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## Submission in relation to The Mental Health bill (exposure draft)

Liberty Victoria is pleased to have the opportunity to make this submission in relation to the *Mental Health Bill (Exposure Draft)*. The revision of the *Mental Health Act 1986* is a significant legislative development. This is not least because the legislation may affect substantially and negatively the rights and freedoms of people with mental illness. It is crucial therefore that an appropriate balance be struck between the necessity that people with mental illness be treated effectively and the imperative that their rights and freedoms should be limited only to the extent absolutely necessary to achieve that treatment objective. Liberty's comments in this submission are addressed principally to the achievement of the proper balance.

This submission deals with the Exposure Draft by reference to the sequential structuring of the legislation. We examine and provide commentary on each Part in turn.

### 1. Preliminary

Liberty supports Cl. 1 which deals with the Purpose of the legislation with one qualification. We note that the legislation is designed to ensure that people receiving treatment for their mental illness retain their rights, dignity and self respect. This, however, is qualified by reference to consistency 'with the proper delivery of mental health services'. The meaning of this latter phrase is entirely unclear. And it would be highly undesirable if people's treatment with dignity were to be qualified, for example, by reference to some administrative or managerial necessity. We recommend, therefore, that this latter phrase be removed.

We note that a person's capacity to make a decision for the purposes of the Act is defined by reference to three criteria in Cl.3(2). Liberty strongly supports the principle embodied in the Act that a person should be presumed, in the first instance, to have the capacity to make decisions with respect to their treatment, care and other relevant matters. And if they cannot, that every endeavour be made to assist them with the exercise of such capacity of which they are capable. We note, however, that a person's capacity to make decisions with respect to their treatment and care is defined by reference to different criteria in other parts of the draft. So, for example, it is defined in different terms in Cl.70(c) and Cl.71(c). Given the fundamental importance of the concept of capacity to the framework of the draft, any such differences or ambiguities should be removed.

## **2. Objectives and Principles**

Liberty supports in general terms the statement of objectives and principles that is outlined in Part 2. In particular, Liberty supports the following key principles:

- That people with mental illness have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights.
- That people with mental illness should not receive treatment of mental illness without their consent, unless the legislation provides otherwise and specifically.
- That people with mental illness should be consulted with respect to their treatment and care and that they should have their preferences and wishes considered in the making of decisions that affect them; and
- That people with mental illness should receive treatment only for diagnostic or therapeutic purposes
- That people with mental illness should be treated compulsorily only if it is not possible to do so on a voluntary basis by reason of them lacking the capacity to make decisions with respect to their treatment

- That people with mental illness should be provided with treatment in a manner that is the least restrictive means available, consistent with the preservation of their dignity and fundamental human rights.

### **3. Administration**

#### Mental Health Tribunal

Liberty supports the establishment of the new Mental Health Tribunal and makes the following comment in relation to its operations and administration. The Exposure Draft substantially expands the jurisdiction accorded to the existing Mental Health Review Board. In order for the Tribunal to work effectively, that expansion must be matched by an equivalent expansion in the membership and financial resources made available to it. At the very least the implications of the jurisdictional extension will be as follows:

- A requirement for the membership of the Tribunal to be significantly expanded.
- A requirement that existing remuneration for members be reviewed in the light of their additional responsibilities and so as to attract the most highly qualified candidates for membership.
- A requirement that sufficient new members be appointed so as to permit significantly more frequent hearings and to take into account the reality that hearings are likely to be longer and more complex.
- A requirement that separate divisions may be created to deal with different aspects of the Tribunal's jurisdiction, e.g. review of ECT.
- A requirement that the Tribunal have the power to strike out applications, for example, where a person with mental illness no longer wishes to pursue an application, or where a person with a mental illness has engaged in frequent appeals over a lengthy period without reasonable prospect of success.

Liberty supports Cl.27 which underpins the independence of the Tribunal but notes that no sanction for interference by government with Tribunal independence is set down. Liberty supports the provisions of Schedule 1 with respect to the membership of the

Tribunal. It supports the position that the President of the Tribunal and any Acting President should have legal qualifications. Depending on their number, however, it would appear unnecessary for all Vice-Presidents to have legal qualifications. It should be open for Vice-Presidents to be appointed on the basis of the particular expertise and experience in areas of significant importance to the Tribunal's effective operation.

Liberty has significant reservations regarding the addition of the category of registered medical practitioner members. In the draft, there is no apparent requirement that any such member have particular knowledge and skill with respect to mental health or mental illness. If that is the case, serious questions should arise with respect to the appropriateness of the appointment of such members if they lack such expertise. It would be better in these circumstances, if an additional category is required, to devote it to the appointment of psychologists.

Liberty does not support the alteration of the name of the third category of membership from community member to expert member. While knowledge and expertise relating to mental health and mental illness should be required of the third category of member, it is preferable in Liberty's view for such expertise to be found still in members who at least to a certain extent may reflect broader community views as to the legislation's subject matter and operation.

