Review of the Mental Health (Secure Facilities) Act 2016
Stakeholder Consultation

Organisation			
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Feedback _ Review of the Mental Health (Secure Facilities) Act 2016		
Section of the Act	Feedback and/or observations (+/-)	If you consider this section of the Act would benefit from change – please explain what and how you would change the Act?
	The *Mental Health (Secure Facilities) Act 2016* (henceforth 'the Act') does not currently contain a section articulating the legislation's objects nor relevant overarching principles. 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 *Mental Health Act 2015* (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 the Dhulwa Mental Health Unit (henceforth 'Dhulwa').	An Objects section sets out the intent and purpose of an Act. Incorporating the objects section from the MHA would demonstrate that the Act is to be read alongside the MHA and its objects of promoting the recovery of people with a mental disorder or mental illness by receiving treatment and care in a way that is least restrictive and that recognises and respects the rights and inherent dignity of all people within secure mental health facilities (SMHFs). The Objects section should also expressly refer to the *Human Rights Act 2004* (HR Act), including a note that staff have public authority obligations under section 40B to act consistently with human rights and properly consider relevant rights when making a decision. An objects clause would also provide a useful vehicle by which to distinguish the different categories of patients who may be accommodated at Dhulwa.

Part 2 – Administration *Part 3 – Contact* *Part 4 – Searches of Patients*	The Act emphasises coercive restrictions and considerations of the security and good order of the SMHF. By placing a high priority on risk management above that accorded to patient recovery, the Act enables nursing practices that can be psychologically harmful (eg violating a person's sense of safety and bodily integrity, restricting their autonomy and self-expression, punitive removal of a person's limited privileges, restricting a person's connection to community and the outside world, isolation and seclusion). Such behaviours may occur reactively, pre-emptively, or defensively rather than in a way that is therapeutic.	As above, an Objects section emphasising the therapeutic purposes of mental health treatment in a way that respects the rights of all people within ACT SMHFs may provide an important means of remedying the Act's present overemphasis on coercive restrictions and security and good order. Highlighting the therapeutic intent that underlies the Act would also provide more fulsome legislative context to inform interpretation of the Act's provisions, whether for the purposes of implementation, consumer and staff education or statutory interpretation by courts or tribunals.
	Unlike other legislation governing closed settings in the ACT, the Act does not prescribe minimum living conditions and standards of treatment. The right to humane treatment while deprived of liberty, which is protected in s 19 of the *HR Act*, mandates the government's positive obligation to ensure the human dignity of detained people; that they should not be subjected to hardship or constraint beyond that resulting from their deprivation of liberty. This requires that governments establish and articulate a minimum standard for humane conditions of detention, as informed by international law. Section 12 and Chapter 6 of the *CMA* and s 141 and Part 6.5 of the *CYPA* provide relevant examples of how the ACT has acknowledged such minimum standards in other legislation.	Insofar as a person may be involuntarily detained in a SMHF for an appreciable period of time, we strongly recommend that the Act specify the minimum living conditions to which patients are entitled (eg nutritional food, access to fresh air and exercise, access to meaningful activities and programs, contact with family and others (framed positively as an entitlement, rather than how it is currently framed in section 15 of the Act), access to educational services and news, provision for religious, spiritual and cultural needs etc.).
	The Act does not presently make provision regarding patients' leave from the facility, how to apply for leave, how the panel is constituted, and providing for decisions regarding leave to be reviewable decisions. Where an order under the MHA does not itself contemplate leave arrangements for a person, the default approach has been that a patient's leave will be granted or refused at the discretion of the authorised health practitioners and/or the SMHF. In such	The Commission recommends that, to ensure compatibility with the HR Act, the Act be amended to provide a framework in relation to decisions about leave where not otherwise provided for by the patient's mental health order. We suggest that such amendments articulate the criteria and considerations relevant to a decision to grant leave, which might be done by a non-exhaustive list. Among these, we recommend that the views of an affected person (as defined in the MHA) be identified and sought as a relevant criterion, noting that such views as to a

