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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

MENTAL HEALTH AMENDMENT BILL 2023

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004*, s 37)**

**Presented by
Emma Davidson
Minister for Mental Health**

MENTAL HEALTH AMENDMENT BILL 2023

The Bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to the Mental Health Amendment Bill 2023 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

BACKGROUND

The Bill relates to amendments to the *Mental Health Act 2015* (the Act). The amendments have been developed in response to urgent issues raised by clinicians in exercising their functions under the Act, via consultation with key stakeholders, and in conjunction with the Mental Health Act Oversight Committee (MHAOC).

In the development of the Bill, close engagement has occurred with the ACT Human Rights Commission, the Public Advocate, ACT Civil and Administrative Tribunal (ACAT), ACT Ambulance Service, ACT Policing, ACT Mental Health Consumers Network, Carers ACT, Calvary Public Hospital Bruce and Canberra Health Services.

OVERVIEW OF THE BILL

The following amendments are included in the Mental Health Amendment Bill 2023 (the Bill).

- a. Amend section 77 and section 124 of the Act to permit a mental health officer to exercise the contravention powers under this section in addition to a relevant official.
- b. Amend section 77(2) (contravention of mental health order) and section 124(2) (contravention of forensic mental health order) of the Act, to replace the existing criteria regarding notice of the contravention process, with a requirement for the relevant official to utilise ‘all

reasonable steps' to contact the person prior to exercising contravention powers of apprehension.

- c. Amend section 80 (apprehension) of the Act to clarify that transport of the person to an approved mental health facility by an authorised officer is authorised, where a different authorised officer originally apprehended the person in accordance with the criteria under section 80.
- d. Amend section 180 (conditional release orders) to include a new requirement that the ACT Civil and Administrative Tribunal (ACAT) must have regard to the views of the Chief Psychiatrist and/or Director-General when considering the release of the person.
- e. Amend section 201 (mental health officers) to give the Chief Psychiatrist the authority to appoint mental health officers under the Act.
- f. Amend section 180(4) to clarify that orders made may include a requirement to comply with a mental health order as in force from time to time.
- g. Add a new definition to the Dictionary for 'restraint' to provide that restraint does not include the use of a spit hood. This amendment clarifies that the use of spit hoods is not authorised under the Act and therefore intends to ensure that spit hoods are not used by any person exercising a power or performing a function under the Act.

JUSTIFICATION FOR THE BILL

The amendments support the objects and principles contained in the Act, particularly the rights of a person with a mental illness or mental disorder to determine their own recovery and access the best available, and timely and accessible, treatment, care and support relating to their individual needs.

The amendments reflect the ACT Government's commitment to person-centred care, a healthy community and a safe, responsive and sustainable public health system.

The first amendment to sections 77 and 124 enables a mental health officer to authorise the contravention of a person. Presently only the Chief Psychiatrist or

delegate of the Chief Psychiatrist is authorised to initiate the contravention process. In practice, it is mental health officers who provide regular, if not daily, treatment, care and support to a person on a mental health order, who is being treated as an outpatient. A mental health officer is usually best placed to engage the most effective steps in locating and engaging with the person in supporting a person to comply with the terms of their mental health order.

The amendments to section 77(2) and 124(2) of the Act create new criteria to be followed in circumstances where a person subject to a mental health order (section 77) or a forensic mental health order (section 124) issued under the Act contravenes a condition of the order. The amendment will replace the existing requirements to first orally, and then in writing, tell the person of their failure to comply with an order, with a requirement to take all reasonable steps to tell the person.

Different kinds of communication can have various challenges for different people in the context of treatment orders under the Act. For example, with some kinds of oral communication, such as leaving a telephone message, or attending a person's place of residence when they are believed to be home, it is uncertain whether the person has heard the communication. For written communication, there may also be various challenges, for example, postal delivery of a notice requires the person to have a known or fixed address, and there may be a lack of assurance that notice via email, text message or other forms have been received by the person, especially where the person may not have reliable access to technology for email accounts, or may not have a reliable contact phone number. In some cases, there may also be concerns around whether particular kinds of communication (either written or oral) are clearly understood by the person.

