

2015

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

Mental Health Bill 2015

Supplementary Explanatory Statement

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1. Outline

- 1.1 This Supplementary Explanatory Statement is on proposed Government amendments to the Mental Health Bill 2015 ('the Bill'). The Bill was presented to the Australian Capital Territory (ACT) Legislative Assembly ('the Assembly'), on 4 June 2015.
- 1.2 All but six of the amendments are in response to comments on the Bill that the Standing Committee on Justice and Community Safety made in its *Scrutiny Report No. 34* of 28 July 2015¹. The six proposed amendments that are not in response to that Report are minor and technical. They are:
- Amendments 1 and 16, which would essentially provide for a new commencement date of 1 March 2016 for the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT) ('the Amendment Act');
 - Amendments 13, 14 and 15, which correct words erroneously inserted into the Bill; and
 - Amendment 17, which would supply a new definition of 'psychiatrist' for the Bill's proposed *Mental Health Act 2015*.
- 1.3 Fundamental to the interpretation of all the proposed amendments are the:
- rights in the *Human Rights Act 2004* (ACT) ('the Human Rights Act'); and
 - Amendment Act's sections 5 (Objects) and section 6 (Principles), which clearly incorporate many of the rights in the Human Rights Act, and would relocate² into the Bill's proposed *Mental Health Act 2015*, upon the commencement of the latter Act.
- 1.4 The rights in the Human Rights Act, and the Amendment Act's sections 5 and 6, are key to the interpretation of these proposed amendments for the same reasons they are to the Bill's interpretation. Those reasons are explained in the Bill's Explanatory Statement.

2. Detail

- 2.1 **Amendment 1** would amend the Bill's commencement clause, clause 2. The effect of that amendment would be to commence all but one part of the proposed *Mental Health Act 2015*, after the commencement of section 3 of the Amendment Act. (Amendment Act sections 1 and 2, the Act's name and commencement provisions, respectively, have already commenced. Section 75(1) of the *Legislation Act 2001* automatically commences the naming and commencement provisions of any ACT Act upon the Act being notified. The Amendment Act was notified on 12 November 2014.)

¹ Legislative Assembly for the ACT Standing Committee on Justice and Community Safety, *Scrutiny Report No. 34*, 28 July 2015 <http://www.parliament.act.gov.au/_data/assets/pdf_file/0010/753976/Report-34a.pdf>, accessed 16 September 2015.

² Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.33 would relocate, into the *Mental Health Act 2015* the *Mental Health (Treatment and Care) Act 1994* (ACT), sections 5 and 6, as those sections will be after the commencement of the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT).

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- 2.2** That part of the proposed *Mental Health Act 2015* which would not be commenced by Bill clause 2 as amended by Amendment 1 is schedule 2, part 2.1A. Schedule 2, part 2.1A would be created by proposed Amendment 16 of the Bill. It would change the commencement provision of the Amendment Act to commence its section 3 on 1 March 2016.
- 2.3** Consequently, the enactment of Amendment 1 of the Bill would commence the proposed *Mental Health Act 2015* immediately after the commencement, on 1 March 2016, of all of the Amendment Act that has not yet commenced, which is to say all of it, save its sections 1 (Name of Act) and section 2 (Commencement).
- 2.4** **Amendment 2** would be to clause 39(1)(f). The Amendment would insert three particular examples of Bill clause 39(1)(f). One of these is: 'the person was in an agitated state and hit their head against the side of the transport vehicle'. It is an example of, as clause 39(1)(f), reads 'anything else that happened when the person was being apprehended and taken to the facility that may have an adverse effect on the person's physical or mental health'.
- 2.5** Clause 39(1)(f) is one of several matters of what Bill clause 39 would require to be addressed in a section 39 statement, upon commencement of the proposed *Mental Health Act 2015*. Section 39 will impose a duty on a police officer, authorised ambulance paramedic, doctor, or mental health officer who exercises the emergency apprehension power supplied to them by what will be section 37 of the *Mental Health (Treatment and Care) Act 1994* upon commencement of the Amendment Act. The commencement of the *Mental Health Act 2015* will relocate³ section 37 into it.
- 2.6** The said duty of the police officer, authorised ambulance paramedic, doctor, or mental health officer will be to provide a statement that includes the particulars section 39 stipulates must be in that statement. Paragraph (1)(f) is just one of several particulars that section 39 states must be included in a section 39 statement.
- 2.7** **Amendment 3** would insert a particular Note under Bill clause 41A(2). That Note would indicate that people acting under the enacted clause 41A(2) must use any form approved, under section 146A, for that clause. Clause 41A(2) vests in the person in charge of an approved mental health facility a duty to notify the Magistrates Court about a person's emergency detention or release from emergency detention.
- 2.8** Section 146A(1) endows upon the Minister a power to approve forms 'for the Act' and section 146A(2) allows the Minister to do so 'for a particular purpose'. Section 146A is currently in the *Mental Health (Treatment and Care) Act 1994*. The Amendment Act, upon its commencement, will wholly preserve section 146A and the commencement of the *Mental Health Act 2015* will relocate⁴ it into the *Mental Health Act 2015*.
- 2.9** **Amendment 4** would insert a new subclause (1A) into Bill clause 61. That subclause would require the doctor applicant to be a psychiatrist, upon commencement of the proposed *Mental Health Act 2015*, section 61. Section 61 would require a doctor who proposes to perform psychiatric surgery on a person to make an application to do so to the chief psychiatrist. Section 61 would also make certain requirements of how that application is made.
- 2.10** It is relevant to the interpretation of this proposed amendment that Amendment 17

³ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.37 would relocate into the *Mental Health Act 2015* the *Mental Health (Treatment and Care) Act 1994* (ACT), section 37, as that section will be after the commencement of the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT).

⁴ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.48 would relocate section 146A the *Mental Health (Treatment and Care) Act 1994* (ACT) into the *Mental Health Act 2015*.

would change the definition of 'psychiatrist' in the Bill Dictionary.

- 2.11 Amendment 5** would insert a new paragraph (aa) into section 61(2). The effect of that insertion would be that the psychiatrist applying to perform psychiatric surgery on a person, under section 61 of the proposed *Mental Health Act 2015*, would be required to include in that application the person's advance consent direction, if the person has one in which they supplied their advance consent to psychiatric surgery.
- 2.12** The interpretation of Amendment 5 turns on, among other things:
- Part 3.3 of the Amendment Act, which declares how all advance consent directions must be made; and
 - Amendment 12 of these proposed Amendments, which specifies some extra requirements for making an advance consent direction that includes consent to psychiatric surgery.
- 2.13** The commencement of the proposed *Mental Health Act 2015* would relocate,⁵ into the *Mental Health Act 2015*, Part 3.3, which will be, at that point, Part 3.3 of the *Mental Health (Treatment and Care) Act 1994*, because the Amendment Act commences before the proposed *Mental Health Act 2015* would.
- 2.14 Amendment 6** would insert two new subclauses, (2A)(a) and (b), into Bill clause 62. That insertion would impose some requirements on any committee appointed under section 67 of the proposed *Mental Health Act 2015*. Section 67 would compel the Minister to appoint a committee to consider an application under section 61 of the proposed *Mental Health Act 2015*. Section 61 would compel a doctor who is proposing to perform psychiatric surgery to apply to the chief psychiatrist to perform the surgery.
- 2.15** The *Mental Health (Treatment and Care) Act 1994* currently requires such a section 61 application and section 67 committee. Subclause (2A)(a), provided by Amendment 6, would newly require that committee to give certain people it specifies an opportunity to make an oral or written submission to it on a psychiatrist's application to perform psychiatric surgery on a person. The people specified by subclause (2A)(a) are those told of the surgery under section 62(2)(a) of the proposed Act. Under subclause (2A)(b), the committee would also be newly required to consider any submissions received as an outcome of the committee's compliance with subclause (2A)(a).
- 2.16 Amendment 7** replaces subclause (1) of Bill clause 65 with new subclauses (1) and (1A). The effect of this replacement would be that clause 65 expresses that a psychiatrist may apply to the ACT Supreme Court for an order consenting to psychiatric surgery for a person, only if the person lacks decision-making capacity to give that consent themselves and they do not have an advance consent direction giving that consent.
- 2.17** The Bill currently puts neither condition on the psychiatrist applying to the Court and this was an inadvertent omission.

⁵ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.34 would relocate, into the *Mental Health Act 2015*, Part 3.3 of the *Mental Health (Treatment and Care) Act 1994* (ACT) as that Part will be after the commencement of the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT).