	circumstances, our view is that decisions about leave must be made based on clear and notified criteria and constitute a reviewable decision for the purposes of Part 5 of the Act. Though relating to *forensic* custodial environments (and so not directly analogous to a SMHF), it is relevant that both the *CMA* and the *CYPA* explicitly provide frameworks for granting or refusing leave in Chapter 12 and Part 6.8 respectively.	patient's leave would otherwise normally be advanced by the Victims of Crime Commissioner during mental health proceedings in the ACT Civil and Administrative Tribunal (ACAT). In this regard, we consider the legislation should oblige the panel to actively seek and consider the affected person's views. In addition, we recommend that a decision to refuse leave be listed as a reviewable decision in Schedule 1 of the Act. This responds to occasions we have observed in which planned leave has been refused due to improper considerations (eg as punishment) and, in our view, merits the potential for independent external review.
7	Section 7 allows the Minister to declare an approved mental health facility to be a secure facility if it provides for the involuntary detention and treatment of people, including correctional patients and forensic patients. Whether a declaration is consistent with the right to humane treatment while deprived of liberty (HR Act, s 19) will turn on whether the approved mental health facility is able to, and does, meet those minimum standards – both in terms of its design, facilities and the services it can accommodate. Further, as clinicians' different practice approaches tend to indicate diverging perceptions about a SMHF's purpose (ie therapeutic v forensic), we consider that it would be of value for this section (or a new subsequent section (e.g. s 7A)) to frame this distinction with greater clarity.	The Commission recommends that an additional subsection be added to s 7(2) to require that, in declaring an approved mental health facility to be a SMHF, the Minister must be satisfied that the approved mental health facility meets the minimum standards of treatment required for consistency with the right to humane treatment while deprived of liberty. Should this review adopt our earlier recommendation about prescribing minimum living conditions in the Act, this outcome could be achieved by requiring that the Minister be satisfied on reasonable grounds that the approved mental health facility is capable of meeting those minimum standards. We also recommend the review consider amending s 7 or adding a new section (eg s 7A) to make clear the distinction between a SMHF and a forensic mental health facility. As recommended above, the inclusion of an objects clause may also provide a useful vehicle by which to make this distinction clear.
9	Section 9 provides for the director-general to make directions in relation to a 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	In addition to our overarching recommendation that existing unnotified policies and procedures be reviewed and translated into SMHF directions, we recommend that s 9 be amended to require that each instrument be accompanied by a statement as

	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. Given their status as notifiable instruments, these directions need not be accompanied by a statement as to their impact on human rights. As noted throughout this submission, existing arrangements in respect of visits, patient leave and access to electronic and other communications may each significantly limit rights and must be demonstrably justified as reasonable in accordance with s 28(2). We note that, for this reason, the Justice and Community Safety Committee of the Eighth ACT Legislative Assembly previously recommended that such instruments be disallowable instruments which would have enabled their review.	to how human rights have been considered in the development of the direction. Such proper consideration of relevant human rights is already required under s 40B of the HR Act and was recently confirmed by Victorian jurisprudence to extend to the making of operational policies, procedures and directions. This recommendation acknowledges the potential for SMHF directions to authorise or require substantial limitations of rights and recognises that, if credibly challenged, ACT Health and Dhulwa staff will be required to evidence proper consideration of rights in the development of SMHF directions. The availability of such justifications also anticipates the operation of the Optional Protocol to the Convention Against Torture (OPCAT), including requests for information by the National Preventive Mechanism and/or the UN Subcommittee for the Prevention of Torture should they choose to visit ACT.
10	Section 10 of the Act appears to be modelled on section 81 of the CMA, which also provides an unfettered discretion to the director-general to declare prohibited items. As these statutory powers do not require the director-general (or their delegate) to be satisfied that the declared item presents a risk to the safety of a person in the relevant setting or the security and good order of the facility, both provisions could feasibly authorise arbitrary interferences with a person's rights under the HR Act, such as a person's rights to privacy (s 12), religion (s 14) or freedom of expression (s 16). In addition, although a relevant policy exists and has been implemented in relation to prohibited things, we note that a SMHF direction (ie a notifiable instrument) has not, to date, been made to declare prohibited things for Dhulwa. This is of significant concern given that certain statutory powers of the director-general rely on a prohibited thing having been validly declared (eg ability to monitor mail under s 25; directions to	The Commission recommends that section 10 be amended, based on s 148 of the CYPA, to provide that the director-general may declare that a thing is a prohibited thing for a SMHF if the director-general believes on reasonable grounds that the declaration is necessary to ensure security or good order of a detention place.

