



Mental Health Act Review Team  
Via [MHACTREVIEW@act.gov.au](mailto:MHACTREVIEW@act.gov.au)

21 May 2021

Dear Mental Health Act Review Team,

**Review of the *Mental Health (Secure Facilities) Act 2016***

The ACT Human Rights Commission welcomes the opportunity to provide a submission on the review of the *Mental Health (Secure Facilities) Act 2016* (henceforth, 'the Act'). We understand the purpose of the review is to determine whether the human rights of consumers are safeguarded by the Act and the Act is operating safely and effectively.

**About the ACT Human Rights Commission**

The Commission is established under the *Human Rights Commission Act 2005* (HRC Act), with its main object being to promote the human rights and welfare of people in the ACT. The Commission includes the President and Human Rights Commissioner, the Discrimination, Health Services, Disability and Community Services Commissioner, the Public Advocate and Children and Young People Commissioner, and the Victims of Crime Commissioner. Each Commissioner has distinct statutory functions that give effect to, support, or are otherwise relevant to fundamental human rights. As independent office holders with key oversight and advocacy functions in relation to human rights, the Commission is uniquely placed, and welcomes the opportunity, to provide feedback about the Act.

It is important to note that many of the most significant challenges the Commission experiences in respect of oversight of practices at Dhulwa Mental Health Unit (henceforth 'Dhulwa') relate to consistent patterns of non-compliance with the Act. We are continuing to address these issues through the ongoing oversight efforts of the Public Advocate, as well as the current conduct of a commission-initiated consideration by the Health Services Commissioner under s 48 of the HRC Act.

In its present form, we consider that the Act fails to accord proportionate weight to ensuring a therapeutic environment that supports consumers' recovery and is overly deferential to security concerns. While we have addressed specific provisions in the requested template, the following overarching observations about the legislative framework in the Act merit attention.

**Objects and need for separate legislation**

As presently framed, the Act does not contain a provision that articulates the legislation's objects, such as that found in s 5 of the *Mental Health Act 2015* (MHA). Objects clauses provide valuable assistance to courts in interpreting the purpose of operational provisions and, where ambiguous, determining which interpretation is most consistent with human rights as required by the *Human Rights Act 2004* (HR Act, s 30).

In this regard, the absence of an objects clause in the Act is unique among other territory laws that regulate closed settings (including, for example, the *Corrections Management Act 2007* (CMA) and *Children and Young People Act 2008* (CYPA)). Although we understand that s 5 of the MHA is intended to inform the application of the Act, we are concerned that this intention has not been borne out in practice or culture of Dhulwa.

This observation speaks to the Commission's broader concern about the separation of provisions governing secure mental health facilities from the broader mental health regime in the MHA. All other Australian human

rights jurisdictions govern secure mental health facilities within their primary mental health legislation.<sup>1</sup> We accordingly recommend that your review critically consider whether the Act should instead be integrated as a chapter of the MHA.

At minimum, the explicit inclusion of an objects clause in the Act would, in our view, valuably draw a link between it and the therapeutic intent of the MHA, and we strongly suggest this be considered. We further recommend that such objects and principles explicitly refer to the need for Dhulwa to operate in accordance with the HR Act and advocate that an explanatory note cross-reference the obligations of staff to act consistently with human rights and properly consider rights when making a decision.<sup>2</sup>

### Secure facility v forensic facility

In our experience, there is confusion in the community and among Dhulwa staff about the differing purposes of a secure mental health facility relative to those of a forensic facility.<sup>3</sup> In this regard, Dhulwa's purpose as a secure facility is the treatment of a patient with a mental illness, rather than their forensic detention. Although we recognise that patients may be accommodated at Dhulwa under forensic treatment orders, it is important that a person's treatment is proportionate to their status and that the whole facility is not governed as if it were wholly forensic. In this regard, we note that patients may also be involuntarily detained at Dhulwa under psychiatric treatment orders. As long as secure mental health facilities in the ACT are governed by a discrete Act, it is essential that staff and patients appreciate the difference between secure and forensic facilities so that patient rights are understood, exercised and protected.