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- 2.18** Critical to the interpretation of Amendment 7 are at least three provisions. One is section 7 (Meaning of decision-making capacity) of the *Mental Health (Treatment and Care) Act 1994*, as it will be upon commencement of the Amendment Act. The commencement of the *Mental Health Act 2015* would relocate⁶ section 7 of the *Mental Health (Treatment and Care) Act 1994* into the *Mental Health Act 2015*.
- 2.19** The second is section 27 (Making an advance consent direction) of the Amendment Act, which states how a valid advance consent direction will be made upon commencement of the Amendment Act. The commencement of the *Mental Health Act 2015* would relocate⁷ section 27 of the *Mental Health (Treatment and Care) Act 1994* into the *Mental Health Act 2015*.
- 2.20** The third is what would be the new section 27(4A) of the proposed *Mental Health Act 2015*, upon commencement of the Act, if the Bill is amended by proposed Amendment 12, explained below. Proposed section 27(4A) would lay down certain rules for the making of an advance consent direction that gives consent to psychiatric surgery.
- 2.21** **Amendment 8** would insert, into clause 65(2), the phrase ‘on reasonable grounds’, after ‘if satisfied’. Clause 65(2) currently states that the Supreme Court must be satisfied of certain matters, before ordering consent to psychiatric surgery for a person who is lacking in the decision-making capacity to give it themselves. This Amendment would condition the Supreme Court so ordering on its satisfaction of those matters being ‘on reasonable grounds’.
- 2.22** **Amendment 9** would replace clause 65(2)(b) of the Bill, with a new paragraph (b). As it is currently, clause 65(2)(b) would only require that, before the Supreme Court substitutes its consent for the person’s, it be satisfied that the person is both lacking in the decision-making capacity to consent to the psychiatric surgery and has not refused to consent to that surgery.
- 2.23** The new paragraph (b) clarifies one of these two conditions and adds one. The clarification is that the person’s refusal may be by way of an advance consent direction or otherwise. The extra condition is that the person ‘does not have an advance consent direction consenting to the surgery’.
- 2.24** **Amendment 10** would add to Bill clause 66(2), ‘either orally or in writing’, the phrase ‘or by indicating in any other way’. This is to make it clear that the person may indicate, in any way, that they refuse psychiatric surgery. It need not be a refusal conveyed through writing or speech. This clarification is important because a person may physically resist, or otherwise physically convey, their opposition to participating in an activity, but:
- they cannot write or are very reticent to do so because they have literacy difficulties or are not fluent in English;
 - they have a developmental or intellectual disability that, for them or everyone with that disability, is characterised by them not or rarely communicating orally or in writing;
 - the person’s mental illness/es that have lead them to be a prospective recipient of psychiatric surgery, and/or another mental illness they have, manifests by way of them finding it difficult to bring themselves to communicate orally or in writing.

⁶ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.33 would relocate section 7 of the *Mental Health (Treatment and Care) Act 1994* (ACT) into the *Mental Health Act 2015*.

⁷ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.34 would relocate into the *Mental Health Act 2015* what will be section 27 of the *Mental Health (Treatment and Care) Act 1994* (ACT), upon commencement of the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT).

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- 2.25 Amendment 11** would insert a new amendment 2.2A into Schedule 2, division 2.1.1, of the Bill. Amendment 2.2A would have the effect of adding psychiatric surgery to what will be section 27(3) of the *Mental Health (Treatment and Care) Act 1994*, upon commencement of the Amendment Act. The commencement of the proposed *Mental Health Act 2015* would relocate⁸ section 27(3) of the *Mental Health (Treatment and Care) Act 1994* into the *Mental Health Act 2015*.
- 2.26** Without Amendment 11, that section would only prescribe certain requirements for making an advance consent direction that does not include consent to electroconvulsive therapy. The Amendment would mean that, upon the commencement of the proposed *Mental Health Act 2015*, those requirements would also apply to an advance consent direction that does not include consent to psychiatric surgery.
- 2.27 Amendment 12** would insert a new amendment 2.3A into Schedule 2, division 2.1.1, of the Bill. Amendment 2.3A would have the effect of instituting the same requirements for making an advance consent direction that does include consent to psychiatric surgery as what will be required for making an advance consent direction that does include consent to electroconvulsive therapy.
- 2.28** Those requirements for making an advance consent direction that does include consent to electroconvulsive therapy are currently in the Amendment Act, section 11, clause 27(4). Upon the commencement of the Amendment Act, those requirements will be in section 27(4) of the *Mental Health (Treatment and Care) Act 1994*. The commencement of the proposed *Mental Health Act 2015* would then relocate⁹ that section into the *Mental Health Act 2015*.
- 2.29 Amendment 13** would include in Bill Schedule 2, division 2.1.1, a new amendment 2.22A. That amendment would be to remove the word 'psychiatric' from what will be section 48ZJ(3) of the *Mental Health (Treatment and Care) Act 1994*, upon the commencement of the Amendment Act.
- 2.30** The word 'psychiatric' will be inappropriate in that section, as it will provide for forensic community care orders, not forensic psychiatric treatment orders. Upon commencement of the proposed *Mental Health Act 2015*, section 48ZJ(3) will be relocated¹⁰ from the *Mental Health (Treatment and Care) Act 1994* into the *Mental Health Act 2015*.
- 2.31 Amendment 14** would include in Bill Schedule 2, division 2.1.1, a new amendment 2.23A. That amendment would replace the proper noun 'chief psychiatrist' with 'care coordinator' in what will be section 48ZM(4) of the *Mental Health (Treatment and Care) Act 1994*, upon the commencement of the Amendment Act.
- 2.32** 'Chief psychiatrist' will be inappropriate in that section, as it will provide for forensic community care orders. Upon commencement of the Amendment Act, forensic community care orders will be a new class of orders that are administered by the care coordinator.

