

2020

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

MENTAL HEALTH AMENDMENT BILL 2020

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Shane Rattenbury
Minister for Mental Health**

MENTAL HEALTH AMENDMENT BILL 2020

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004 (HRA)*.

BACKGROUND

The *Mental Health Act 2015* (the Act) refers to the legislation in the ACT that applies to the assessment, treatment, care and support of people experiencing a mental illness or mental disorder.

The Act came into effect on 1 March 2016 and is the result of considerable stakeholder and public consultation and seeks to promote a renewed recovery-oriented approach to mental health service delivery. It brings the ACT's mental health legislation in line with human rights law including the United Nations Convention on the Rights of People with a Disability and the HRA.

Section 271 of the Act required two reviews: a review of section 85 (the maximum period of further detention) and a review of the mental health orders provisions contained in the Act. The ACT Health Directorate (ACTHD) engaged Australian Continual Improvement Group (ACIG) to undertake the community consultation and review in two parts.

The first consultation and review were limited to the operation of section 85 which defines the further period of involuntary detention. The review concluded that the period of further involuntary detention was operating as intended. The report of the review of section 85 of the Act was tabled in the Assembly on 30 July 2019, which can be viewed here:

https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/1398122/ACT-Mental-Health-Act-2015-Review-of-the-Authorised-Period-of-Emergency-Detention.pdf

The second consultation and review on the operation of mental health orders and forensic mental health orders commenced on 23 April 2019. This consultation process also received submissions on the general operation of the Act.

The report concluded that forensic mental health orders are not operating as intended. As at the time of the review, no forensic orders had been made since the commencement of the Act. Two forensic mental orders have subsequently been made. The report of the review of the orders provisions was tabled in the Assembly in the February 2020 sittings, which can be viewed here:

https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/1483368/List_Review-of-mental-health-orders-under-Mental-Health-Act-2015.pdf

The Mental Health Act 2015 Implementation, Evaluation and Monitoring Committee (IEMC) has endorsed both review reports.

ACTHD, in conjunction with IEMC, identified several possible legislative amendments from both the reports and directly from consultation submissions. This Amendment Bill seeks to introduce amendments to pressing issues that can be remedied in a short time frame. The remaining possible legislative amendments will be considered in a second tranche of work scheduled to commence development and consultation in late 2020.

OVERVIEW OF THE BILL

The following amendments have been identified for inclusion in the Mental Health Amendment Bill 2020 (the Bill):

- a. Amend section 77 of the Act to provide clarity in the circumstances that a contravention notice is in force but the patient consents to treatment;
- b. Amend section 80 of the Act to include as a criterion for emergency apprehension that the person has not agreed to treatment and include a review provision for a decision made under this section and provide a review power for the ACT Administrative and Civil Tribunal (ACAT);
- c. Expand the definition of forensic patient in section 127, and any consequential amendments including to sections 56,134,180, 182, 188 and 190 to include people who are within the ACAT mental health jurisdiction through a criminal justice pathway;
- d. Include a new section requiring a further review of the mental health order provisions of the Act in five years and provisions added or amended by this Bill; and
- e. Include provision for the Chief Psychiatrist to issue guidelines.

Clauses 1, 2 and 3 provide for the name of the Bill, commencement date and the Act being amended by the Bill. The Act commences on the day after notification, with the exception of Clause 7 which commences no later than 12 February 2021, or earlier if subject to a Ministerial notification. This reflects the need for training to be provided to police officers and ambulance paramedics regarding the changes to section 80(1) prior to commencement of the amendment

Clauses 4, 5, 10, 11, 12, 13, 14, 15 and 16 expand the affected persons scheme to ensure that an affected person's rights are not negatively impacted if the perpetrator of a crime follows a mental health pathway rather than a criminal justice pathway. The amendments to the definition of forensic patient in section 127 will enable affected persons to access information about orders that are made as well as other information, such as if the perpetrator absconds from a mental health facility. The amendments create a right for the affected person and the victims of crime commissioner to be heard at an ACAT hearing regarding the perpetrator, regardless of the type of order being sought or considered. The expansion of this scheme is

balanced by existing section 133 that provides that a person can be removed from the affected persons register on their own initiative or the initiative of the Director General.