We therefore recommend, as above, that the Act include a specific statement about the human rights obligations on staff in decision making about patients should be included in the legislation. The Commission recommends that Dhulwa staff and new recruits undertake training on public authority obligations under the HR Act in decision-making. Such human rights training may be able to be provided by the Justice & Community Safety Directorate or the Government Solicitor's Office.

### Are policies and procedures consistent with the Act?

Section 9 of the Act broadly empowers the director-general to make directions in relation to a secure mental health facility (SMHF) to facilitate the effective and efficient management of the facility. SMHF directions must be consistent with the Act, the MHA and applicable health practitioner registration standards. Moreover, as these directions must be notified on the ACT legislation register, they provide essential transparency about the operation of Dhulwa and other closed mental health settings in the ACT. SMHF directions are also anticipated by:

- s 16(3) (about communications facilities for contact with family);
- s 19(5) (about patient requests about no contact with stated people);
- s 24 (about access to and supervision of electronic communication facilities);
- s 28(1) (about visiting conditions); and
- s 73 (about entry of prohibited items for the purpose of services).

It is therefore concerning that SMHF directions have only, to date, been made in respect of strip searches and uses of force. Insofar as reasonable limits on rights under the *Human Rights Act 2004* must be set by laws (see HR Act, s 28), reliance on unnotified policies and procedures impedes transparency and oversight and may be found to unreasonably interfere with individuals' rights.

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<sup>1</sup> See *Mental Health Act 2014* (Vic), Part 14 and *Mental Health Act 2016* (Qld), Part 6.

<sup>2</sup> *Human Rights Act 2004*, s 40B.

<sup>3</sup> Information on the ACT Health website states that "Dhulwa provides mental health care for people who are, or are likely to become, involved with the criminal justice system" ('Who can use Dhulwa?')

<<https://www.health.act.gov.au/hospitals-and-health-centres/dhulwa-mental-health-unit>>

We also note that, due to their status as notifiable instruments, the rationale and proportionality of select provisions made by direction can be difficult to ascertain. Section 198A of the MHA provides for the Chief Psychiatrist to make guidelines for a mental health facility in relation to any matter under this Act. Such guidelines must be accompanied by a statement about how the guideline is consistent with the MHA's objects and principles and human rights. We recommend that there also be an obligation that SMHF directions be accompanied by such statements.

Are there adequate oversight provisions in the Act for the monitoring of restrictive practices?

Existing oversight of restrictive practices at Dhulwa is presently limited to the presence of Official Visitors for Mental Health and notifications to the Public Advocate under the MHA about discrete uses of restraint and seclusion. In this regard, we are concerned there is currently insufficient *specialist* statutory oversight of *all* restrictive practices that patients at Dhulwa are subjected to. Further practices that we consider merit timely attention include access to leave, purchased food, access to items routinely available in other jurisdictions' secure facilities (eg internet, telephones) and how Dynamic Appraisals of Situational Aggression (DASA) are undertaken and acted on.

A person exercising a function under the Act is presently deemed to an exempt entity for the purposes of the *Senior Practitioner Act 2018 (SPA)*, and so is not subject to the jurisdiction of the Office of the Senior Practitioner (OSP). The Senior Practitioner Bill's explanatory statement indicates that secure facilities were exempted due to specific oversight arrangements in closed settings and contemplates a phased implementation 'in various settings.' Accordingly, the Commission strongly recommends that this review consider additional oversight of restrictive practices within secure mental health facilities by way of the ACT Senior Practitioner (in consultation with the OSP in respect of resourcing).

The model presented by the SPA offers several advantages that could be adapted to the context of a secure mental health facility. The SPA requires that use of restrictive practices be in accordance with registered plans, which would necessarily require practitioners to anticipate the needs and risk of individual patients. It is intended that such plans be refined over time and reviewed annually as strategies are identified to reduce the patient's intensity, frequency and duration of harmful behaviours. The SPA then contains important thresholds and safeguards for use of a restrictive practice, including that it is reasonably considered necessary and is as least restrictive as possible in the circumstances, having regard to alternatives, approach and duration.

Should you wish to discuss this matter further, the contacts in the Commission are both Karen Toohey and Jodie Griffiths-Cook, who may be reached on 6205 2222.

Yours sincerely



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President and Human  
Rights Commissioner



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Discrimination, Health  
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