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

MENTAL HEALTH (SECURE FACILITIES) BILL 2016

EXPLANATORY STATEMENT

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This Explanatory Statement accompanies the Mental Health (Secure Facilities) Bill 2016.

The primary purpose of the Mental Health (Secure Facilities) Bill (the Bill) is to provide a clear legislative platform for the operation of secure mental health facilities. The Bill was developed in response to the decision to build a secure mental health unit and the legal advice that such a facility should have supporting legislation.

Secure mental health facilities provide care for some of the most vulnerable people in the community. People cared for in such facilities may have fluctuating capacity and will be deprived of their liberty.

They are a group who suffer from a number of disadvantages. Those disadvantages can range from having unstable housing, financial difficulties, worse health outcomes than the general population and the stigma that still pervades mental illness.

With that in mind, this Bill has been prepared to ensure that secure mental health facilities have the best possible opportunity to be safe, therapeutic places where people can achieve recovery, whatever recovery means to them.

For those places to be safe for all within them, consideration needs to be given to a multitude of issues such as access and egress from facilities, what contraband means, how visitors attend, when and where searches can take place and how all those powers can be used and are governed.

It is these sorts of issues that the Bill makes provision for.

Necessarily, the Bill is required to consistently balance two competing demands. One, the need to ensure that secure mental health facilities are safe for all people within them. Two, that any restrictions that are in place are necessary, proportionate and do not unduly restrict the rights of people.

The Bill provides clarity for all who have an interest in the operation of secure mental health facilities and constitutes a clear statement of powers, rights and responsibilities.

It provides a greater degree of leadership to clinical staff on the extent of their powers, what actions they can take to protect the safety of secure mental health facilities and the checks and balances on those powers that they are subject to.

It also provides a clear legislative structure for patients, carers and their advocates to base their experiences in secure mental health facilities against.

Part by Part Guide

Part 2

The Bill seeks to utilise a model whereby a piece of primary legislation sets out a clear framework, articulating the standards expected in the management of secure mental health facilities.

The Bill permits the Director-General of ACT Health to issue subordinate instruments, hereafter referred to as ‘directions’. The purpose of the directions will be to set out detailed arrangements for the organisation and operation of secure mental health facilities. A significant advantage of utilising this model is the relative speed with which directions can be amended, should it be required. Directions will cover such matters as visitor protocols and contraband and will be notifiable instruments, issued by the Director-General’s Office and placed on the Legislation Register.

Part 3

Division 3.1 Contact generally

Division 3.1 sets out provisions for contact with people, including family and friends, as well as accredited people. It also clearly articulates the steps that the Director-General is obliged to take in ensuring that people in secure mental health facilities are able to communicate. It is an important policy point to be noted that there is a particular obligation ensure adequate communication facilities to contact accredited people.

Section 16 sets out a power that the Director-General may place a limit on contact with other people, should there be reasonable grounds to do so. There is a requirement that reasonable grounds are established to enable this power. Reasonable grounds may be inappropriate or abusive contact with others. This power is potentially quite far reaching and a record is required to be kept as a check and balance. As a further potential limitation a potential abuse of the power, it was felt appropriate that it be a reviewable decision.

Division 3.2 Contact monitoring electronic communications

These provisions engage section 12 of the *Human Rights Act (2004)* around the right to privacy and reputation.

ACT Health has a responsibility to protect the privacy of people receiving care in secure mental health facilities and to ensure that it takes reasonable steps to protect the reputation of people receiving care.

This requirement is fundamentally the rationale as to why restrictions are proposed on the use of technology capable of capturing images. The use of that technology in shared areas of secure mental health facilities poses a significant risk that images of people will be captured of and relayed to others without their consent.

This impacts upon their ability to maintain privacy.