The inflexible nature of the requirements of the existing sections 77(2) and 124(2) can result in both delays in providing the relevant notice, and uncertainty around whether the notice requirements have been met in some cases. This can lead to lengthy delays between the contravention, and the fulfilment of the relevant notification steps, which can place a person subject to a mental health order or a forensic treatment order at risk of serious harm to themselves or others.

The amendment will allow the steps that are taken to be adapted to the particular person and their circumstances to maximise the effectiveness of the communication. More effective communication will also better support the person having a reasonable opportunity to remedy a contravention, before an apprehension action is taken, and therefore supports the principle of least restrictive care tailored to the individual's needs as outlined in the objects and principles of the Act.

The amendment to section 80 provides clarity to first line responders to ensure that a person who requires urgent care can be transported to receive that care in a timely fashion by providing flexibility as to who can facilitate the transportation.

The existing provision at section 80 contains some uncertainty around authorisation to transport a person, where the officer or official transporting the person is not the same as the officer or official who apprehended the person under section 80(1) or section 80(3).

The amendment clarifies that where a person is apprehended by a police officer or authorised ambulance paramedic, the person may be transported to a mental health facility by that person, or another police officer or authorised ambulance paramedic. Where a person is apprehended by a mental health officer or a doctor the person can be transported by any police officer, authorised ambulance paramedic, mental health officer or doctor.

The amendment to include a new section 180(3)(f) requires the ACT Civil and Administrative Tribunal (ACAT) to consider the views of the Chief Psychiatrist and health service in making conditions contained in a conditional release order. This amendment will require ACAT to have regard to the information provided in the context of an order under section 180. However, it is noted that evidence in respect of these matters may already be provided to ACAT under Chapter 11 of the Act. The amendment is beneficial to the person as it facilitates orders made to be informed by appropriate clinical care. The amendment intends to enhance the ACAT's understanding of the clinical circumstances for persons being placed under a conditional release order. This is done by ensuring that ACAT has regard to information provided by the Chief Psychiatrist and/or Director-General in relation to conditions that may be considered for inclusion in the order. This would include

whether the person is suitable for an inpatient admission, and if the person is suitable, then considered identification of the appropriate mental health facility, for the admission of the person to receive treatment, care or support. It is not the intention of this amendment to vary the effect of section 57 of the Act and empower ACAT to order a particular form of treatment, care or support in relation to a Mental Health Order or Forensic Mental Order, only to enhance the ACAT's understanding of the treatment, care and support needs of a person when considering the release or conditional release of a person.

An amendment is also made to section 180(4) to clarify that orders for the release of a person made by ACAT may include a requirement to comply with a mental health order as in force from time to time. This is intended to streamline the operation of the section, by updating the example to make clear (to the extent there is any doubt) that it is not necessary to specify a particular mental health order or forensic treatment order (as made at a point in time), so as to allow conditional release orders to continue to apply where a mental health order or forensic treatment order might change.

The amendment to section 201 of the Act is to change the authorising officer for the appointment of mental health officers from the Minister for Mental Health to the Chief Psychiatrist. This reflects the practice of appointments since the Act's commencement as the Chief Psychiatrist has had delegated responsibility since this time. Further, the Chief Psychiatrist has oversight of the mental health system and is best placed to make decisions on mental health officer appointments.

The inclusion of a new definition of "restraint" in the Dictionary clarifies that the use of spit hoods is not authorised under the Act. There is currently no specific provision relating to the use of spit hoods as a method of restraint, so this amendment intends to ensure that spit hoods are not to be used by persons exercising a power or performing a function under the Act. The amendment will specify that spit hoods are not considered a minimum or reasonable method of restraint for any purpose under the Act. This will promote the delivery of patient care in a way that is least restrictive and intrusive for the person, and in accordance with the objects and principles of the Act.

