03/07/01**
Page **4**

An 89-year-old man charged with one of the most horrific crimes in Australian history is a free man today after a psychiatrist determined he had Alzheimer's disease and was unfit to stand trial. Arthur Stanley Brown, a gaunt, frail old man who told psychiatrists last year he thought Don Bradman was still playing club cricket, has escaped a retrial for the murders of two little girls in Townsville 30 years ago.

Queensland's Director of Public Prosecutions, Leanne Clare, announced yesterday her office had decided not to proceed with the retrial ordered earlier this year by the Queensland Court of Appeal. Mr Brown will also escape trial on 43 charges of sexual offences against six girls, aged from three to 10, in the 1970s.

In December 1998, Mr Brown was charged with the abduction, sexual assault and murder of Susan Mackay, 5, and her sister Judith, 7, on August 26, 1970. The girls disappeared while walking to catch a bus to school. Their bodies were found two days later in the dry bed of Antill Creek, 25km southwest of Townsville. They had been raped, stabbed, strangled and suffocated. Brown, who had worked at the Mackay sisters' school but did not emerge as a suspect during the manhunt after the discovery of their bodies, was tried for their murders in October 1999, but the jury failed to reach a verdict and a new trial was ordered. The decision announced yesterday ended 12 months of court-imposed silence on Mr Brown's procession through the justice system. In the past year he has been found fit to stand trail by the Supreme Court, unfit for trial by the Mental Health Tribunal, fit for trial by the Queensland Court of Appeal, and, finally, unfit for trial by a Crown-appointed psychiatrist.

Mr Brown's retrial was to have taken place last July but, at the instigation of his lawyer, Mark Donnelly, a special four-day jury trial was held in secret to determine whether Mr Brown was capable of understanding court proceedings. The jury found him fit to stand trial, but two days later, just as the retrial was about to begin, Mr Brown's wife Charlotte successfully applied to have him examined by the Mental Health Tribunal. The tribunal found him unfit for trial but the then attorney-general Matt Foley successfully appealed the decision and ordered the retrial to proceed.

"Following that decision (the DPP) office sought an independent assessment by a psychiatrist of Mr Brown's current fitness to stand trial," Ms Clare said yesterday." That opinion confirms that Mr Brown has degenerative Alzheimer's disease." He is considered to be currently unfit for trial and such condition is expected to progressively deteriorate. Four other

psychiatrists who have previously examined Mr Brown were of the same opinion."
Contacted at his Toowoomba home yesterday, the Mackay sisters' father, William, said: "We are very disappointed. That's all we want to say." Mr Donnelly said that putting Mr Brown on trial again would be "the equivalent of putting a person in a foreign country on trial without the aid of an interpreter".

Title **Was Charles Manson temporarily insane when he led a wild killing rampage in the US in 1969?**
Author **Deborah Cassrels**
Source **Courier-Mail**
Date Issue **23/06/01**
Page **30**

Why is Queensland the only jurisdiction in the Commonwealth with a Mental Health Tribunal which establishes if an accused is fit to face trial or of unsound mind at the time of an alleged offence? Why is mental incompetence not determined in an adversarial court by a jury? Under the Mental Health Act 1974, the tribunal, a statutory body operating since 1985, comprises three-yearly appointments of a Supreme Court judge and two assisting psychiatrists, whose advice does not have to be accepted. The judge alone constitutes the tribunal, an inquisitorial process conducted in the Supreme Court in Brisbane. Victims or family are not notified of hearings or allowed to submit victim impact statements. They are prohibited from talking to the media until 28 days after the decision. And when patients return to the community there is no requirement for neighbours or victims to be notified.

Is this legislation enlightened or are we just suckers, falling for time and money-saving strategies? The tribunal has earned a reputation as progressive, humane and economical among some judges who have presided over it. The inaugural chair, former Supreme Court judge Angelo Vasta QC, thinks the tribunal system is "enlightened" and "it saves an enormous amount of expenditure". He points to the humane side of treating the ill in a secure hospital rather than punishing them for offences but is uncomfortable with borderline cases.

