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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

MENTAL HEALTH (SECURE FACILITIES) BILL 2016

REVISED 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 not 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 (at section 9) 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 prohibited items and will be notifiable instruments, issued by the Director-General's Office and placed on the Legislation Register.

Part 2, at section 10 which addresses prohibited things, specifically engages section 12 of the *Human Rights Act 2004*, which is concerned with the right to privacy and reputation. The policy intention of section 10 of the Bill is to ensure that those responsible for the management of Secure Mental Health Facilities are fundamentally able to protect the safety of the facility and those going about their lawful business inside the facility.

There is an obligation on those managing the facility to prevent items that can cause harm to those in Secure Mental Health Facilities . This provision is drafted, however, with the policy intent that in identifying those items that are not permitted in Secure Mental Health Facilities, the Director-General has a rationale in identifying those items.

Without an item's prohibition serving a clear utility for the safety of the facility, the decision to prohibit something may well constitute a prima facie breach of *Human Rights Act 2004.* Should the prohibition of a given item be justifiable in respect of the protection of the safety of the facility, it is likely to be defensible under section 28 of the *Human Rights Act 2004.*

It should also be clear the powers under section 12 of the Bill, around the prohibition of items, is also a reviewable decision under Schedule 1 of the Bill.

Part 2 also potentially engages the Human Rights Act (2004) at section 13, which addresses the eventuality of a child or young person being admitted into Secure Mental Health Facilities. Specifically, section 13 contains a provision around dedicated provisions to be applied should the child or young person identify as an Aboriginal & Torres Strait Islander person.

It may be argued that specific provisions for children or young people identifying as Aboriginal and Torres Strait Islander constitutes a potential breach of section 8 of the *Human Rights Act 2004*, concerning equality before the law. However, these provisions are drafted with the intent that any Aboriginal and Torres Strait Islander children and young people receive appropriate treatment, respectful of their cultural traditions and background. This provision is already outlined in section 10 of the *Children & Young People's Act 2008*

and has been inserted into this Bill to ensure a consistency around how children and young people are treated, whilst detained, across the statue book.

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 to 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 under Schedule 1.

This division of the Bill includes, at sections 17 and 21, a clause which engages section 12 of the *Human Rights Act 2004* concerned with the right to privacy and reputation. Section 17 outlines the powers around imposing limits on patient's contact with others and the records of that.

There is an obligation on the Director-General as decision maker to consult with the chief psychiatrist to ensure that there is a clinical decision making component to the restricting on contact with others.

The policy intent in this provision is to ensure that the Director-General is able to restrict contact, when there is a clear and justifiable rationale to do so. Firstly, there is an obligation on those in charge of Secure Mental Health Facilities to ensure that patients are not in a position where they may contact people and, whilst unwell, engage in behaviour that may compromise their privacy and reputation. This is clearly an obligation on ACT Health and restricting someone's ability to make contact is proposed as appropriate under section 28 of the *Human Rights Act 2004*.

ACT Health also clearly has a role in limiting, as much as possible, unwanted or unwelcome contact from patients to people outside Secure Mental Health Facilities, if that contact reaches a point where a restriction would be appropriate.

It should also be clear that these provisions to restrict contact with people do not apply to people with a statutory role and where those decisions have been taken, they are reviewable as per Schedule 1 of the Bill.

Division 3.2 Contact monitoring electronic communications

These provisions at Section 23 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 that 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.

Specifically, section 25 of the Bill outlines the powers of those managing Secure Mental Health Facilities to inspect the contents of some of patients' mail, should there be sufficient grounds to do so.

It should be clear that 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 disproportionally 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 and clearly some restrictions on the right to privacy are contained within the Bill In attempting to minimise those restrictions and ensure that they are appropriate and within the spirit of section 28 of the *Human Rights Act* 2004, a number of conditions are prescribed in the Bill.

Mail can only be intercepted when there is a prima facie concern over their contents and then it can only be inspected, in the presence of the patient or representative, to the extent to which is necessary to ensure that there is no prohibited item in the mail that can impact upon the safety and security of Secure Mental Health Facilities.