CONSULTATION ON THE PROPOSED APPROACH

In preparing this Bill the ACT Health Directorate (ACTHD) consulted in detail with the Mental Health Consumer Network, Carers ACT, Canberra Health Services, Calvary Public Hospital Bruce, ACT Ambulance Service, ACT Policing, the ACT Civil and Administrative Tribunal, the Human Rights Commission, and the Public Advocate.

The Mental Health Act Oversight Committee (MHAOC) were consulted at all stages of the reviews and in the planning of this policy approval. MHAOC is chaired by the Chief Psychiatrist and hosted by ACTHD. MHAOC includes representatives from: Canberra Health Services, the Justice and Community Safety Directorate, ACT Mental Health Consumer Network, Carers ACT, ACT Police, ACT Ambulance Service.

CONSISTENCY WITH HUMAN RIGHTS

The Bill contains measures that engage and promote human rights protected under the *Human Rights Act 2004* (HRA) as well as measures that may limit such rights.

Rights which may be engaged

The Bill engages a number of rights under the HRA, either directly or indirectly, or both, including:

- Section 9 – right to life
- Section 10 (1) & (2) - protection from torture and cruel, inhuman or degrading treatment
- Section 18 – the right to liberty and security of the person;
- Section 19 (1) – humane treatment when deprived of liberty.
- Section 21 – right to a fair trial.

The right to a fair trial may be engaged by the amendment to section 180(4) which clarifies that the orders for the release of a person made by ACAT may include a condition to comply with a mental health order or forensic mental health order as in force from time to time. This is because it is made clearer that amendments to the mental health order or forensic mental health order could occur after the conditional release order.

Rights Promoted

This Bill engages and promotes the following rights under the HRA:

- Section 9 – right to life

- Section 10 (1) & (2) – protection from torture and cruel, inhuman or degrading treatment
- Section 18 – the right to liberty and security of the person;
- Section 19 (1) – humane treatment when deprived of liberty

The right to life, right to liberty and security of the person, and freedom from medical treatment without consent may be enhanced by the amendments to sections 77(2) and 124(2) by expanding the role of mental health officers and providing flexibility in the approach taken to adapt the method of contacting the person to the circumstances of that individual. This amendment will facilitate a range of contact methods not currently contemplated by the Act. Promoting more effective communication in relation to contraventions will simultaneously minimise delays in communication which can result in delays in treatment which can worsen mental health outcomes. This promotes more effective treatment, care or support being provided to a patient and supports their right to life.

More effective communication will also support an individual to better understand the consequences of contravention, and therefore better support the person to make more informed decisions and to promote care being provided on a less restrictive out-patient basis. This promotes the persons' rights under sections 10(2) and 18 of the HRA.

With respect to section 80, the amendments facilitate the faster transport of people who require immediate medical attention and therefore promote the right to life. The clarification of those authorised to transport a person apprehended under section 80 also facilitates the transport of the person in the least restrictive manner appropriate for their care by ensuring greater flexibility of transport options. For example, the amendment ensures that it is clear that if a person is apprehended by a police officer, that person may instead be transported by ambulance which may be the less restrictive alternative. This further promotes the right of the patient to protection from torture and cruel, inhuman or degrading treatment, and promotes the right to humane treatment of any person deprived of liberty.

The amendment to define 'restraint' to not include the use of spit hoods as a restrictive practice under the Act also promotes the rights at section 10(1) and section 19(1) of the HRA. The new definition explicitly recognises that spit hoods are

not a form of restraint authorised under the Act which reflects that spit hood use is a cruel and inhuman restrictive practice which is not appropriate when exercising a function under the Act. This supports consistency with the objects and principles of the Act.

Rights Limited

This Bill engages with and may limit the following rights:

- Section 18 (1) - The right to liberty and security of person

Existing sections 77, 124 and 80 of the Act deal with the authorisation of apprehension of a person and ability to take that person to a mental health facility. The effect of these provisions limits section 18(1) in relation to the right to liberty and security of the person. The amendments to sections 77 and 124 and section 80 also engage with, and limit, this right.