Further, due to the nature of the illness that secure mental health facilities treat, people may engage in behaviour that they may perceive as a risk to their reputation, should it be captured and relayed. In drafting these provisions and balancing two potentially competing interests, it was considered by those consulted that the privacy and reputation of people is more important than allowing people to possess image capturing technology in secure mental health facilities.

To ensure that people who may want to use such technology for legitimate reasons can do, provision is made requiring the Director-General to provide appropriate facilities a dedicated area where the risk of capturing the image of non consenting patients or staff is minimal.

Division 3.3 – Contact – monitoring mail

Division 3.3 is concerned with the protection of the safety of secure mental health facilities, for all in the facility and it attempts to balance that need with respecting the privacy of people's correspondence.

As part of normal business processes, all mail addressed to an ACT Health facility is electronically scanned, whomsoever it is addressed to, on safety grounds. Mail addressed to people in secure mental health facilities will be treated in the same way. It is important to note that only in situations where there are concerns over the contents of a package, will an interception be permissible. In drafting, this was felt to be a reasonable method of protecting the safety of all people in secure mental health facilities, whilst at the same time not disproportionately curtailing people's rights to privacy.

Further, it should be noted that no interception is permitted in correspondence with accredited people.

The Bill engages section 12 of the *Human Rights Act 2004*, pertaining to privacy and reputation.

In so far as the right to privacy is concerned, privacy of correspondence is protected, with restrictions on that privacy only permissible when there is a tangible concern about the contents of a package.

Division 3.4 Contact – visitors

Visitors are welcome in secure mental health facilities for the benefits that they bring. The security provisions set out in Division 3.4 have not been drafted with an inherent suspicion of visitors and it is important that this is acknowledged. Visitors may inadvertently be seeking to bring items into secure mental health facilities that they do not realise would pose a threat and the searching process adds some assurance about this.

Provisions around visiting engage section 11 of the *Human Rights Act 2004*, which addresses the protection of the family and children.

This right is engaged in two respects.

Firstly, the Bill specifically addresses the right of visitors and recognises the importance that visitors can play, ensuring that people can keep in touch with people who are important to them. The restrictions outlined in the Bill refer to ensuring that those visiting do not take anything into secure mental health facilities that may compromise their safety or security. These provisions have been drafted to protect the safety of people in a facility and should not be construed as a limitation on people seeking to visit people in the facility. Should people consent to being searched upon entry and behave in a manner that does not cause concern to staff, access should be granted to conduct a visit, in line with visitor protocols that may be set out in subordinate instruments.

The provisions relating to visiting should be interpreted in a manner that is conducive to the protection of the family.

The importance of people in secure mental health facilities being able to see children who are important to them and may be part of a family is recognised. Having made that point, it is important to recognise that 11(2) of the *Human Rights Act 2004* obligates public authorities to provide ‘the protection needed by the child because of being a child, without distinction or discrimination of any kind’. As such, secure mental health facilities may need to balance the competing priorities of ensuring any family interaction can go on, as at the same time, protecting children from environments which would not be in their best interests to experience. In considering this matter, there should be a presumption in favour of allowing children access as visitors, assuming that there is no compelling reason as to why the child should not be granted access.

Searching visitors

In terms of granting access to secure mental health facilities all visitors will be searched, as well as the possessions that they seek to take into the facility. This aims to protect the safety of the facility, its consumers and staff by ensuring that items that could pose harm are prevented from entering the facility.

There are a number of items that could harm the safety and security of secure mental health facilities. The concept of contraband is outlined elsewhere in this Explanatory Statement.

An important point to note is that the searching of visitors will be consent based, but it may be a condition of entry. Should people refuse to acquiesce with search of their persons or possessions, people will not be forced, but they may not be permitted entry either. Visitors will only be searched via scanning, frisk and ordinary searches, with the least intrusive method required.

The Bill makes clear that there will be an obligation on staff to ensure that all those visitors to be searched will be clearly advised that it is by consent and no-one will be searched against their consent or in a state of confusion about the consent issue.

