



New South Wales

Mental Health Legislation Amendment Act 1997 No 28

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New South Wales

Mental Health Legislation Amendment Act 1997 No 28

Act No 28, 1997

An Act to amend the *Mental Health Act 1990* with respect to mentally ill persons, police detention powers, Magistrates' hearings, the release of patients from hospitals, community treatment orders and health care agencies, official visitors, the interstate transfer of patients, treatment under interstate orders, the treatment of interstate persons and the apprehension of interstate persons, and for other purposes; and to amend the *Mental Health (Criminal Procedure) Act 1990* to remove the requirement for certain offenders to be held in strict custody. [Assented to 25 June 1997]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Mental Health Legislation Amendment Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Mental Health Act 1990 No 9

The *Mental Health Act 1990* is amended as set out in Schedule 1.

4 Amendment of Mental Health (Criminal Procedure) Act 1990 No 10

The *Mental Health (Criminal Procedure) Act 1990* is amended as set out in Schedule 2.

5 Explanatory notes

The matter appearing under the heading “Explanatory note” in Schedules 1 and 2 does not form part of this Act.

Schedule 1 Amendment of Mental Health Act 1990

(Section 3)

1.1 Amendments relating to involuntary detention of persons

[1] Section 9

Omit the section. Insert instead:

9 Mentally ill persons

- (1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:
 - (a) for the person's own protection from serious harm, or
 - (b) for the protection of others from serious harm.
- (2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.

Explanatory note (Schedule 1.1 [1])

A person may not be involuntarily detained under the Act unless the person is a mentally ill person or a mentally disordered person. The amendment inserts a new definition of mentally ill person that removes the existing requirement that a person suffering from a mental illness is such a person if the person requires care, treatment or control for the protection of the person or others from serious physical harm and replaces it with a requirement that such a person requires care, treatment or control for protection of the person or others from serious harm. The effect of this is to enable other kinds of harm, such as financial harm or harm to reputation, to be considered when determining whether a person can be detained as a mentally ill person. The new definition omits the existing provisions classifying persons suffering from certain mental illnesses characterised by

severe disturbance of mood or sustained or repeated irrational behaviour as mentally ill if they require care, treatment or control for protection from serious financial harm or serious damage to reputation. The new definition also makes it clear that, in assessing whether a person is a mentally ill person, any likely deterioration in the person's condition and its effects is to be taken into account.

[2] Section 24 Detention after apprehension by police

Omit "a public place" from section 24 (1).
Insert instead "any place".

Explanatory note (Schedule 1.1 [2])

Currently, police may apprehend persons for the purpose of detention in a hospital if the persons appear to be mentally disturbed and have, or appear to have, committed an offence and are in a public place. The amendment extends this power of apprehension under the Act to such persons in any place.

[3] Section 42 Adjournments

Insert after section 42 (2):

- (3) The Magistrate may adjourn an inquiry under this section only if:
 - (a) the Magistrate is of the opinion that it is in the best interests of the person in respect of whom the inquiry is held to do so, and
 - (b) the Magistrate has considered any certificates given under this Act available to the Magistrate.
- (4) If an inquiry is adjourned, the person in respect of whom the inquiry is held is to continue to be detained in the hospital unless the person is discharged or allowed to be absent from the hospital under another provision of this Act.

Explanatory note (Schedule 1.1 [3])

The Act currently permits an adjournment of an inquiry before a Magistrate (to determine whether a person should continue to be detained in a hospital) for a maximum of 14 days at any one time. The amendment restricts the circumstances in which an adjournment may be granted by requiring the Magistrate to believe that it is in the best interests of the patient to grant an adjournment and provides for the patient to continue to be detained unless released under another provision of the Act.

[4] Schedule 2 Medical certificate as to examination or observation of person

Omit item 1 in Part 1. Insert instead:

1. I am of the opinion that the person examined/observed by me is a mentally ill person suffering from mental illness/or a mentally disordered person and that there are reasonable grounds for believing the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:
 - (a) in the case of a mentally ill person:
 - (i) for the person's own protection from serious harm, or
 - (ii) for the protection of others from serious harm, or
 - (b) in the case of a mentally disordered person:
 - (i) for the person's own protection from serious physical harm, or
 - (ii) for the protection of others from serious physical harm.