	leave the SMHF under s 35, searches of visitors under s 36, directing treatment to remove ingested things under s 48 etc.).	
13	The Commission's view is that, even where a child or young person is prone to violence, Dhulwa will not be an age-appropriate setting for their treatment. It is not apparent when, if ever, it will be reasonable to place a child or young person in a SMHF, especially given the impending existence of potential alternative settings like the Adolescent Mental Health Unit. In its present form, we are concerned that the Act does not provide an adequate legal framework such as to ensure that the detention of a child or young person in any form of SMHF would be a necessary, reasonable and proportionate limitation of their rights in accordance with s 28(2) of the HR Act. As presently framed, section 13 contemplates detention of children and young people in a SMHF. This section requires that a decision-maker apply principles from the CYPA when making decisions under the Act in relation to a patient who is a child or young person. Specifically, section 13(2)(a) requires that the decision-maker regard "the best interests of the patient" as a paramount consideration, as required by article 4 of the *Convention on the Rights of the Child* and international jurisprudence. The 'best interests of the child' referred to in s 13(2)(a) are not, in this context, accompanied by legislative criteria that would consistently guide a decision-maker's understanding of how this seemingly broad concept is to be interpreted and applied. By contrast, s 349 of the CYPA seeks to outline, albeit incompletely, the relevant considerations for a decision-maker when considering the best interests of the child in care and protection decisions. Absent appropriately tailored legislative criteria about how the best interests of a child should be interpreted and applied in the context of a SMHF, the current construction risks	Accordingly, the Commission recommends that this review carefully examine whether existing provisions that affirm that children and young people can be involuntarily detained in a SMHF be retained. Should such existing provisions be preserved, we recommend that the Act (or the MHA) clarify that placement of a child or young person in a SMHF be considered only as a last resort and not where other alternative settings (eg the Adolescent Mental Health Unit or bespoke arrangements) may be reasonably provided. In addition, we consider that it will be necessary to introduce several additional provisions to provide the following essential safeguards: ○ Clear process, binding thresholds and criteria for a decision-maker in directing that a child or young person be placed in a SMHF; ○ Notifications and oversight of process by the Public Advocate; ○ Specific minimum standards of treatment for children and young people (especially acknowledging that they may be the only child or young person in a secure facility at the time); and ○ A requirement that a specific model of care be developed and applied for children and young people accommodated in a SMHF. Such provisions must, in our view, be supported by a clear description of the considerations relevant to assessing the best interests of the child in the context of a SMHF, akin to (but not modelled on) s 349 of the CYPA. The Commission would be open

	that a decision-maker will substitute their own subjective understanding of a child's 'best interests', contrary to the requirements of the HR Act.	to providing input to the development of a such provisions.
16	Section 16(3) enables the director-general to make a SMHF direction about provision of and access to communication facilities in a SMHF. To our knowledge, no SMHF direction has been made to date about the provision of, and access to, communications facilities at a SMHF.	Insofar as reasonable limits of rights under the *Human Rights Act 2004* must be set by laws (see HR Act, s 28), the absence of a SMHF direction in respect of access to communication facilities is of significant concern and may unreasonably limit rights, including the right to family. We recommend that a suitable SMHF direction be prepared at the earliest opportunity and in consultation with relevant stakeholders.
17	Section 17 provides that the director-general may, in consultation with the chief psychiatrist, limit a patient's contact with others if the director-general believes on reasonable grounds that the limit is necessary and reasonable to avoid prejudicing the effectiveness of the patient's treatment, care or support. Although a decision to limit contact is a reviewable decision for the purposes of the Act, there is no further guidance provided in statute about the considerations a decision-maker should have regard to in deciding to limit contact with others. In addition, it is unclear on the face of the legislation that staff to which this discretion might be delegated would have appropriate experience and expertise, have completed relevant training and be subject to managerial oversight.	The Commission recommends this review consider whether there are adequate legislative safeguards (in the Act or applicable SMHF direction) to ensure a transparent framework for making decisions to limit a person's contact under s 17. Although a decision of this kind may be subject to review by the ACAT (in accordance with s 68 of the Act), the Commission and interested people will have limited practical ability to challenge improper decisions to limit a patient's contact in the absence of a more transparent framework about how these decisions must be considered.
20	Section 20 states that where a person (the complainant) tells the person in charge of a mental health facility that they do not want to be contacted by a patient in the facility and the person in charge is satisfied there are 'good reasons' for this, then the person in charge must tell the patient of the request and take reasonable steps to prevent contact. The section provides an example of 'good reasons' as inappropriate or threatening behaviour towards the complainant.	The Commission recommends that section 20 be amended to facilitate measures comparable to those under the *Corrections Management (No-Contact List) Policy 2019* at SMHFs to ensure the safety and wellbeing of community members. At a minimum this would provide a mechanism to automatically prevent patients from contacting victims or persons on the Affected Persons Register.