Once a search is underway, the visitor being searched is entitled to request that the search of person or possessions stops at any time and those conducting the search are obliged to acquiesce to that request. The intention of this is twofold. Firstly, for the search of a visitor to

be continued once consent has been clearly withdrawn would prima facie create an incident of a trespass tort and a possible criminal offence¹. Secondly, it is important to emphasise that the provision has been developed to underline that visitors will only be searched when consent has been obtained and is active.

These search provisions are not aimed at enabling staff to have an inappropriate oversight of people's possessions, nor a disproportionate ability to interfere with people's use of their possessions. The purpose of the legislation is merely to ensure that no items that can do harm to the safety or security of secure mental health facilities. This intention is borne out by the provision stipulating that any possessions placed in lockers will not be searched or examined.

The Director-General of ACT Health is entitled to establish a protocol for people wanting to visit secure mental health facilities. In developing these protocols, the Director-General is duty bound to strike an appropriate balance of ensuring the safety and security of secure mental health facilities and not putting in place any disproportionate barriers for people being able to visit. In some instances, visits to secure mental health facilities, may need to be supervised by a staff member, who would be required to leave the clinical floor to do so. In some instances, therefore, it would be reasonable for a visit to be planned.

To ensure the safety of secure mental health facilities, it is reasonable to ask visitors to obey certain rules in respect of their visit, which will be made clear to them. These provisions deal with scenarios where staff have a concern about a visitors' behaviour and require the power to direct a visitor to leave.

It should be clear that visitor should not be asked to leave prior to the scheduled end of a visit, unless there are reasonable grounds for staff to do so.

Part 4 – Searches of patients

Searching

This Bill was heavily influenced by the *Human Rights Act (2004)*, associated human rights jurisprudence from comparable jurisdictions and the philosophical tradition of the human rights movement. This centres on ideas of the inherent value of a person and the concept that there are a set of rights that are each person's birthright, indivisible from their identity as a person.

As such, the development of the Bill and the preceding policy work has been developed in a process where the principles of least restrictive means, proportionality of action taken, the inherent worth of the individual and the need to balance human rights that can be conflicting in mental health facilities.

The Bill engages a number of Articles in the *Human Rights Act (2004)*, and each of those issues are dealt with in this Explanatory Statement.

¹ Lindley V Rutter [1981] QB128 at 135

The development of this Bill was influenced by a number of internal instruments that Australia has ratified. Powers that are drafted in relation to search have been heavily influenced by the right to freedom from cruel, inhuman or degrading treatment which is outlined in Article 7 of the International Covenant on Civil and Political Rights and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Bill outlines powers that can be utilised in secure mental health facilities to protect the safety and security of those facilities. To ensure that those powers are used appropriately and can be recorded, the Bill uses a concept of authorised health practitioners and authorised officers and this section deals with how those people may be appointed to act on behalf of the Director-General of ACT Health.

A significant aspect of the Bill covers the topic of searching and specifically the extent to which clinical staff can search people and their possessions. The purpose of searching people and possessions is to ensure, as much as possible, that facilities are safe for people receiving care as well as staff. Search that is not carried out with the express intent of ensuring the safety of the facility is of questionable merit.

When considering the approach to be adopted in relation to search, detailed thought has been given to the imposition on the party being searched and the requirement to ensure that a facility is safe for all concerned.

The Bill engages Section 19 of the *Human Rights Act (2004)*, which addresses the requirement of humane treatment when deprived of liberty. This section has guided the development of a number of provisions in the Bill and has specifically directed the principles of carrying out all methods of search on people in secure mental health facilities.

Healthcare facilities are fundamentally places with a therapeutic mission, where people access appropriate care to hopefully see an improvement in their medical condition. Health facilities can only deliver on their therapeutic mission if a few pre-requisites are met. These include sufficient staff in skill and number, necessary equipment and appropriate locations.