[5] Schedule 2

Omit the matter relating to section 9 from the notes to the Schedule. Insert instead:

9 Mentally ill persons

- (1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:
 - (a) for the person's own protection from serious harm, or
 - (b) for the protection of others from serious harm.

- (2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.

Explanatory note (Schedule 1.1 [4] and [5])

The amendments are consequential on the substitution of section 9 by item [1].

1.2 Amendments relating to release of forensic patients

[1] Section 81 Tribunal to review cases of persons found not guilty by reason of mental illness

Omit "in strict custody" wherever occurring in section 81 (1).

Explanatory note (Schedule 1.2 [1])

The amendment removes references to detention in strict custody. (That requirement is to be abolished by Schedule 2.)

[2] Section 101 Termination of classification as forensic patient of person found not guilty by reason of mental illness

Omit "in strict custody" wherever occurring in section 101 (1).

Explanatory note (Schedule 1.2 [2])

The amendment removes references to detention in strict custody. (That requirement is to be abolished by Schedule 2.)

1.3 Amendments relating to health care agencies and community treatment orders

[1] Section 115 Directors and Deputy Directors

Omit ", by order published in the Gazette" from section 115 (4).

Explanatory note (Schedule 1.3 [1])

Currently, the Director-General of the Department of Health may appoint the holders of specified offices as Directors and Deputy Directors of health care agencies. The revocation of any such appointment is required to be published in the Gazette, as is the appointment of a new Deputy Director where one has not been originally appointed. The amendment removes the requirement to publish the revocation or appointment in the Gazette.

[2] Section 135 Duration of community treatment orders

Omit section 135 (1). Insert instead:

- (1) A community treatment order expires:
 - (a) on a date stated in the order that is not later than 6 months after the date of the order, or
 - (b) if an expiry date is not stated in the order—6 months after the date of the order, or
 - (c) if the affected person is detained in a hospital under this Act (except this Part) or becomes a forensic patient.

Explanatory note (Schedule 1.3 [2])

This amendment extends the maximum duration of a community treatment order from 3 months to 6 months.

[3] Section 143 Effect of review by medical superintendent

Omit section 143 (1) (a). Insert instead:

- (a) in the case of a mentally ill person, a direction is to be taken to have been given under section 51 (3) for detention of the person in the hospital until the expiration of the community treatment order or the person is released under section 143A, whichever is the earlier, or

[4] Section 143A

Insert after section 143:

143A Review by Tribunal of detained persons

- (1) A person detained in a hospital under section 143 (1) (a) must be brought before the Tribunal not later than 3 months after the person was detained. The Tribunal must determine whether the person is a mentally ill person.

- (2) In the course of making its determination, the Tribunal **must:**
 - (a) inquire as to the administration of any medication to the person, and
 - (b) take account of the effect of the administration of the medication on the person's ability to communicate, and
 - (c) consider such other information as may be placed before it.
- (3) **If the** Tribunal determines that the person is a mentally ill person and is of the opinion that no other care of a less restrictive kind is appropriate and reasonably available to the person, the Tribunal must determine whether the person should be detained in the hospital until the expiration of the community treatment order.
- (4) If the Tribunal does not determine that the person is a mentally ill person or is of the opinion that other care of a less restrictive kind is appropriate and reasonably available to the person, the person must be released from the hospital. However, the Tribunal may also defer the release of the person for up to 14 days.
- (5) Release from the hospital does not affect the continuity of the community treatment order.
- (6) This section does not apply if the community treatment order expires less than 3 months after the person is detained in hospital.

Explanatory note (Schedule 1.3 [3] and [4])

Because the length of community treatment orders has been extended to 6 months, it is necessary to enable review by the Mental Health Review Tribunal of persons detained in hospitals as a result of breach of community treatment orders (proposed section 143A). Currently the length of detention for this reason is the remaining duration of the order (unless the person becomes well or other treatment is considered appropriate). If an order's duration is more than 3 months, a person could be detained without his or her condition being reviewed for that period. Other patients who are temporarily detained must be reviewed by the Tribunal every 3 months. These amendments are consistent with that right to review.