"Whether people are mad or bad ought to be established by a very thorough investigation. In the case of Ross Farrah (who killed Christine Nash in 1995) the facts were so in dispute that it should never have been made the subject matter of a determination by the Mental Health Tribunal. In that situation, it should have been referred to a jury."

The present chair, Justice Richard Chesterman, said two years ago that he "is no less qualified than a jury to make the appropriate determination" and that the tribunal did so earlier and at less cost than if the matter went before a jury. He determined the fate of Claude John Gabriel, who stabbed to death teenager Janaya Clarke in 1998. Found criminally insane at the time, Gabriel is treated for schizophrenia at the John Oxley Memorial Hospital at Wacol, from which he escaped a year ago and was caught on the run to the airport. The Courier-Mail reported last week that the Clarke

family was fearful on learning Gabriel, who knew their address, had been granted leave from hospital after only two-and-a-half years. Approval is given on individual evaluation. Gabriel will never be tried before a jury because the tribunal endorses medical rather than punitive treatment.

The associated Patient Review Tribunals (of which there are five) consist of three to six members, including the chair who is a legal officer, a medical practitioner and a mental health professional. A psychiatrist is not required. The other three have no specific qualifications and can include former patients. The tribunals operate in closed hearings and patients of unsound mind or unfit for trial are reviewed every 12 months. Leave is granted either by the Mental Health Tribunal or the Patient Review Tribunal, which determine when a restricted patient is discharged into the community. Says the Director of Mental Health, Dr Peggy Brown:

"In the case of serious offences you can be assured the period of monitoring is quite lengthy." Under the Mental Health Act 2000 to be implemented late this year, the tribunal will be replaced by a Mental Health Court and the Patient Review Tribunal by the Mental Health Review Tribunal. Queensland Health Minister Wendy Edmond says the name change reflects transparency, with proceedings under oath and cross-examination of witnesses. The legislation represents "real change to the rights of victims of crime". But there is still an embargo on publishing decisions in the media. Dr Brown says when patients are granted leave, victims or families can apply to be notified but decisions will be made on individual cases.

"The (new) tribunal has to establish that there are reasonable grounds for the notification order to be made . . . and it's also an appealable decision," returning to the Mental Health Court. Brown says there are efficiencies in the new legislation but "it's not about saving money". The main advantages were that victims could make submissions to both bodies. Concerns still might not be addressed but reasons were expected to be provided. The court's composition and sole power of the judge will be retained. Victims or relatives can be notified of hearings and decisions about the patient. If not, reasons must be provided.

The Patient Review Tribunals will be replaced by one tribunal with hearings still closed. It will comprise up to five members including a president (a lawyer of at least seven years' standing), psychiatrist or medical practitioner and community members and it will be chaired by a legal officer. Leave will be approved by the corresponding previous bodies. Chief Justice Paul de Jersey who presided over the 1995 case of Ross Farrah, a paranoid schizophrenic, who after murdering his girlfriend, Christine Nash, was allowed out of the John Oxley Centre to play sport and see movies, says the proposed legislative changes to the Mental Health Act appear to be "refinements".

Two weeks ago, Nash's teenage son Wade committed suicide after suffering years of torment following his mother's murder. In May 1996, a letter was sent to the tribunal by now former director of secure care services at John Oxley Dr Peter Fama. It said:

"Should Ross be committed to the Tribunal for trial on a charge of manslaughter or murder, I have to report that he is now fit to be placed in corrective custody . . . There is no clinical need for further detention of Ross in hospital."

De Jersey has been involved in the process of amendments in the new Act and believes the "adjustments" are satisfactory: "It's probably a question of how they're implemented. I thought the changes were more concerned with image than effecting substantial change to the system, calling it a court rather than a tribunal. There is some attempt to enhance the openness of the procedures such as the advice given by the existing psychiatrists being revealed in open court to the judge but they're aspects of streamlining rather than substantive change."