Clause 6 provides a clear pathway for treatment to be provided to a person subject to a contravention notice, who subsequently consents to the treatment. This is in direct response to the known scenario where a person consents to treatment subsequent to a contravention notice being issued, but is taken to a mental health facility rather than having the option to undergo the treatment at home. This amendment will ensure that clinicians and patients can work together to provide such treatment at the patients home where appropriate, without needing to transport a person to a mental health facility to undergo the treatment. The amendment also provides a discretion for the clinician to determine that the patient should be taken to an approved mental health facility for treatment in accordance with a mental health order without the need for an additional order.

Clause 7 amends section 80(1) of the Act that creates a power for police officers and ambulance paramedics to make an apprehension if they have reasonable grounds to believe that a person has a mental illness or disorder and the person is attempting or likely to attempt harm. The Bill creates an additional threshold that must be satisfied that the person requires immediate examination and does not agree to be examined.

Clause 8 inserts a new provision stating that in forming a belief for subsection 80(1), a police officer or ambulance paramedic is not required to make medical assessment or clinical judgment about the person.

Clause 9 introduces a review power for ACAT regarding an apprehension under section 80(1).

Clause 17, 18, 19 and 20 introduce a guideline making power for the Chief Psychiatrist. This will bring the Act into line with mental health legislation in other Australian jurisdictions and provide the ability for the Chief Psychiatrist to provide clarity, consistency and best practice standards in the mental health system. These guidelines will apply to both public and private facilities providing treatment, care and support to people who have a mental illness or disorder. A mental health facility or private psychiatric facility must comply with the guidelines. An individual with functions under the Act must consider the guidelines. In making guidelines the Chief Psychiatrist must state how the guideline considers the objects and principles of the Act, and any human rights considerations.

The Chief Psychiatrist must consult with the Chief Police Officer and the Chief Officer (Ambulance Service) if a proposed guideline relates to a function exercised by police officers or ambulance paramedics.

This acknowledges the interaction between the role of the Chief Psychiatrist in relation to the Act and the role of the Chief Police Officer and Chief Officer (Ambulance Service) in relation to their respective statutory remits.

The Chief Psychiatrist will be required to provide a statement of how a guideline is consistent with the objects and principles of the Act, and human rights. This will be required for all guidelines, including changes of a guideline pursuant to 198A (7) (e.g. the changes in an adopted law of another jurisdiction from time to time). Guidelines will be notifiable instruments and the power to make guidelines cannot be delegated.

Clause 18 ss (7) states that a guideline may apply, adopt or incorporate a law of another jurisdiction or an instrument, as in force from time to time. Ss (8) states that the Legislation Act, section 47(6) does not apply in relation to a law or an instrument mentioned in subsection (7).

These provisions allow for a law of another jurisdiction or an instrument being incorporated into guidelines without the requirement under s 47 (6) of the Legislation Act applying. This means that a law or instrument can be incorporated or adopted as or as part of a guideline without the requirement that the law or instrument is notified as would normally be required under the Legislation Act. Section 47 (6) of the Legislation Act requires that an incorporated document is taken to be notifiable instruments and notified on the legislation register. This ensures that legal instruments are centrally available for all to people to readily access and provides a single point of truth for all legislation and subordinate instruments in the ACT.

The adoption clause 18 (8) limits the rights to equal access to relevant laws. However, this limitation can be justifiably displaced because the law of another jurisdiction or instruments being incorporated in a guideline will be available on the internet or in another public accessing way. As it is a requirement under clause 18 (9) that a guideline is a notifiable instrument it is envisaged that the adoption of another jurisdiction's laws or instruments into an ACT guideline made under clause 18 will clearly state where that law or instrument can be located. At the time of the drafting clause 18 of the amendment Bill there were no laws or instruments from other jurisdictions contemplated for inclusion in a chief psychiatrist guideline. Section 47 (6) was included to provide a standard mechanism for adopting best practice in mental health treatment care and support, created in existing instruments, into ACT law without creating additional regulatory burden.