Item [3] makes a consequential amendment.

1.4 Amendments relating to emergency electro convulsive therapy and other treatments

[1] Section 186 Circumstances in which treatment may be administered without consent to patients—emergencies

Omit the section.

Explanatory note (Schedule 1.4 [1])

Section 186 authorises emergency electro convulsive therapy to be given to involuntary patients without first obtaining the Mental Health Review Tribunal's order that treatment is reasonable and proper and necessary or desirable. The provision is being omitted as a result of improvements in available technology enabling the Tribunal to deal promptly with emergency applications.

[2] Section 204 Special medical treatment

Omit section 204 (2) (b). Insert instead:

- (b) if the Tribunal consents to the carrying out of the treatment in accordance with this section.

[3] Section 204 (2A) and (2B)

Insert after section 204 (2):

(2A) The Tribunal must not consent to the carrying out of special medical treatment on a patient unless:

- (a) the treatment is necessary in order to save the patient's life or to prevent serious damage to the patient's health, or
- (b) the Tribunal is authorised to give that consent under subsection (2B).

(2B) In the case of special medical treatment declared by the regulations to be special medical treatment, the Tribunal may consent to the carrying out of the treatment if it is satisfied that:

- (a) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient, and

- (b) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of the treatment— those guidelines have been or will be complied with as regards the patient.

Explanatory note (Schedule 1.4 [2] and [3])

Section 204 sets out the only circumstances in which special medical treatment is permitted to be carried out on a patient. The amendments bring the powers of the Mental Health Review Tribunal to consent to special medical treatment for patients into line with those of the Guardianship Board to consent to such treatment for persons who are under guardianship but who are not patients. Currently there are no statutory restrictions on the Tribunal's power to consent to the treatment.

1.5 Amendments relating to official visitors

[1] Section 228

Omit the section. Insert instead:

228 Appointment of official visitors

- (1) The Minister must, by instrument in writing, appoint official visitors for an area health service.
- (2) A person may be appointed as an official visitor if the person is a medical practitioner or is otherwise a suitably qualified or interested person.
- (3) At least one of the official visitors for an area health service must be a medical practitioner.
- (4) In this section:

area health service means:

- (a) an area health service constituted under the *Area Health Services Act 1986*, or
- (b) any of the following:
 - Far West Health Service
 - Greater Murray Health Service

Macquarie Health Service
Mid North Coast Health Service
Mid Western Health Service
New England Health Service
Northern Rivers Health Service
Southern Health Service

[2] Section 230 Inspection of hospitals

Omit section 230 (1). Insert instead:

- (1) Any 2 or more official visitors, one being a medical practitioner, must visit:
 - (a) each hospital under the control of the area health service concerned, and each authorised hospital situated in the area of the area health service, at least once a month, and
 - (b) each health care agency under the control of the area health service concerned, and each other health care agency situated in the area of the area health service, at least once every 6 months,with or without any previous notice, at such time of the day or night and for such length of time as they think fit.

[3] Section 230 (2)

Omit “month”. Insert instead “visit”.

[4] Section 234 Request by patient or other person to see Official visitor

Omit “7” from section 234 (2). Insert instead “2”.

[5] Schedule 5 Provisions relating to principal official visitor and official visitors

Omit clause 3 (1) (f).

[6] Schedule 5, clause 3A

Insert after clause 3:

3A Suspension of office

- (1) An official visitor is suspended from office if the official visitor becomes a mentally incapacitated person.
- (2) The suspension from office ceases when the official visitor ceases to be a mentally incapacitated person or the period of the official visitor's appointment expires, whichever is the earlier.