A further prerequisite in ensuring that health facilities can deliver on their core mission is to ensure that they are safe for those seeking care, those providing care and those visiting.

People have a reasonable expectation that health facilities are safe. Relatively recent case law from the United Kingdom has suggested that express powers of detention on mental health grounds, includes where necessary, a power to search². The Court of Appeal found that that power of search was necessary to ensure that the hospital could deliver on its primary function to treating patients in a safe environment for patients and staff.

The Bill is written in the spirit that searching is a necessary, albeit carefully managed, component of ensuring a safe environment for people receiving care and those people

² R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital [2002] WLR 419.

delivering care. The Bill is also clear that the method of search must be the least restrictive/least intrusive to perform the necessary task.

In this context the House of Lords Case *Savage v South Essex Partnership NHS Foundation Trust* [2008³]. This case involved a person who completed suicide while receiving inpatient psychiatric services from the National Health Service. The court held that

*Health authorities have an over-arching obligation to protect the lives of patients in their hospitals, pursuant to the right to life. This obligation includes a duty to ensure that the policies, procedures and systems in place at the hospital adequately safeguard life. If the hospital authorities have performed these obligations, casual acts of negligence by members of staff will not give rise to a breach of the right to life.*⁴

The overwhelming priority in developing the search provisions is ensuring that health facilities are safe for all people who receive care at secure mental health facilities.

In addition, under common law, an occupier of premises having control over both the premises and the entry of persons onto the premises, owes a common law duty of care to those who suffer injury and/or damage on their premises. As part of that duty, an occupier must take care as is reasonable in the circumstances for the entrants' safety, to protect them from risks of injury which can be foreseen and avoided.⁵ The scope of the duty implies that an occupier must take reasonable steps to maintain the security of the facility to protect from foreseeable risk.

The provisions around searching consumers and the ability to do so, whilst invoking Human Rights Act implications, also engage provisions in the *Work Health & Safety Act 2011*.

Section 19 (1) & (2) of the *Work Health & Safety Act 2011* provide that:

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of –

- (a) Workers engaged, or caused to be engaged, by the person: and
- (b) Workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

People employed to work in front line clinical roles in secure mental health facilities, may expect from consumers a degree of challenging behaviour due to the nature of their illness.

³ *Savage v South Essex Partnership NHS Foundation Trust* (2008) UKHL 74

⁴ [2008] UKHL 74 (10 December 2008)

⁵ *Australian Safeway Stores Pty Ltd v Zaluzna* 91987) 162 CLR 479.

Having made that point, this does not validate a situation where staff or visitors, are placed in physical danger by someone being able to bring an items or items into a facility that would pose a threat to the safety or security of those going about their lawful business within the facility.

Provisions in the Bill that relate to search have been prepared with these obligations placed on ACT Health in mind.

Conducting appropriate searches plays a part in ensuring that the welfare of people is protected and an appropriate search is a proportionate intervention to protect that welfare of those in a facility.

Division 4.1 searches of patients preliminary

Division 4.2 Scanning, frisk and ordinary searches of patients

Division 4.1 and 4.2 contain search provisions that are available to be used, by appropriately authorised staff, in secure mental health facilities.

Whilst all of these searches are permissible, they are conditional powers and not absolute powers. The Bill requires that prior to someone being searched, reasonable grounds are established for the search and the search must be conducted on a rationale that is concerned with the safety, security or good order of the facility. These search methods, which are defined in the Bill, sit on a sliding scale of intrusion to the person being searched. As a result of this, there is the clear requirement that the person carrying out the search will always choose the least restrictive means necessary.

This division identifies who may carry out the search and the conduct that is necessary in carrying out the search. The provisions seeks to strike a balance between ensuring that the secure mental health facility's safety is protected, whilst the person in question does not have their privacy, inherent dignity unnecessarily infringed.

This division also addresses the necessary information that should be captured following that search. The maintenance of a register, that can be inspected by proper authorities, also acts as a check and a balance on the use of this power.