Clause 21 requires a further review of the orders provisions similar to section 271 as it was when the Act was first enacted. It also introduces a requirement for the review of the amendments made by this Bill to review whether the sections are operating as intended.

The review provision will create the requirement for review not earlier than five years and not later than six years from the date of the amendment, with a report to be tabled within two years of the review commencing.

JUSTIFICATION FOR THE BILL

The mandatory reviews undertaken by the ACTHD provided an opportunity for the first review of the Act since its commencement. The Bill seeks to enhance the rights of mental health consumers subject to the Act through inclusion of additional safeguards to apprehension and clarity about contraventions orders. It also seeks to ensure the rights of affected persons by expanding the affected persons register and providing a mechanism for ACAT to consider the views of the affected persons and the Victims of Crime Commissioner when orders are being contemplated or made. It also provides the Chief Psychiatrist with a tool to undertake their functions under the Act by creating guidelines.

The amendments support the objects and principles contained in the Act, particularly the rights of a person with a mental illness or disorder to determine their own recovery and access the best available treatment, care and support relating to their individual needs.

The amendments reflect the ACT Government commitment to person centred care, a healthy community and a safe, responsive and sustainable public health system.

The amendments to section 77 will make the section more consistent with the objects and principles of the Act, particularly that a person has the right to consent to treatment and the object of the Act to ensure that people receive treatment in a way that is least restrictive or intrusive to them. The amendment ensures that an official retains the power to take the person to an approved mental health facility for the treatment if necessary, for example, if it is not safe for the clinician or the patient for the treatment to be provided at the persons home. This amendment will also reduce demand on the approved mental health facilities as more patients will be able to receive treatment in their home.

The amendments to section 80 will make the section more consistent with the objects and principles of the Act, particularly that a person has the right to consent to treatment and the object of the Act to ensure that people receive treatment in a way that is least restrictive or intrusive to them. It articulates the important concept that it is not appropriate or lawful to assume that a person with a mental illness or disorder lacks capacity to make their own decisions in relation to their healthcare, and that a person has the right to determine their own recovery. If a person agrees to be examined, they should be afforded the latitude to do so as they see fit, rather than being apprehended to an approved mental health facility.

This amendment preserves the critical purpose of section 80 to provide a mechanism for police officers and ambulance paramedics to assist vulnerable people who have a mental illness or disorder to access treatment, care and support while making appropriate consideration for the rights of the person.

Section 80 is a rare example of legislation that can lead a member of the community to be deprived of their liberty outside the criminal justice system. It is appropriate that there are safeguard thresholds in the existing legislation and that section 80 (1) does not allow for arbitrary decision-making. The existing provision requires that the authorising officer satisfies on “reasonable grounds” that all statutory criteria of section 80 (1) are met before exercising the power to apprehend. The threshold of section 80(1)(b) requires a risk of “serious harm”, which is significantly higher than a simple “harm” threshold. Apprehension can be carried out only for the purposes of taking the person to an approved mental health facility. A police officer or paramedic is required by section 263 (2) (c) of the Act to use ‘the minimum amount of force necessary’ to apprehend the person.

Clause 7 amends section 80(1) by inserting a further matter to be determined by a police officer or authorised ambulance paramedic before they may apprehend a person. New subsection 80(1)(c) provides that, together with the matters set out in existing section 80(1), the officer may apprehend the person if they believe on reasonable grounds that the person requires an immediate examination by a doctor and does not agree to be examined. Clause 8 clarifies that the officer is not required to make a medical assessment or clinical judgment.

The Bill expands the scope of ACAT review power, providing an additional safeguard for consumers in the circumstance that there are grounds to seek a review of an apprehension made pursuant to section 80(1).