He says many people are irked by a perceived disproportion between the treatment of mentally ill offenders and their victims.

"As a community we need much more positively to address the situation of victims." De Jersey points to the James Bulger murder in the UK eight years ago when two 10-year-old boys abducted and battered James, two, to death. The killers are expected to be freed soon. Says de Jersey:

"Whatever one thinks of future plans for the young offenders it is extraordinary, if reportedly correct, that so little help has been given to the bereft mother of the murdered toddler.

"Similarly, here, it is generally indefensible where victims or the families of victims are not informed of details of the likely release of their offenders, and even before that where they are not given a proper explanation as to the process and counselling to help them comprehend that process and as well the consequences of the crime. We are as a community moving towards a greater focus on the position of victims but a lot more needs to be done.

"The anguish of victims and the families of victims that insane offenders appear to escape punishment is understandable. The issue is whether the community is prepared to accept that insane offenders primarily need treatment."

The Mental Health Tribunal worked on two assumptions, that offenders of unsound mind should, in the interests of the community, be treated rather than punished, and that a determination whether an offender was of unsound mind could responsibly be made by a Supreme Court judge with expert psychiatric assistance.

"I have wondered whether with the ultimately serious crimes such as murder the community may not reasonably demand that in the interests of reassurance that the determination be made by a jury."

He believes the community's longer term interests would best be served by medically treating insane offenders in a hospital rather than a prison, where if rehabilitated, they could contribute to the community.

"I accept, however, that in many cases there will be serious residual concern, for example, can the offender be trusted, if left unsupervised, to continue to take the relevant medication?"

De Jersey admits problems have arisen when offenders, granted leave, stopped taking medication but says if they can be relied upon to maintain stability through medication it would be inhumane to keep them locked up. Continued medical monitoring was necessary. If conditions were breached the person should be returned to restricted custody at the psychiatric hospital. While the most vulnerable in society deserve compassion it does not surprise there is public concern about lack of proper scrutiny, the capacity to re-offend and misuse of the legal process by using insanity as a defence.

In the general quest to improve treatment provisions for patients the 2000 Act says:

"The new legislation provides for involuntary treatment in the community as an alternative to being an in-patient in a mental health service which reflects contemporary clinical practice and the principle of reform that involuntary treatment must be in the least restrictive form."

Perhaps the overwhelming feeling is patients' rights have priority over victims' rights. Ted Flack, spokesman for the Queensland Homicide Victims Support Group says the new Act provides a better environment for victims' participation, but there are serious flaws. The rights of homicide victims were not guaranteed and this caused an inordinate amount of distress.

"There's still considerable discretion in the hands of the Mental Health Court and the Mental Health Review Tribunal as to whether they would admit any evidence from the victims. The new Act is framed in such a way as to provide guaranteed rights to the person who's suffering from a mental illness and those rights come appropriately from the international conventions, but there are similar international conventions for victims and they are being completely ignored in the Act."

Flack says the primary purpose of the Mental Health Tribunal is to save money and to safeguard the rights of the mentally disabled person. He believes the criminally insane can be catered for properly in jail.
"The imprecise science of psychiatry is not an appropriate set of guidelines for the release into the community of dangerous killers," he says. "I thought the changes were more concerned with image".

Title **Victims' families get say on killers.**
Author **Peter Morley**
Source **Sunday Mail**
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Families of people murdered by criminally insane killers will be given the right to oppose their release. Long-overdue changes to the Mental Health Act, to be in place by the end of this year, will allow relatives and rape victims to object when offenders are considered for release back into the community. And the relatives and victims will be able to apply for an order requiring authorities to inform them if a person in custody is granted leave or transferred to another facility.