Nature of the right and the limitation (s28(2)(a), HRA)

Section 18 of the HRA provides that everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained. Further, section 18 provides that no-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The amendment will allow flexibility to better manage circumstances where effective communication is problematic, for example where a person has no fixed address, is difficult to locate, has challenges understanding communication of a particular kind or where there is uncertainty whether communication has been heard or received.

The amendment is intended to allow apprehension of a person in contravention of an order under section 77 or 124 to proceed in circumstances where all reasonable steps to provide notice have been taken, but there remains uncertainty around whether communications have been heard or received. It is also intended to cater for circumstances where the urgency of the treatment, care and support required by the person may also be relevant to the reasonable steps to be taken in particular circumstances. This will mean that in some circumstances a person receives notice of only one kind. For example, instead of oral notice and then written notice, “all reasonable steps” might be satisfied in the circumstances by multiple attempts at

oral communication via phone and in person at the person's residence or by multiple attempts at different types of written communication.

The purpose of the amendment to section 80 is to clarify the range of transport options authorised once a person is apprehended under section 80, without the transporting officer needing to be separately satisfied that the person meets the test at section 80(1) or 80(3) as relevant. This will reduce the safeguard of two officers being separately satisfied that reasonable grounds exist for the person to be apprehended.

In practice, this will mean that where a mental health officer has assessed the person as meeting the test at section 80(3), but that person cannot safely be transported by the mental health officer, it is clear that the person can be transported by a police officer or authorised ambulance paramedic (as relevant) without that police officer or authorised ambulance paramedic making a further assessment under section 80(1). This may mean a person exhibiting behavioural concerns is transported by a police officer after being first apprehended by a doctor or a mental health officer. The person therefore may be subject to a greater level of restraint than if they were transported by a doctor or a mental health officer.

Legitimate purpose (s28(b))

The amendments to section 77 and 124 acknowledge that people with mental illness and mental disorders have different experiences and circumstances. By enabling those who support the person in their mental health treatment and recovery the opportunity to engage with the person via the most suitable means, whether it is by phone, letter, in person or via other channels, the person is better placed to ensure compliance with the mental health orders. The section also contemplates that it may be harmful to the person to delay their treatment and that in those circumstances an 'all reasonable steps' approach can balance the needs of the person with their right to determine their own health care.

The amendment to section 80 clarifies the authorisation of the transporting official, which provides greater transparency to the process for apprehension and transport and facilitates more prompt, safer and more flexible transport of the person. It reduces the complexity inherent in two separate officers being required to consider

whether grounds to apprehend the person exist, thereby facilitating the person receiving timely treatment.

Rational connection between the limitation and the purpose (s28(d))

The contravention mechanism at sections 77 and 124 of the Act allows enforcement of the terms of a mental health order or a forensic mental health order which helps to ensure that a person is treated within the appropriate timeframe, as delay in treatment can result in diminished capacity to recover from mental illness. This is particularly important if a person experiences serious consequences if their illness is left untreated for long periods. A person may experience substantially shorter periods of their illness, and less associated, long-term disability, if the time between the onset and treatment of the illness is reduced.

Existing sections 77(2) and 124(2) are intended to operate as a safeguard by ensuring a person has an opportunity to remedy a contravention, however the existing provisions do not adequately provide for circumstances where telling the person in writing or orally is not an effective means of communication, or where it is unclear that notice is heard or received. The current drafting of section 77(2) and section 124(2) also requires notice to be given in a strict sequential order, with oral notice occurring first, followed by written notice if the contravention continues.

The amendment to section 77 will provide greater scope in tailoring notifications to remedy a contravention, rather than a one size fits all approach which may or may not provide adequate opportunity for a person to remedy a contravention, whilst also retaining the safeguard of notice requirements.