In addition and in an effort to ensure that rights under section 12 of the *Human Rights Act 2004* are not unnecessarily compromised, staff may not read mail.

In addition, it should be clear that as a check and balance on this power, the decision to inspect the contents of mail is reviewable under Schedule 1 of the Bill. In addition, the utilisation of this power is required to be recorded, which are 'inspectable' by accredited visitors.

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.

Specifically, section 28 of the Bill addresses the ability of the Director-General to outline, in a notifiable instrument, visiting conditions for those seeking to attend the facility as visitors. These provisions may engage the right to privacy under section 12 of the *Human Rights Act 2004*. To address those potential impacts on people's rights under section 12, it is worth considering the utility of the requirements on visitors seeking to visit. Secure Mental Health Facilities are, by definition, a place that carries an inherent level of risk. Those responsible for the management of Secure Mental Health Facilities are required to have a clear understanding of those who are visiting the facility and it for only those reasons that personal information of those visiting would be required.

In addition, section 33 of the Bill, which addresses visits by family, friends and others potentially engages section 11 of the *Human Rights Act 2004,* which is concerned with the protection of the family and children. From a policy perspective, the Bill is drafted to recognise the importance of visitors that are close to patients, respecting their rights to see the person important to them, as well as recognising the positive impact that good quality contact with those important to patients can have in their recovery.

The ability for the Director-General to require visitors to make appointments has been developed to ensure that staff at Secure Mental Health Facilities can facilitate safe visits, as some visits may be supervised visits for clinical reasons. Clearly, having to accommodate a high number of unexpected visitors at any one time may compromise the ability of clinical staff to ensure that the facility is effectively managed. It should be clear that the Bill does not insist appointments must be made and where appropriate and describable, clinical staff should look to accommodate 'drop in' visits.

The power to refuse entry to a visitor has been drafted to ensure that staff are not obliged to allow entry to visitors when there is a reasonably developed belief that entry may be disadvantageous for the patient.

Clearly, there is a requirement for staff making such decisions to be able to defend their decisions and account for the grounds for their decisions in writing to both the visitor and the Director-General.

Again, as a further check and balance, it should be clear that this is a reviewable decision under Schedule 1.

The requirement to protect the clinical wellbeing of the patient is the first priority of staff at Secure Mental Health Facilities and only on such occasions that this is considered, by appropriately trained clinical staff, to be at risk of allowing a visitor entry would the powers outlined be used. Secure Mental Health Facilities will operate under the presumption of welcoming visitors. This distinction is considered appropriate under section 28 of the *Human Rights Act 2004*.

Searching visitors

The searching of visitors is addressed in sections 36, 37 and 38 of the Bill. Clearly, these provisions engage section 12 of the *Human Rights Act 2004* and provision around people's right to privacy. It should be noted that in terms of granting access to secure mental health facilities all visitors will undergo scanning and potentially frisk and ordinary searches, 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 prohibited items is outlined elsewhere in this Explanatory Statement.

An important point to note, that has a direct relevance to the issue of privacy and section 12 of the *Human Rights Act 2004*, is that the searching of visitors will be consent based, but it may be a condition of entry. Should people refuse search or search of their possessions, people will absolutely not be searched against their will, but they may not permitted entry either. Visitors will only be searched via scanning, frisk and ordinary searches, with a clear obligation on staff that the least intrusive method is utilised.

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 offence [1]. 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.

[1] Lindley V Rutter [1981] QB128 at 135

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, thereby respecting people's rights to privacy under section 12 of the *Human Rights Act 2004*.

The provisions of search outlined above attempt to strike an appropriate balance in ensuring that the physical safety of Secure Mental Health Facilities is protected, whilst ensuring that the restrictions on people seeking access to the facility are only subject to the restrictions on their rights, as per section 28 of the *Human Rights Act 2004*, that are proportionately necessary to protect the safety of facilities and the people within those facilities, By ensuring that all searches of visitors and their possessions are only ever by consent, this is considered appropriate. In addition, anything that a visitor does not want to inspected by staff can be placed in lockers provided and no searches of these items is permitted.