The Bill makes a series of amendments to ensure the affected persons register operates as intended to provide protection, support and information to affected people. It introduces the necessary legal framework for the Victims of Crime Commissioner to supporting affected people during the ACAT process by providing a right of appearance for both affected people and the Victims of Crime Commissioner in relevant hearings. The Victims of Crime Commissioner currently supports affected persons in ACAT at the grace of the ACAT Member hearing a matter but has no right at law to be present at a hearing, make submissions or to have their views considered in decision making. The amendments align many of the rights of an affected person with the rights of a victim of crime, which ensures that an affected person is not exposed to risk or harm simply because the criminal justice pathway diverts to a mental health pathway. If a situation arises where it is not appropriate for a person to be on the affected persons register, the existing Act provides a mechanism for removing a person from the register.

The review provisions replicate the intention of the first version of the Act, and also introduce a requirement to review the changes created by this Bill. This is a measure of transparency that will ensure the Legislative Assembly has oversight, given the unique character of this legislation in restricting the liberty of people in our community who have not been convicted of a crime.

The Chief Psychiatrist guidelines provide a mechanism for the Chief Psychiatrist to undertake the functions set out in the Act. The Chief Psychiatrist has a broad function to provide treatment, care or support, rehabilitation and protection for persons who have a mental illness. The Chief Psychiatrist will be able make guidelines as necessary to provide clarity to clinicians, consumers and carers about the operation of the Act in relation to the treatment care and support of the patients under their ambit of responsibility.

The amendments acknowledge the potential overlap between the functions and responsibility of three separate roles: the Chief Psychiatrist (appointed by the Minister under the Act), the Chief Officer (Ambulance Service) (appointed by the relevant Director General under the *Emergencies Act 2004*) and the Chief Police Officer for the ACT. Ultimate decision making must sit with the Chief Psychiatrist as the person who is responsible for the treatment, care and support of people who have a mental illness, and consultation will ensure overlap is identified and resolved through the process of making a guideline. The Chief Psychiatrist is responsible for ensuring that the guidelines are consistent with the objects and principles of the Act, as well as human rights and this will form part of the consultation to ensure these objects, principles and human rights remain the centre of the mental health legislative framework. There is a direct line of oversight between the Chief Psychiatrist and the Minister under the Act.

Guidelines will be notifiable instruments to ensure the highest level of transparency and accountability. It is not appropriate for guidelines to be disallowable instruments, as it is not appropriate for the Legislative Assembly to seek to disallow guidelines made by the Chief Psychiatrist using their professional expertise, having turned their mind to the delicate clinical and operational issues that underpin the treatment, care and support of people with mental illness or disorder.

CONSULTATION ON THE PROPOSED APPROACH

The Bill is responsive to issues raised during the reviews of the Act, noting that both the individual submissions and reports informed this work. This Bill is not a comprehensive response to all issues raised, but rather a first tranche of work and urgent response on select issues that could be actioned in a limited time frame and that have significant value to improve the human rights of people interacting with the legislation.

The *Mental Health Act 2015* Implementation, Evaluation and Monitoring Committee (IEMC) were consulted at all stages of the reviews and in the planning of this policy approval. IEMC is chaired by the Chief Psychiatrist and hosted by ACTHD. IEMC includes representatives from: Canberra Health Services, the Justice and Community Safety Directorate, ACT Mental Health Consumer Network and Carers ACT. IEMC conducted a detailed consideration and analysis of a late draft of the Bill and endorsed the final draft by email.

In conducting the reviews, ACIG consulted extensively with consumers, carers, health service professionals, providers, ACAT, the Human Rights Commission, government partners and community peak organisations. This was a full public consultation that provided multiple opportunities for engagement with a focus on the practical application of the Act. Responses were received from consumers, carers, other members of the public, health professionals, ACT Policing, Ambulance ACT and the Human Rights Commission.

In preparing this Bill ACTHD consulted in detail with Canberra Health Services, the Human Rights Commission and particularly the Victims of Crime Commissioner, ACT Policing, ACT Ambulance Service, Calvary Public Hospital Bruce, Carers ACT and the Mental Health Consumer Network.

CONSISTENCY WITH HUMAN RIGHTS

This Bill is compatible with the rights set out in the *Human Rights Act 2004* (HRA) and for completeness, analysis below is provided.