The amendment to section 80 provides for the range of transportation options which may need to be utilised to provide for the emergency apprehension and transport of a person to a mental health facility. This will provide greater flexibility to ensure that the transport option utilised is the most appropriate and tailored to the person's circumstances. It will also mean only the officer reviewing the person initially needs to be satisfied that reasonable grounds exist.,

Proportionality (s28(e), HRA)

The flexibility provided by the amendments to section 77(2) and 124(2) of the Act balances the goals of ensuring a person receives timely treatment, care and support

and facilitating the principle that a person has a right to determine their own recovery in accordance with the objects and principles of the Act at sections 5 and 6. The rights of a person to liberty and security of the person, will continue to be safeguarded by a requirement to take “all reasonable steps” to provide the relevant actions.

It is noted that the effect of section 77(4) is not altered by the amendment, and this continues to provide a safeguard to persons who have contravened a mental health order. Section 77(4) provides clarity in the circumstances where a contravention notice is in force, and allows the patient to consent to treatment at a place other than a mental health facility thus ensuring that a person has every opportunity to engage in their own decision making for their health care. The amendment is also supported by the inclusion of a new section 124(4) to mirror this benefit of section 77(4) for those persons subject to a forensic mental health order.

To ensure that the additional flexibility in the “reasonable steps” approach does not further limit a person’s right to liberty and security of the person, the amendment will be supported by development of a chief psychiatrist guideline made under section 198A of the Act. The guideline will provide further detail in relation to the requirement to take “all reasonable steps”, and support both people subject to a mental health order by providing surety in the measures that must be taken before a contravention can be acted on, and for relevant officials and mental health officers in ensuring that they have a clear direction on what is reasonable in the circumstances. The guideline will be binding on those authorised to act on a contravention of a mental health order under section 77(2) or section 124(2).

Clarifying the authority of those who can apprehend and transport a person under section 80 ensures that the person can receive the most appropriate, least restrictive treatment, during the apprehension process, by allowing one officer only to consider whether the grounds in section 80 are met. It will also mean that if it is not safe for the person and/or a mental health officer to transport the person, other mechanisms can be tailored to the person’s circumstances. This allows greater transparency about transportation under section 80. This leads to better health outcomes for patients as there will be minimal delay between apprehension and transportation to an approved mental health facility.

Although new section 80(2A) and 80(3A) will allow transport to occur by a range of mechanisms, the exercise of the function will remain subject to sections 5 and 6 of the Act which require that treatment, care and support is provided in a way that is the least restrictive to the person. Both the amendment to section 77 and the amendment to section 80 recognise that a person's mental health care is unique and having flexibility built into provisions for enforcing contraventions of mental health orders or apprehending and transporting the person to an approved mental health facility for assessment can ensure patient centred decisions are made. To the extent that the amendment of sections 77, 80 and 124 of the Act limit the rights of a person to liberty and security of the person, that limitation is considered proportionate to the purpose of providing patient centred care, and is the least restrictive approach to achieve the policy purpose of the amendment.

Mental Health Amendment Bill 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Mental Health Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

Clause 1 provides that the title of the Act will be the *Mental Health Amendment Act 2023*.

Clause 2 Commencement

Clause 2 provides that the Act commences on the day after the notification day.

Clause 3 Legislation Amended

Clause 3 provides that the Act amends the *Mental Health Act 2015*.

Clause 4 Section 77(2), (2A) and (2B) Contravention of mental health order

Clause 4 replaces the criteria to be followed in circumstances where a person subject to a mental health order issued under the Act contravenes a condition of the order. Section 77(2) allows the relevant official or mental health officer to take action to tell a person that failure to comply with the order may result in the person being apprehended and taken to an approved mental health facility. Section 77(2A) provides that the action taken under section 77(2) must occur within 7 days of the contravention and involve the taking of all reasonable steps to tell the person of the matters set out in section 77(2). Section 77(2B) provides that if non-compliance continues after the taking of reasonable steps the person may be taken to an approved mental health facility or approved community care facility for treatment, care and support.