Explanatory note (Schedule 1.5 [1]–[6])

The amendments enable official visitors to be appointed for area health services rather than to individual hospitals or health care agencies, as is presently the case (item [1]). The frequency for visits to a health care agency by an official visitor is also reduced from once a month to once every 6 months (items [2] and [3]). The time within which an official visitor must be informed of a patient's request to see an official visitor is to be reduced from 7 days to 2 days (item [4]). In addition, rather than losing office if they become mentally incapacitated (that is, are involuntarily detained in a hospital under the Act) official visitors will have their offices suspended until their terms expire or they are no longer mentally incapacitated, whichever is the earlier (items [5] and [6]).

1.6 Amendment relating to interstate application of mental health laws

Chapter 10A

Insert after Chapter 10:

Chapter 10A Interstate application of mental health laws

Part 1 Preliminary

286A Object of Chapter

The object of this Chapter is to provide for the interstate transfer of patients under mental health legislation, the interstate recognition of documents enabling detention of persons under mental health legislation, the treatment of

interstate persons and persons in this State subject to community treatment orders or similar orders made in other States and the apprehension of persons subject to certain interstate warrants or orders, or otherwise liable to apprehension, under mental health legislation.

286B Definitions

In this Chapter:

agreement means an agreement under section 286C.

corresponding law means a law declared by the regulations to be a law corresponding to this Act for the purposes of this Chapter.

interstate community treatment order means an order made under a corresponding law and declared by the regulations to be an interstate community treatment order for the purposes of this Chapter.

State includes Territory.

286C Authority to enter into agreements

- (1) The Minister may enter into an agreement with a Minister of another State for or with respect to the application of mental health laws of this State or the other State, the transfer, detention and apprehension of persons in this State and the other State under mental health laws and administrative matters and other matters ancillary to, or consequential on, any such matters or any matters contained in this Chapter.
- (2) Nothing in this section limits the power of the Minister to enter into any agreement relating to mental health laws.

286D Corresponding laws, documents and interstate community treatment orders

- (1) The regulations may declare that a specified law of another State relating to mental health is a law corresponding to this Act for the purposes of this Chapter.

- (2) The regulations may declare that a specified class of order relating to the treatment of persons outside hospitals under a corresponding law of another State is an interstate community treatment order for the purposes of this Chapter.

286E New South Wales officers may exercise functions under corresponding laws

Subject to the provisions of any agreement under section 286C, a medical superintendent or other person authorised by the Minister for the purposes of this section, may exercise any function conferred on him or her by or under a corresponding law or an agreement under section 286C.

Part 2 Transfer of patients and persons

Division 1 Transfer of persons from this State

286F Admission of persons to hospitals in other States

- (1) A person who may be taken to and detained in a hospital under section 21, 22 or 24 may be taken to a hospital in another State instead of a hospital in this State, if this is permitted by or under a corresponding law of the other State.
- (2) A person may be taken to a hospital in another State under this section by:
- (a) a person who is authorised by this Act to take a person to a hospital, or to apprehend a person and take the person to a hospital, if this is permitted by or under the law of the other State, or
 - (b) any other person who is authorised to do so by the regulations or under a provision of a corresponding law of the other State.
- (3) The regulations may make provision for or with respect to:
- (a) the handing over of custody of a person referred to in subsection (1) by persons in this State, and

- (b) the persons (including interstate persons) who may take any such person to a hospital in another State under this section, and
- (c) the hospitals to which a person may be taken under this section and the places taken to be hospitals for the purposes of this section.

286G Effect of certificates

A certificate under section 21 ceases to have any effect under this Act if the person concerned is taken to and detained in a hospital in another State.

286H Transfer of patients from this State

- (1) A person who is involuntarily detained as a temporary patient or a continued treatment patient in a hospital in this State may be transferred to a hospital in another State, if the transfer is permitted by or under a provision of a corresponding law of the other State and is in accordance with the regulations.
- (2) A person who is transferred to a hospital in another State under this section ceases to be a temporary patient or a continued treatment patient on admission to the hospital.
- (3) A person may be taken to a hospital in another State under this section by a person who is authorised to do so by the regulations or under a provision of a corresponding law of the other State.
- (4) The regulations may make provision for or with respect to:
 - (a) procedures for authorising the transfer of a patient under this section and for notifying any such transfer or proposed transfer, and
 - (b) criteria for authorising the transfer of a patient under this section, and
 - (c) the handing over of custody of any such patient by persons in this State, and

- (d) the persons (including interstate persons) who may take a patient to a hospital in another State under this section, and
 - (e) the hospitals to which a patient may be taken under this section and the places taken to be hospitals for the purposes of this section.
- (5) Section 78 does not apply to a transfer under this section.