Rights which may be engaged

The Bill may engage a number of rights under the HRA, directly or indirectly, including:

- Section 8 (3) – right to equality and non-discrimination
- Section 9 – right to life
- Section 10 (2) - Protection from torture and cruel, inhuman or degrading treatment
- Section 12 – Right to privacy and reputation
- Section 13 – right to freedom of movement;
- Section 18 – the right to liberty and security of the person;

Rights Promoted

This Bill engages and promotes the following rights under the HRA:

- Section 8 (3) – right to equality and non-discrimination
- Section 9 – right to life
- Section 10 (2) – protection from torture and cruel, inhuman or degrading treatment etc
- Section 18 – the right to liberty and security of the person

Section 8(3) of the *Human Rights Act*, which provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination on any ground, is promoted by the proposed amendments to broaden the definition of forensic patient in the Act. The amended definition is intended to include all persons who arrive at ACAT through a criminal justice pathway regardless of the type of order that is made. This will allow affected persons to have access to the affected person's register and the rights that flow from inclusion on the register. These rights are consistent with the rights of victims of crime in a criminal pathway.

The amendment to section 77 (clause 6 of the Bill) engages Section 10 (2) of the *Human Rights Act*. The amendment of section 77 does not limit this right. This is an absolute right and cannot be subject to reasonable limitations. This right is promoted as the amendment provides clarity for mental health clinicians to provide treatment in situations where a contravention of an order has occurred. This amendment enhances the right outlined in s 10 (2) of the Human Rights Act by allowing clinicians to make a judgement on the appropriateness of providing treatment, the subject of the contravention, in a place other than an approved mental health facility.

Additionally, section 10(2) is promoted through the introduction of section 80(1)(c) which imposes an additional threshold that must be satisfied for a lawful apprehension, that the person does not agree to immediate examination by a doctor or mental health professional. This recognises the right of the person to determine their own treatment and recovery pathway.

The right to a fair hearing is promoted because a person apprehended may seek review of the apprehension by an independent and impartial tribunal. This provides oversight and transparency for usage of section 80(1) and is a protection against arbitrary use of section 80(1).

Rights Limited

This Bill limits the following rights:

- The right to privacy and reputation: Section 12 HRA; and
- The right to liberty and security of person: section 18 HRA.

Right to privacy and reputation

Section 12 of the HRA states that everyone has the right to not have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily, and not to have his or her reputation unlawfully attacked.

The amendment proposed in clauses 4, 5, 10, 11, 12, 13 and 14 engages and limits the right to privacy of the person who perpetrated a crime in that an affected person is entitled to information that would otherwise be private. The provisions also enable a person affected by a crime to have their views considered by the ACAT when orders are being contemplated or made and enable the Victims of Crime Commissioner to do the same. The provisions are an extension of the scheme that currently exists in the Act if a Forensic Mental Health Order is made.

Clauses 4, 13 and 14 also engages and potentially limits the right to privacy of registered affected people because a statement given by a registered affected person to the ACAT under those provisions may contain personal information.

Legitimate purpose (s28(b))

The purpose of this limitation is to provide affected persons with information relevant to their personal safety and participation in the justice process. It is important to enable people who have been the victim of a crime to have relevant information about the person who committed the crime so that an affected person may take steps for their own safety and wellbeing. This principle is reflected in other ACT legislation, particularly the *Victims of Crime Act 1994*, however this legislation does not apply when a matter is diverted from a criminal justice pathway to a mental health pathway. Clauses 4, 5, 10, 11, 12, 13 and 14 of the Bill introduce these types of rights into the Act to ensure that people who would have rights under the *Victims of Crime Act* continue to have those rights, regardless of the pathway. This ensures that an affected person can have their voice heard in the process and can make decisions for themselves about their safety and the safety of their family using the information that is available person.

Personal safety is a human right, expressed through section 9: right to life, section 18: right to security of person, section 10: protection from torture and cruel, inhuman or degrading treatment and section 12: right to privacy. Affected persons are entitled to access these human rights, as is the mental health consumer.

The justice process is becoming increasingly and deliberately inclusive of the victim, or in this case, the accused person. While it is important to differentiate an accused from a mental health consumer who is diverted to ACAT from a criminal justice pathway, the principle holds true that the person affected by the acts of the mental health consumer should have the option to obtain relevant information or participate in ACAT processes.