The inadequacies of the existing law have been highlighted by Gold Coast mother Robyn Clarke's decision to go into hiding after authorities gave "leave" to the man who killed her daughter 2 1/2 years ago. The release was defended yesterday by medical authorities who said Claude John Gabriel would not have been released if the family were at risk.

"The crucial issue is safety when dealing with decisions on leave," Queensland Health's Peggy Brown said. But that did not satisfy Premier Peter Beattie who said he was "deeply concerned" and could understand Mrs Clarke's distress.

"From what I know of this case, she is entitled to be afraid," Mr Beattie said. "I think a lot of people would find it deeply disturbing as I do. "I have called for a full report on the matter."

Although there is no existing requirement on authorities to advise Mrs Clarke, she learned on Thursday that Gabriel had been granted leave. At the same time, she received a letter threatening she would be in contempt of court if she divulged the information. In November 1998, Gabriel killed Mrs Clarke's 17-year-old daughter Janaya. He stabbed her 13 times but did not stand trial because he was suffering from a mental illness. Gabriel was admitted to John Oxley Hospital in the Brisbane suburb of Wacol. A year ago he escaped but was caught heading for the airport.

Gabriel knows the Gold Coast address of Mrs Clarke, whose friends and family encouraged her to go into hiding with her three other children. Dr Brown, the department's mental health director, said the public could be assured that the patient review tribunal that granted Gabriel leave had "fully assessed" his case and "paid particular attention to safety issues".

APPENDIX B – MINISTERIAL MEDIA STATEMENT

The Hon Wendy Edmond MP, Minister for Health and Minister Assisting the Premier on Women's Policy, 11 September 2001.

Community and patient safety the priority in health legislation

Legislation to increase community safety through a range of measures in 20 separate Acts was introduced in Parliament today by Health Minister Wendy Edmond. The bill amends laws related to areas including food safety, mental health, consent for the use of organs and tissues.

Ms Edmond said that the changes to the Food Act 1981 would protect public health and safety.

"This legislation increases the penalties for the sale of unsafe foods from $3,500 to $100,000 for individuals and from $17,500 to $500,000 for corporations," Ms Edmond said. "It signals the Queensland Government's commitment to protecting the public from food-borne illnesses and reducing the risk of food poisoning."

Ms Edmond said the impacts of food borne illness could be serious, particularly for children, pregnant women and the elderly. The amendments are the next step in applying the National Model Food Act, which has been agreed to by all of the states and the Commonwealth.

The changes to the Mental Health Act ensured that public safety must be considered in decisions about patients confined to mental health institutions. The changes clarify issues raised by two Justices of the Court of Appeal who suggested that in certain interpretations the Mental Health Act could make it easier for people acquitted on the basis of unsoundness of mind to be released into the community.

"The amendment will overcome any uncertainty and reinforces our intention to provide strict safeguards to ensure that all decisions balance the rights and treatment needs of the patient with the safety of the community," Ms Edmond said." This change ensures that the emphasis is on public safety."

Under changes to the Transplantation and Anatomy Act 1979, tissues and organs can only be used for the purpose that has been consented to. The changes clarify Queensland's policy requiring consent either by the deceased person during their life or, after death, the senior next of kin who knows what the deceased person's wishes were in relation to donating organs and tissues.

"The changes will accurately reflect current public opinion on these issues and ensure that the wishes of the individuals and their families will be respected when it comes to organ donation, non-coronial post mortem examinations, and the donation of whole bodies for science," she said. "It will strengthen the safeguards now in place by increasing penalties for the unlawful removal or use of tissues or organs." Ms Edmond said protection for whistleblowers passing on information about such practices will also be provided. Penalties for unlawful removal or use of tissues or organs will be increased to $7,500 up from $750.

Changes to the Medical Practitioners Registration Act will facilitate the registration of overseas specialists to work in "areas of need" - where there are insufficient numbers of medical practitioners to meet the needs of local patients.

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