	The Commission recommends that where the patient has entered the facility through a criminal justice pathway and the complainant is a person who has suffered harm because of an offence committed, or alleged to have been committed, by the patient, the onus for prevention of contact should be on the mental health facility, and not on the complainant themselves. We note that the criminal justice system has measures in place to prevent contact between offenders and victims of crime. For example, ACT Corrective Services administers the Corrections Management (No-Contact List) Policy 2019 which ensures automatic prevention of contact by offenders to victims who are on the Victims Register as well as victims of sexual offences and children and young people.	
24	Section 24 enables the director-general to make a SMHF direction about access to and supervision of electronic communication facilities in a SMHF. To our knowledge, the director-general has not, to date, made a SMHF direction, about access to and supervision of electronic communication facilities.	Insofar as reasonable limits of rights under the *Human Rights Act 2004* must be set by laws (see HR Act, s 28), the absence of a SMHF direction in respect of access to electronic communication facilities is of significant concern and may unreasonably limit rights, including to freedom of expression. We recommend that a suitable SMHF direction be prepared at the earliest opportunity and in consultation with relevant stakeholders.
27	Section 27 requires that the director-general keep a register of mail searched under s 25 (Monitoring mail). Under s 27(2), the register must include the name of the patient whose mail was searched, the date of the search, whether the mail contained a prohibited thing and other details (including those that would be prescribed by regulation). These compulsory details do not include the reasons for the search (ie the grounds for the director-general's reasonable suspicion under s 25). By contrast, within section 25, at subsection (5), the director-general is also required to record in the patient's health record the details of a search, including: (a) the date of the search; (b)	Accordingly, we recommend that s 27(2) of the Act be amended to include a new subsection requiring that the grounds for a reasonable suspicion precipitating the search of a patient's mail be included on the register of searched mail.

	the reasons for the search; and (c) the outcome of the search. Although the Commission may be able to obtain these health records (with the consumer's consent) when dealing with a health services or other complaint, we are concerned that not including the reasons for a search in the register, which each of our commissioners are entitled to request and access in the exercise of their functions, impedes effective and proactive oversight of searches.	
28	To our knowledge, the director-general has not, to date, made a SMHF direction in respect of visiting conditions under s 28 of the Act. In addition, we note that s 28(2)(j) permits the director-general to include in a direction conditions relating to anything they consider necessary to protect security or good order at the SMHF. We note that this threshold is not qualified by objective considerations of reasonableness and so would potentially provide an unduly broad discretion. We also note that the CMA discretely anticipates that visiting conditions should be declared as a disallowable instrument (CMA, s 143), and recommend that a similar status be considered. Human rights standards will require more exacting standards of care in a SMHF given the additional vulnerability of patients.	Insofar as reasonable limits of rights under the *Human Rights Act 2004* must be set by laws (see HR Act, s 28), the absence of a SMHF direction in respect of visiting conditions is of significant concern and may unreasonably limit rights to family and children, fair hearing, etc. Moreover, we note that the obligations and powers in ss 29-30 (eg to give notice of visiting conditions to visitors, to direct a visitor to leave for non-compliance) appear to rely on visiting conditions having been validly declared under a SMHF made under s 28 of the Act. We therefore recommend that a suitable SMHF direction be prepared at the earliest reasonable opportunity and in consultation with relevant stakeholders. We further recommend the review consider scope for visiting conditions to be declared as a disallowable instrument (given their impact on the rights of patients and families), which would enable their scrutiny by the Justice and Community Safety Committee of the ACT Legislative Assembly. In addition, we also recommend that the threshold in s 28(2)(j) be qualified to read: 'anything else the director-general considers on reasonable grounds to be necessary to protect…'
60	Section 60 governs the use of force in secure mental health facilities. While it requires that the director-general ensure, as far as practicable, that the use of force in relation to	The Commission recommends that the review consider legislative safeguards governing use of force (including use of restraint) in other closed environments (including in Territory