Division 4.3 Strip Searches, secure mental health facilities

Under Division 4.3, strip searches are permissible in secure mental health facilities.

The inclusion of strip search provisions was felt as appropriate for secure mental health facilities, given the risk factors involved and that in some respects it is comparable with a custodial setting and those facilities have the ability to conduct strip searches, albeit under strict controls. The use of strip search is intended to be very much the last option for people carrying out the search and is subject to very stringent controls outlined in the Bill, around who can be present and the methodology to be used. The Bill also articulates what is expected in respect of a register of strip searches and that the proper authorities can inspect that register at their initiation.

Division 4.4 Treatment – patient has ingested or concealed something

Division 4.4 addresses circumstances where there is reasonable grounds to believe that a person has either ingested or is concealing something in or on their body that may pose a risk to either the health of the person in question, or the security of the facility in question.

In such circumstances, this section creates a legal obligation for the Director-General, or delegate, to ensure that the person in question is placed under the care of an appropriate clinician with appropriate expertise to deal with the matter at hand.

This could mean a transfer to another health facility and if this is the case, it is the responsibility of those leading a shift to ensure it happens. This is in recognition of the fact that in such circumstances, a different part of the local health system has greater expertise in handling such a medical matter. In addition, this proposed course of action ensures that people in secure mental health facility receive access to services that is equivalent to that enjoyed by the general community.

A register of these instances is required which can be inspected by the proper authorities.

Division 4.5 Searches of premises and personal property etc

Division 4.5 ensures that the Director-General has the necessary legislative authority to conduct a search of a secure mental health facility, as well as personal property, to protect the safety and security/good order of the location. This power can only be carried out when there are reasonable grounds to believe that it is so prudent to do so. Those grounds have to be concerned with the safety and security of the facility.

The Bill also outlines the steps that are necessary relating to a search of premises or personal property and how that information is recorded on a register.

Division 4.6 Secure mental health facilities – seizing property

Division 4.6 ensures that staff have a power to remove items from the environment that could have a detrimental impact on the safety and security of a secure mental health facilities. This is regardless of how staff become aware of the item or items.

The power to seize goods is conditional on a ‘reasonable grounds’ test. A register is required as a check and balance on this power.

Division 4.7 Searches – register

This section addresses the needs to make records of searches and the detail around that process.

Division 4.8 – Secure mental health facilities – use of force

Division 4.8 addresses the circumstances where use of force may be employed and the responsibilities of those carrying out force. Some people in secure mental health facilities may exhibit behaviour so challenging that even following appropriate warning, use of force is necessary to ensure the safety of the facility and people in the facility. The Bill makes it clear that the use of force is a last resort and every other possible strategy must be considered before force is used.

This division also addresses how the use of that power should be recorded.

Part 5 – Notification and reviews of decisions.

Part 5 outlines which decisions taken under the Bill are reviewable and who may review them.

Part 6 – Authorised People

This part addresses the scheme of delegation that is necessary for someone to be an authorised officer under this Bill, to enact the functions outlined in this Bill.

Part 7 –Miscellaneous

This section includes a number of provisions that have a natural place for inclusion elsewhere in the Bill.

There is a need for approved tradespeople to have access to secure mental health facilities for maintenance purposes and they will need to take equipment with them that would otherwise be considered contraband. This section also addresses the access to healthcare services that is considered important to the welfare of people. This is particularly important when it is considered that people in approved mental health facilities have the right to the highest attainable health outcomes.

Article 25 of the UN Convention on the Rights of Persons with Disabilities reinforces the right of persons with disabilities to attain the highest standards of health care, without discrimination. Section 70 of the Bill outlines a requirement that people receiving care will receive a standard of healthcare equivalent to that available to the general community of the , will receive access to appropriate services when required and that access will be comparable to the access enjoyed by the local community.