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. This issue is addressed in section 34 of the Bill. Again, the driving force behind this provision centres around ensuring the safety of the facility and the ability for staff to be able to expedite a visitor's departure if it is felt appropriate for the safety and clinical integrity of the facility. This provision is also subject to review under Schedule 1.

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 development of this Bill was influenced by a number of external instruments that Australia has ratified. Powers that are drafted in relation to search have been heavily influenced and directed by the section 10(1) of the *Human Rights Act 2004*, addressing right to freedom from cruel, inhuman or degrading treatment. This is also addressed 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 search[2].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.

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

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 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* [2008[3]]. 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 2004* 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.

[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.

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.

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 item 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

The searching of patients is addressed in sections 40 and 41 of the Bill. Clearly these sections engage section 12 of the *Human Rights Act 2004.*

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. Clearly searching is a difficult process and the Bill can only establish a framework for ensuring that it is done lawfully and transparently. The Bill cannot legislate for the spirit in which it is carried out and to some extent, the Bill relies on the skill and judgement of clinical staff in undertaking searches. For this reason, there is a clear requirement that all searches are recorded and those records can be inspected at the request of accredited visitors.

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. In contemplating search powers and in justifying those powers in the context of section 28 of the *Human Rights Act 2004*, detailed thought has been paid to how those powers are used. In this sense, it is an important consideration that the Bill does not permit random searches and the least restrictive possible search may only be initiated on reasonable grounds. The powers of search are balanced with the obligation of attempting to keep the facility and all those within the facility safe.

The Bill also permits the use of force and details it in sections 52, 61 and 62. These sections address the certain circumstances where force may be utilised. They pertain to ensuring that a justifiable search, to be executed on reasonable grounds, can be carried out and for reasons in keeping with ensuring that the wider safety and security of the facility is protected. Clearly, these sections engage sections 12, 18 and 19 of the *Human Rights Act 2004*. The Bill makes it clear that the use of force should be utilised as a very last resort and only to such an extent that it is required to protect the safety and the security of the facility.

In recognition of the extent of this power, the Bill also makes it clear that force may only be applied by an authorised health practitioner, judging on clinical grounds that there is no other realistic option in addressing the situation at hand.

Clinical staff are specifically trained in the use of force as appropriate for a clinical setting. Again, the power to use force must be considered in the context of section 28 of the *Human Rights Act 2004* and whether the restrictions on the Human Rights addressed above are proportionate and justifiable in the circumstances. Staff will have to report on the use of force and those reporting mechanisms will be inspected at the behest of accredited visitors.

To ensure that the facility remains safe for all people in the facility, given the extent of the checks, balances and restrictions placed on the use of force, it is considered as reasonable limitation on sections 12, 18 and 19 of the *Human Rights Act 2004*.

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.

Strip searches are addressed specifically at sections 44-47 and they clearly and explicitly engage sections 12 and 19 of the *Human Rights Act 2004*. The Bill is very clear that a strip search can only be carried out as a ‘last resort’ once all other search strategies have been exhausted. The Bill is explicit in outlining how a search may and may not be conducted and who may be present. Again, the Bill seeks to strike an appropriate balance between protecting the inherent dignity of the individual being searched by outlining how a search may be conducted, whilst also seeking to protect the safety of the facility.

To ensure that these powers are not used disproportionately, or inappropriately, the Bill is articulates very clearly around how it should be recorded and those records are to be open to inspection by accredited visitors.

Division 4.4 Treatment – patient has ingested or concealed something

Division 4.4, at section 48, 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.

It should be noted that this section engages the right to freedom for forced medical treatment in section 10 (2) (b) of the *Human Rights Act 2004*. It should be clear that the drafting intention in this section is concerned with ensuring a parity of access to medical services for those in Secure Mental Health Facilities that would be enjoyed by the general population and to ensure that a relatively vulnerable population has those protections. It is clear, however, that it raises the issue of capacity and people's ability or willingness to consent to medical treatment to deal with the matter at hand.