The Act currently has these measures in place when a forensic order is made. The Bill extends the same measures to all affected persons, regardless of the type of order that is contemplated or being made. This is appropriate, fair and equitable.

Rational connection between the limitation and the purpose (s28(d))

It is not possible to achieve the purpose of protecting affected people without limiting the rights of the person who committed the crime.

The Bill achieves the purpose outlined above in two ways. It creates an entitlement for the affected person and/or Victims of Crime Commissioner to receive information about ACAT proceedings and decisions about the relevant consumer, and provides the right for the affected person or Victims of Crime Commissioner the right to be heard in ACAT proceedings (either in person or in statement) when an order about a relevant consumer is being contemplated. This is an extension of the existing scheme, which clearly intended for affected persons to have this access.

Proportionality (s28(e))

The amendment in the Bill is the least restrictive means reasonably available to achieve the objective. There are safeguards in place to ensure that the release of information is only to the extent that it is necessary to achieve the intended protection.

There are no alternative options to enable people affected by crimes to make their own informed decisions regarding their safety and wellbeing as they relate to the mental health consumer.

There are safeguards to appropriately confine the extent of this limitation to what is necessary and reasonable for the protection and safety of affected persons, in acknowledgment that this requires a careful balancing of the rights of the perpetrator and the rights of the affected person. Some of these safeguards include the ability to remove a person from the affected persons register, defined requirements that already exist in the Act specifying what can be disclosed, and specific protections for information related to children.

Further, section 194 requires a hearing of a proceeding under the Act to be held in private unless the subject person asks for the hearing to be held in public, or the ACAT orders otherwise. Section 39 of the *ACT Civil and Administrative Tribunal Act 2008* operates to allow the ACAT to make an order specifying certain information, including personal information, that must not be published or disclosed. The ACAT may make such an order on application by a party or own its own initiative.

This limitation is reasonable and proportionate, noting the nature of this legislation and the separate types of vulnerable people who are impacted by this legislation (people with mental illness or disorder and people who have been the victim of a crime).

Compatibility of the measure with other human rights

The Act is intended to protect multiple vulnerable populations who have competing rights that cannot be positively resolved for all. The amendments consider how these competing rights must balance against each other to achieve an outcome that is fair and equitable. The mental health consumer's right to privacy (both in the hearing of the ACAT matter and also in relation to private information) is reasonably limited to ensure that the affected person can access their right to security.

The right to liberty and security of person

The existing section 80 (1) that is to be amended by clause 7 engages and limits the right to liberty and security of person in that a person can be apprehended by a police officer or authorised ambulance paramedic if the criteria of the section are met.

The amendment adds an additional threshold to be satisfied, being that the person requires immediate examination and does not agree to be examined immediately. This seeks to further embed the human rights focussed objects and principles of the Act into this section, particularly by promoting a person's capacity to determine and participate in their treatment and assessment, and ensuring that people receive assessment and treatment in a way that is least restrictive or intrusive to them. It is envisaged that this section will ensure that a person has every opportunity to make their own treatment decisions, while preserving the important function of this section to enable police offices and authorised ambulance paramedics to assist vulnerable consumers to receive treatment.

The amendment constitutes an additional safeguard to the limitation of the right to liberty, in that it, together with other existing safeguards, renders the limitation reasonable and proportionate.

Legitimate purpose (s28(b))

Section 80(1) provides a mechanism for the assessment of a person for mental illness or disorder even though the person withholds consent or lacks the decision capacity to make the decision for themselves. This recognises the nature of mental illness and mental disorder as medical conditions that can inhibit a person's decision making and lead to a situation where a person makes a decision during a period of mental illness or disorder that the person may not have made but for the way the person was experiencing the mental illness or disorder at the time the decision was made.

This recognises the community expectation that unwell people will receive the help they need, balanced against the right of the person to determine their own treatment path. It acknowledges that mental illness and disorder are medical conditions like any other, with the additional characteristic that some consumers may experience significant differences in their decision-making day to day, or at times even hour by hour.