Clause 5 Section 77(3) Mental health officer role in contravention

Clause 5 updates the drafting to align with the amendment made in Clause 4.

Clause 6 Section 77(3)(b) Mental health officer role in contravention

Clause 6 aligns with the amendment made in Clause 4 in extending the ability to take action in relation to a contravention to mental health officers.

Clause 7 Section 77(4) Contravention of mental health order

Clause 7 updates cross-referencing in line with the amendment made in Clause 4.

Clause 8 Section 77(5) Mental health officer role in contravention

Clause 8 extends the requirement for the relevant official to notify ACAT and the public advocate about the detention of a person under section 77 to mental health officers and updates cross-referencing in line with the amendment made in Clause 4.

Clause 9 Section 80(1) Apprehension

Clause 9 supports the amendment at Clause 10.

Clause 10 Section 80(2A) Apprehension

Clause 10 inserts section 80(2A) to provide that any police officer or authorised ambulance paramedic can transport a person apprehended under 80(1).

Clause 11 Section 80(3) Apprehension

Clause 11 supports the amendment at clause 12.

Clause 12 Section 80(3A) Apprehension

Clause 12 inserts section 80(3A) to provide that any doctor, mental health officer, police officer or authorised ambulance paramedic can transport a person apprehended under 80(3). The inclusion of this provision clarifies that a police officer or authorised ambulance paramedic may transport a person who has been apprehended under section 80(3) without having to satisfy themselves that the test under 80(1) is met.

Clause 13 Section 124(2) Contravention of forensic mental health order

Clause 13 replaces the criteria to be followed in circumstances where a person subject to a forensic mental health order issued under the Act contravenes a condition of the order. The amendments to section 124(2) allow the relevant official or mental health officer to take action to tell a person that failure to comply with the order may result in the person being apprehended and taken to an approved mental health facility. Section 124(2A) provides that the action taken under section 124(2) must occur within 7 days of the contravention and involve the taking of all reasonable steps to tell the person of the matters set out in section 124(2). Section 124(2B) provides that if non-compliance continues after the taking of reasonable steps the person may be taken to a mental health facility for treatment, care and support.

Clause 14 Section 124(3)

Clause 14 updates cross-referencing in line with the amendment made in Clause 13.

Clause 15 Section 124(4) Mental health officer role in contravention

Clause 15 extends the requirement for the relevant official to notify ACAT and the public advocate about the detention of a person under section 124 to mental health officers.

Clause 16 Section 125(5) Contravention of forensic mental health order-absconding from facility

Cause 16 clarifies that the relevant official referred to in 125(5) is the relevant officer for the order.

Clause 17 Section 180(3)(f) Review of detention under court order

Clause 17 provides an additional requirement that the ACAT must have regard to when reviewing the detention and considering the release of a person detained under part 13 of the Crimes Act. In addition to the requirements listed in 180(3)(a)-(e) the ACAT must also have regard to information provided by the chief psychiatrist or director-general in relation to the treatment, care or support a person requires, including information relating to whether the person needs to be admitted to a particular approved mental health facility.

Clause 18 Section 180(4) Review of detention under court order and section 182 (5) Review of conditions of release

Clause 18 clarifies that an order for the release of person made under section 180 need not be amended when a mental health order or forensic mental health order is amended. The same applies in relation to section 182(5).

Clause 19 Section 201(1) Mental health officers

Clause 19 provides that the chief psychiatrist may appoint a person as a mental health officer.

Clause 20 Section 201 Notes 1 to 3

Clause 20 replaces notes 1 to 3 from section 201 with a single note referring to pt 19.3 of the Legislation Act for laws about appointments.

Clause 21 New chapter 20

Clause 21 inserts Chapter 20 which provides transitional arrangements for the amendments introduced in the Mental Health Amendment Act 2023.

Clause 22 Dictionary

Clause 22 adds restraint to the Dictionary. The definition of restraint makes it clear that restraint does not include the use of a spit hood.