	management of patients is always a last resort, other details (including the circumstances, kinds and users of force) must not, in our view, be relegated to a notifiable instrument. Although pertaining to forensic custodial environments, provisions about the circumstances in which force will be authorised feature in both the CMA (ss 138-139) and CYPA (ss 224-225). As noted above, human rights standards will require more exacting standards of care in a secure mental health facility given the additional vulnerability of patients than in correctional settings. These provisions offer minimum human rights safeguards, based on international and domestic case law, to ensure that use of force is necessary, reasonable and proportionate; critical safeguards that we consider must be preserved in primary legislation. This being said, we would not be supportive of use of force being employed solely for the purpose of compelling compliance with a direction in the absence of a broader purpose (eg risk to a person etc.) The Justice and Community Safety Committee of the ACT Legislative Assembly's inability to scrutinise notifiable instruments (relative to laws, regulations and disallowable instruments) further creates a risk of these essential safeguards being eroded by an amending instrument without sufficient accountability.	laws and those applicable in other human rights jurisdictions) and consider adopting equivalent safeguards in the Act. It is our view that the level of detail about use of force presently contained in the primary legislation is inadequate. Minimum safeguards that should be considered include, but are not limited to, thresholds for use of force (eg that the officer believes on reasonable grounds that the purpose for using the force cannot be achieved in another way); setting out the purposes for which use of force will be authorised (which might be further qualified by subordinate legislation); and requirements that the officer give a clear warning of their intention to use force (except in urgent circumstances) and that use of force employed be no more than is necessary and reasonable in the circumstances. As a further essential safeguard, reporting requirements must also be included. In this regard, the Commission is available to provide further advice about the minimum necessary safeguards that ought to be included in the primary legislation.
63	As outlined in our previous submission, s 63 only contemplates a review of a patient by a doctor following a use of force only where the patient has been injured. This is inconsistent with the practice in the Adult Mental Health Unit of the Canberra Hospital and, although correctional environments, also with the Alexander Maconochie and Court Transport Unit (see *Corrections Management (Use of Force and Restraint) Policy 2020*, cl 13.1) and Bimberi Youth Justice Centre (*Children and Young People (Use of Force) Policy and Procedures 2018 (No 1)*, cl 6.17). In each setting, a medical examination must be offered	The Commission recommends that section 63 be amended to require that a medical examination be offered to a patient as soon as practicable (and no later than a stated period of time) after force has been used against them. As above, this is a critical human rights safeguard in respect of a use of force that we consider should be contained in the Act itself.

	to a person as soon as practicable or within 2 hours of the use of force, regardless of whether the person was injured or not. This acknowledges that officers who use force will not necessarily be able to ascertain whether a person has been injured or impacted by a use of force against them, such as to warrant medical attention.	
Mental Health (Secure Facilities) Strip Searches Secure Mental Health Facility Direction 2016	The policy statement for the Strip Searches Direction indicates that "[s]earches conducted will facilitate the detection of prohibited and restricted items, damaged property, and any item which may compromise the security of the DMHU." In addition to 'prohibited items', sections 1.3 and 6 of the direction refer to 'restricted items' which do not correspond with defined terms in the Act.	We acknowledge that the Strip Searches Direction will, as part of this review, be assessed for its consistency with the provisions of the Act. We suggest that references to searches being conducted to facilitate detection of 'restricted items' and damaged property be omitted.
Additional comments	The focus of the Act is mostly on what is prohibited, limits and restrictions on consumer contact with others (Part 3), how to conduct searches of patients, seize property and use force (Part 4). The explanatory statement states that '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'. It is, however, not apparent that the Act currently achieves this aim. Although we acknowledge the application of 'policies' governing visits and other arrangements at Dhulwa, it is required by the *Human Rights Act 2004* that reasonable limits of rights be set by laws. We strongly recommend that all such policies be converted into SMHF directions, noting that their status as notifiable instruments accords them an additional level of scrutiny and transparency.	