⁸ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.34 would relocate into the *Mental Health Act 2015* what will be section 27(3) of the *Mental Health (Treatment and Care) Act 1994* (ACT), upon commencement of the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT).

⁹ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.34 would relocate into the *Mental Health Act 2015* what will be section 27(4) of the *Mental Health (Treatment and Care) Act 1994* (ACT), upon commencement of the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT).

¹⁰ Upon commencement of the proposed *Mental Health Act 2015* (ACT), its schedule 2, amendment 2.41 would relocate into the *Mental Health Act 2015* what will be section 48ZJ(3) of the *Mental Health (Treatment and Care) Act 1994* (ACT), upon commencement of the *Mental Health (Treatment and Care) Amendment Act 2014* (ACT).

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- 2.33** Upon commencement of the proposed *Mental Health Act 2015*, section 48ZM(4) will be relocated¹¹ from the *Mental Health (Treatment and Care) Act 1994* into the *Mental Health Act 2015*.
- 2.34** **Amendment 15** would include in Schedule 2, division 2.1.1, a new amendment 2.24A. That amendment would replace the proper noun 'chief psychiatrist' with 'care coordinator' in what will be section 48ZN(5) of the *Mental Health (Treatment and Care) Act 1994*, upon the commencement of the Amendment Act.
- 2.35** 'Chief psychiatrist' will be inappropriate in that section, as it is about forensic community care orders. Upon commencement of the Amendment Act, forensic community care orders will be a new class of orders that are administered by the care coordinator.
- 2.36** **Amendment 16** would include in Bill Schedule 2, a new part 2.1A entitled 'Mental Health (Treatment and Care) Amendment Act 2014' and provide for an amendment 2.48A to that part. That amendment would alter the commencement provision of the Amendment Act, its section 2, to commence the Amendment Act on 1 March 2016.
- 2.37** **Amendment 17** would amend the Bill Dictionary to replace its definition of 'psychiatrist' with a new one. The new definition would have the effect of clarifying that the chief psychiatrist may delegate to a psychiatrist who 'holds limited registration under the *Health Practitioner Regulation National Law (ACT)* to practise in the specialty of psychiatry' and is a public employee or engaged by the ACT, rather than only to a psychiatrist who has already progressed to being registered under the *Health Practitioner Regulation National Law (ACT)* to practise in the specialty of psychiatry and is a public employee or engaged by the ACT.
- 2.38** The chief psychiatrist delegates their functions to psychiatrists who are public employees or engaged by the ACT, under section 118 of the current *Mental Health (Treatment and Care) Act 1994*. That section would be relocated¹² into the proposed *Mental Health Act 2015*, by the commencement of the latter Act.

¹¹ Upon commencement of the proposed *Mental Health Act 2015 (ACT)*, its schedule 2, amendment 2.41 would relocate into the *Mental Health Act 2015* what will be section 48ZN(5) of the *Mental Health (Treatment and Care) Act 1994 (ACT)*, upon commencement of the *Mental Health (Treatment and Care) Amendment Act 2014 (ACT)*.

¹² Upon commencement of the proposed *Mental Health Act 2015 (ACT)*, its schedule 2, amendment 2.45 would relocate section 118 into the *Mental Health Act 2015*.