Division 2 Transfer of persons to this State

286I Admission of interstate persons to hospitals in this State

- (1) A person who may be taken to and detained in a hospital in another State under a corresponding law of that State may instead be taken to and detained in a hospital in this State.
- (2) A person may be taken to a hospital in this State under this section by:
 - (a) a person who is authorised by this Act to take a person to a hospital, or to apprehend a person and take the person to a hospital, if this is permitted by or under the law of the other State, or
 - (b) any other person who is authorised to do so by the regulations or under a provision of a corresponding law of the other State.
- (3) The regulations may make provision for or with respect to:
 - (a) the handing over of custody of a person referred to in subsection (1) to persons in this State, and
 - (b) the persons (including interstate persons) who may take any such person to a hospital in this State under this section, and
 - (c) the hospitals to which a person may be taken under this section and the places taken to be hospitals for the purposes of this section.

286J Application of Act to persons brought to hospital from outside this State

This Act applies to a person who is taken to and detained in a hospital under this Division in the same way as it applies to a person taken to and detained in a hospital under Part 2 of Chapter 4.

286K Transfer of interstate persons to hospitals in this State

- (1) A person who is involuntarily detained as a patient in a hospital in another State under a corresponding law may be transferred to a hospital in this State, if the transfer is authorised under a provision of a corresponding law of the other State and accepted by the medical superintendent of the hospital in this State.
- (2) A person may be taken to a hospital in this State under this section by a person who is authorised to do so by the regulations or under a provision of a corresponding law of the other State.
- (3) However, a medical superintendent may not accept the transfer of a person to a hospital in this State unless the medical superintendent is of the opinion that it is likely that the person is a mentally ill person.
- (4) The regulations may make provision for or with respect to:
 - (a) the procedures for authorising and arranging the receipt of a person under this section, and
 - (b) the persons (including interstate persons) who may take a patient to a hospital in this State under this section, and
 - (c) the receiving of custody of any such person by persons in this State, and
 - (d) the period within which any such person must be reviewed by the Tribunal after being transferred to a hospital in this State.

286L Application of Act to persons brought to hospital from outside this State

- (1) A person transferred to a hospital under section 286K is taken to be a continued treatment patient and the provisions of this Act apply as if the person became a continued treatment patient on the date of the person's transfer to a hospital in this State.
- (2) Despite subsection (1), the regulations may provide for the circumstances when a transferred person is to be taken to be a temporary patient.

Part 3 Community treatment orders and other orders

286M Community treatment orders relating to interstate persons

A community treatment order may be made under Part 3 of Chapter 6 even though the affected person does not reside in this State, if the health care agency implementing the order is located in this State.

286N Orders relating to New South Wales residents

- (1) A member of staff of an interstate health care agency may treat a person subject to an interstate community treatment order in this State, and exercise other functions in this State, for the purposes of implementing the interstate community treatment order.
- (2) The regulations may make provision for or with respect to:
 - (a) the bodies that are taken to be interstate health care agencies for the purposes of this section, and
 - (b) limitations on the treatment that may be given or functions that may be exercised under subsection (1).

**Part 4 Apprehension of persons absent from
 hospital or in breach of orders**

286O Recognition of warrants and orders

A warrant or an order, or other document authorising the apprehension of a person, under a corresponding law is recognised in this State if the conditions for recognition set out in the regulations are met.