Another purpose of section 80 is to protect the safety of people with a mental illness or disorder, as well as other members of the community who may be harmed by people with a mental illness or disorder.

The apprehension framework is one way in which the government can meet its positive duty to protect life, and ensures that people with mental illness and mental disorder are understood through a mental health lens rather than creating a vacuum which is occupied by a criminal justice lens.

Rational connection between the limitation and the purpose (s28(d))

The purpose of section 80(1) is to ensure that there is a mechanism to assist vulnerable people to receive assessment if needed. It is not possible to properly understand the mental health system without acknowledging the widely varied nature of the mental illness or disorders, and the impact that an illness or disorder has on a particular individual. While most people with a mental illness or mental disorder are able to make decisions about their treatment pathway, a small cohort will require a safety net to protect them from harm. Section 80(1) provides this safety net, and the proposed amendment reduces the limitation by recognising that a person who can determine their own treatment pathway is empowered to do so.

It is necessary to vest in police officers and approved ambulance paramedics power to apprehend people with a mental illness or disorder in circumstances where harm may be inflicted (whether upon themselves or other people) because the police and paramedics are the most common first responders who would come into contact with individuals with a mental illness under those emergency circumstances.

Section 80 (1) (c) is being introduced to recognise that where individuals with a mental illness or disorder agrees to receive treatments, care or support, those individuals ought not to be involuntarily taken to a mental health facility and detained for the purposes of undergoing medical examinations, and potentially receiving immediate and necessary treatment, care or support.

Conversely, where it appears to a police officer or an approved ambulance paramedic that a person requires medical examination, and the person, for various reasons, cannot or is unwilling to arrange this treatment, the police officer or paramedic will need to decide whether to apprehend the person for medical examination at an approved mental health facility.

Proportionality (s28(e))

Although section 80 (1) by itself limits the right to liberty and security, the new subsection (1) (c) operates to further circumscribe the limitation. In this sense, the new subsection (1) (c) promotes the right to liberty and security.

In light of the following features of section 80 (1), subsection (1) (c) represents a reasonable and proportionate safeguard to the limitation of human rights. Viewed as a whole, section 80 (1) does not authorise deprivation of liberty that is arbitrary.

Firstly, section 80 (1) does not allow for arbitrary decision-making. It requires that the authorising officer satisfies on “reasonable grounds” that all statutory criteria of section 80 (1) are met before exercising the power to apprehend. Secondly, apprehension can be carried out only for the purposes of taking the person to an approved mental health facility. Thirdly, a police officer or paramedic is required by section 263 (2) (c) of the Act to use ‘the minimum amount of force necessary’ to apprehend the person. Fourthly, an apprehension power exercised under section 80 (1) is subject to review by ACAT. The scope of ACAT review power is being expanded by clause 9 of the Bill.

It is important to understand the circumstances under which the apprehension power is usually exercised: where a person’s life or safety may be at risk due to the person or another person’s potential mental health issues. It is neither practicable nor appropriate to require a police officer or paramedic to make a clinical judgement as to a person’s mental illness or disorder, as they do not have the medical expertise. This is reflected in clause 8 which clarifies that an apprehending officer is not required to make a medical assessment or clinical judgment when considering section 80(1). However, to not authorise the police or paramedics to apprehend a person under the circumstances envisaged by section 80 (1) would put public safety at risk, including individuals who suffer from mental illnesses or disorders.

The way subsection (1) (c) is drafted requires a police officer or paramedic to form the belief that a person requires immediate examination by a doctor, and that the person does not agree to be immediately examined. Such a belief must be formed on reasonable grounds, taking into account any previous history about the person known to the police officer or paramedic, the representations made by the person and on-site witnesses, and the person’s behaviour.

If a person is apprehended, then taken to an approved mental health facility, section 84 (2) requires the person to be examined by a doctor within 4 hours after arriving at the facility. If that is not done, the facility must immediately tell the Chief Psychiatrist, who must arrange for an examination of the person within 2 hours of being told. The person must be released if the Chief Psychiatrist fails to arrange for an examination within the 2-hour period, unless there is a court order stating otherwise.