In reality, it is expected that each such scenario, which is anticipated to be rare, would require to be addressed on its merits and individual circumstances. Treating teams would be required to seek advice about the level of capacity of the person at hand, the nature of the medical risk they face and issues around guardianship, informed consent and whether the person in question has a health attorney or power of attorney in place. It may also be that ACAT become involved in the matter.

This Bill does not seek to supersede those considerations and the intention is not to advocate that enforced medical treatment is carried out, as per section 10 (2)(b) of the *Human Rights Act 2004*. It merely seeks to establish an obligation on those managing Secure Mental Health Facilities to ensure that access to medical care is on a par with what the general community could expect.

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. Specifically, this is addressed in sections 50 and 51. This engages section 12 of the *Human Rights Act 2004* and the common law right to the protection of personal property. It should be clear that the Bill only permits this power to be carried out when there are reasonable grounds to believe that it is so prudent to do so to protect the safety and security of the facility. Clearly this power must be considered in the context of section 28 of the *Human Rights Act 2004* and whether it is justified intrusion into the right to privacy Given the obligation to establish reasonable grounds prior to a search of the premises and of personal property and that those reasonable grounds should be tied to the safety and security of the facility, it is argued that this is a legitimate restriction.

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

Connected to the powers of search on reasonable grounds and the text outlined above, is the power to seize items that pose a threat to safety and security of the facility. This power and appropriate conditions are outlined at sections 53- 58. Again, it should be clear that only things that pose a threat to the safety and security of the facility are permitted to the seized. The Bill stipulates that the seizing of items is a power to be recorded for inspection and the decision to seize goods is reviewable as per Schedule 1.

Division 4.7 Searches – register

Section 59 addresses the needs to make records of searches and the detail around that process to ensure that the utilisation of searches can be monitored and is as transparent as possible.

Division 4.8 – Secure mental health facilities – use of force

Division 4.8, at sections 60-63 addresses the circumstances where use of force may be employed, the responsibilities of those carrying out force and medical care after that use of 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.

It should be noted that this section engages the right to freedom for forced medical treatment in section 10 (2) (b) of the *Human Rights Act 2004.* It should be clear that the drafting intention in this section is concerned with ensuring a parity of access to medical services for those in Secure Mental Health Facilities that would be enjoyed by the general population and to ensure that a relatively vulnerable population has those protections. It is clear, however,

that it raises the issue of capacity and people's ability or willingness to consent to medical treatment to deal with the matter at hand.

In reality, it is expected that each such scenario, which is anticipated to be rare, would require to be addressed on its merits and individual circumstances. Treating teams would be required to seek advice about the level of capacity of the person at hand, the nature of the medical risk they face and issues around guardianship, informed consent and whether the person in question has a health attorney or power of attorney in place. It may also be that ACAT become involved in the matter.

This Bill does not seek to supersede those considerations and the intention is not to advocate that enforced medical treatment is carried out, as per section 10 (2)(b) of the *Human Rights Act 2004*. It merely seeks to establish an obligation on those managing Secure Mental Health Facilities to ensure that access to medical care is on a par with what the general community could expect.

Part 5 – Notification and reviews of decisions.

Part 5, at section 66, outlines which decisions taken under the Bill are reviewable and who may review them. This is considered a crucial component of the Bill and goes some way to ensuring that actions carried out, under the authoritry of this Bill, are legitimate and can be justified under section 28 of the *Human Rights Act 2004*.

Part 6 – Authorised People

This part, at section 69, 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. A crucial componment of the Bill is ensuring that there is a clear delimitation between the role of security staff at a facility and the role of the clinical team. This contributes to ensuring that the operations are clinically led with security staff acting as a support staff and not the reverse.

Part 7 –Miscellaneous

This section includes a number of provisions that have no 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.

Section 74 addresses wider healthcare of patients. 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.