**286P Apprehension of interstate persons absent without leave
 or in breach of corresponding orders**

- (1) A person who is the subject of a warrant or an order or other document recognised in this State, or who is otherwise liable to be apprehended, under a provision of a corresponding law under which the person may be apprehended and taken to a hospital or a health care agency may be apprehended at any time:
 - (a) by a police officer, or
 - (b) by a person who is authorised to do so by the regulations or under a provision of a corresponding law of the other State.
- (2) On being apprehended the person may be conveyed to and detained in a hospital in this State or the other State (if this is permitted by or under a provision of a corresponding law of the other State).
- (3) This Act applies to a person conveyed to and detained in a hospital under this section as if the person had been taken to and detained in a hospital under Part 2 of Chapter 4.

286Q Regulations relating to apprehension of persons

The regulations may make provision for or with respect to:

- (a) the kinds of warrants, orders or other documents that may be recognised in this State for the purposes of this Part, and

- (b) the conditions (if any) to be met before a warrant, order or other document can be recognised in this State, and
- (c) the circumstances when a person is taken to be liable to be apprehended under a corresponding law, and
- (d) the persons (including interstate persons) who may apprehend a person under this section, and
- (e) the hospitals and places to which a person can be taken under this Part (whether in this State or another State), and
- (f) the actions (including transfer to the other State) that may be taken in respect of a person detained under this Part.

Explanatory note (Schedule 1.6)

The proposed Chapter provides for agreements to be made with other States or Territories relating to the interstate application of mental health laws. The provisions authorise agreements to be entered into by the relevant Ministers and provide for the legislative implementation of matters that may be the subject of such agreements. The Chapter:

- (a) enables persons who may be taken to and detained in hospitals in this State to be taken to and detained in hospitals in other States or Territories (Part 2, Division 1), and
- (b) enables involuntary patients in hospitals in this State to be transferred to hospitals in other States or Territories (Part 2, Division 1), and
- (c) enables persons who may be taken to and detained in hospitals in other States or Territories to be taken to and detained in hospitals in this State (Part 2, Division 2), and
- (d) enables involuntary patients to be transferred to hospitals in this State from hospitals in other States and Territories (Part 2, Division 2), and
- (e) enables community treatment orders made in this State to be made in relation to persons in other States (Part 3), and
- (f) enables treatment in this State of persons in this State subject to interstate orders like our community treatment orders (Part 3), and
- (g) enables the apprehension in this State of persons the subject of warrants, orders or other documents for apprehension issued under the mental health laws of another State or Territory, or who are otherwise liable to apprehension under such a law, for example when a patient is absent from a hospital without leave or when a person breaches the equivalent of a community treatment order (Part 4).

1.7 Amendments relating to savings and transitional provisions

[1] Schedule 7 Savings, transitional and other provisions

Insert at the end of clause 2 (1A):

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[2] Schedule 7, Part 7

Insert after Part 6:

Part 7 Provisions consequent on Mental Health Legislation Amendment Act 1997

41 Mentally ill persons

Section 9, as amended by the *Mental Health Legislation Amendment Act 1997*, applies to persons detained before the commencement of that amendment and who continue to be detained.

42 Detention after breach of orders

Section 143A, as inserted by the *Mental Health Legislation Amendment Act 1997*, applies to a person detained after the commencement of that section, whether or not the community treatment order was made before or after the commencement of that section.

43 Official visitors

- (1) A person who held office as an official visitor for a hospital or health care agency immediately before the commencement of Schedule 1.5 [1] to the *Mental Health Legislation Amendment Act 1997*:
 - (a) ceases to hold that office, and
 - (b) is eligible (if otherwise qualified) to be reappointed as an official visitor.

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- (2) A person who so ceases to hold office is not entitled to any remuneration or compensation because of the loss of that office.

Explanatory note (Schedule 1.7 [1] and [2])

The amendments insert transitional provisions consequent on other amendments made by the proposed Act and enable transitional regulations to be made if required.

Schedule 2 Amendment of Mental Health (Criminal Procedure) Act 1990

(Section 4)

Section 39 Effect of finding and declaration of mental illness

Omit “in strict custody”.

Explanatory note

Currently a person who is found not guilty of an offence by reason of mental illness must be detained in strict custody. The amendment removes the requirement for such detention while retaining the requirement for the person to be detained.

[Minister's second reading speech made in—
Legislative Assembly on 9 April 1997
Legislative Council on 20 May 1997]