Paragraphs 4.20 to 4.28 of the revised explanatory statement for the Mental Health Bill 2015 set out the provisos that the apprehension power must meet to be compatible with human rights. Section 80 (1) still meets all the provisos after the inclusion of the new subsection (1) (c), and the amendment of subsection (3).

Mental Health Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Mental Health Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

.....

Gordon Ramsay MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

Clause 1 provides that the title of the Act will be the *Mental Health Amendment Act 2020*.

Clause 2 Commencement

Clause 2 provides that the Act Commences on the day after notification, except for Clause 7 which commences 1 December 2020

Clause 3 Legislation amended

Clause 3 provides that the Act amends the *Mental Health Act 2016*.

Clause 4 Section 56(1)(ea) What ACAT must take in to account

Clause 4 Inserts subsection 56(1)(ea) which requires ACAT to take in to account any statement by the registered affected person.

Clause 5 Section 56(1)(ja) What ACAT must take in to account

Clause 5 inserts Subsection 56(1)(ja) which requires ACAT to take in to account any statement by the Victims of Crime Commissioner.

Clause 6 Contravention of mental health order

Clause 6 inserts 77(2)(a) which allows for a person to consent to treatment after a contravention notice has been issued.

Clause 7 Apprehension - examination

Clause 7 inserts 80(1)(c) that requires that an apprehension may only be made if the person requires immediate examination and does not agree to be examined immediately.

Clause 8 Apprehension - standard

Clause 7 inserts 80(1A) that states that in forming a belief for the purpose of section 80(1), a police officer or ambulance paramedic is not required to make a medical assessment or clinical judgment.

Clause 9 Apprehension review

Clause 9 inserts 80(3) which empowers ACAT to review an apprehension order under section 80(1).

Clause 10 Definition of forensic patient

Clause 10 substitutes the definition of forensic patient to be determined by the pathway through which a person is in the jurisdiction of ACAT, rather than the type of order that is contemplated or made.

Clause 11 Disclosures to registered affected people

Clause 11 extends the right to know certain information to registered affected persons, regardless of the type of order contemplated or made.

Clause 12 Disclosures to registered affected people

Clause 12 extends the type of registered affected persons with a right to know certain information.

Clause 13 Section 180 What ACAT must consider

Clause 13 inserts section 180(3)(ca) that requires ACAT consider any statement by the registered affected person or the views of the Victims of Crime Commissioner in relation to section 180(2) orders.

Clause 14 Section 182(3A) Review of Conditions of release

Clause 14 inserts section 182(3A) that requires ACAT consider any statement by the registered affected person or the views of the Victims of Crime Commissioner in relation to section 182 review of conditions of release.

Clause 15 Section 188(1)(a)(viii) Notice of Hearing

Clause 15 substitutes an expanded basis for receiving notice of hearing that includes mental health orders or order under section 180(2) and provides that both the registered affected person and Victims of Crime Commissioner receive notice of hearing.

Clause 16 Section 190(1)(h) Appearance

Clause 16 substitutes expanded grounds for when the victims of crime commissioner may appear and give evidence at an ACAT hearing.

Clause 17 Section 197(ba) Chief Psychiatrist Functions

Clause 17 inserts a new function for the Chief Psychiatrist to make guidelines for mental health facilities, mental health professionals and anyone exercising a function under the Act.

Clause 18 Section 198A Chief Psychiatrist Guidelines

Clause 18 inserts provisions to create a power for the Chief Psychiatrist to make guidelines.

Clause 19 Section 200(2) Delegation by Chief Psychiatrists

Clause 19 inserts a provision that the Chief Psychiatrist cannot delegate the guideline making power.

Clause 20 Section 226(2) Private Psychiatric Facility Licence

Clause 20 provides that it must be a condition of the licence that the licensee must comply with Chief Psychiatrist guidelines.

Clause 21 Section 271A Review

Clause 21 inserts a provision requiring review of certain parts of the Act after 5 years.

Clause 22 Dictionary

Clause 22 adds chief officer (ambulance service) and chief police officer to the Dictionary.