Liberty notes that in Cl. 79(11) that the Mental Health Tribunal may, if the person concerned consents, determine an application by holding a private and informal meeting or 'on the papers'. We believe this to be a most undesirable provision. One may easily foresee a situation in which a person with a mental illness detained involuntarily may be pressured by staff into consenting to such a closed and cursory procedure. Alternatively, they may be sufficiently unwell to appreciate the benefit of participating in a hearing, which, after all, may offer them their freedom or at least a less restrictive means of receiving treatment. This provision should be abandoned.

### Review Officers

Liberty does not support the appointment of review officers on the basis set down in the Exposure Draft. It is plain that this new level of review has been created to overcome the human rights infringement present in the existing legislation whereby a person with a mental illness who is detained involuntarily, may not be reviewed until after eight weeks of

their initial detention. Plainly, not providing for an early review of involuntary detention may constitute arbitrary detention within the terms of the *Victorian Charter of Rights and Responsibilities (1986)* and for that reason needs to be corrected. The institution of early review by review officers is inadequate to the task.

The review of a person's initial involuntary detention conducted by review officers is declared to be of a procedural nature only. The review officers task is to determine whether an Assessment Order, Inpatient Treatment Order or Community Treatment Order have been made in compliance with the Act. The review is confined to assessing the adequacy of the process of making an order rather than assessing the appropriateness of involuntary detention itself. This institutes a bureaucratic form of review while, at the same time, failing to assist persons detained to achieve early substantive review of their involuntary status. In fact, following this procedural review, the first opportunity for initial, substantive review (apart from appeal) does not then occur for 31 days. Detention for this period of time without compulsory substantive review is unacceptable in human rights terms. Consequently, as presently proposed, the necessity for early procedural review will result in the necessity to appoint very large numbers of review officers who will then undertake a task that does not meet the primary objective required. It will waste a great deal of time, including that of clinical staff, to no sufficient end.

In Liberty's view, it would be far better to abandon the idea of procedural review by review officers, in favour of earlier substantive review by the Mental Health Tribunal. Such substantive review should be undertaken at the latest 21 days after a compulsory treatment order is made.

### Second Opinion Psychiatrists

Liberty supports the appointment of a panel of Second Opinion Psychiatrists. We note, however, that the present Mental Health Review Board has found it extraordinarily difficult to find sufficient qualified psychiatrists to take up membership. The establishment of a new panel of Second Opinion Psychiatrists can only exacerbate this difficulty. This adds weight to the inclusion of a 'psychologist' category for the Tribunal.

#### 4. Compulsory Patients

##### Criteria for Inpatient Treatment Order and Community Treatment Order

When considering the right balance to be struck between the rights and freedoms of people with mental illness and their entitlement to effective treatment, the criteria set down for involuntary detention are critical. It is on the basis of these criteria that judgments will be made about the freedom or restraint of some thousands of Victorians each year.

In principle, Liberty supports criteria that will privilege a person's freedom over their involuntary detention. Nevertheless, we recognize that harm may well be done to a person if they achieve their freedom at the cost of their mental health.

The issue is made more complex by practical considerations with respect to the quality and availability of mental health services, whether on an inpatient or outpatient basis. Plainly, one will be more inclined to favour a person's freedom to reside in the community if community mental health services are accessible and of high standard. In the interests of a person's mental health one may be less inclined to favour discharge from involuntary treatment if community mental health services are inaccessible, inadequate, and insufficiently staffed, whether in terms of numbers or expertise.

In Liberty's view, a person's detention on an involuntary treatment order should be for the shortest possible period. The outcome, however, cannot be to discharge many more people with mental illness into the wider community, without any adequate prospect of further treatment, psychological support, reasonable housing, basic income and similar psychological and practical assistance. In Liberty's view, the great failing of deinstitutionalization was precisely that. Governments were simply unwilling to fund and provide the intensive levels of assistance required to make community living a reasonable alternative to asylum. This is not a mistake that should be made again. Liberty's priority for individual liberty should be understood exactly against that background.

Returning to the criteria for involuntary detention, it is plain that the new criteria are more stringent than those in the existing *Mental Health Act*. This means that it is highly likely that more people who would formerly have been detained involuntarily for the sake of their health or safety, will now be discharged from involuntary treatment. If we are not to

witness a dramatic increase in the numbers of people with mental illness wandering the streets aimlessly and in poverty, the Government must ensure that the community supports necessary for their successful treatment and re-integration are present.

On the assumption, however, that the necessary resources will be made available (and they are not nearly adequate presently), Liberty expresses its general support for the criteria proposed, with the following qualifications:

- We note that it must now be determined definitively that a person has a mental illness, rather than it 'appearing' as if they do. The Mental Health Review Board's experience, however, is that, particularly in the early days of a person's treatment, it is often difficult to assign a precise diagnosis to a person's condition. This fact should not prevent a person from being involuntarily detained if the behavioural manifestations of the person's mental illness are plainly in evidence, even if a precise label for the illness is not yet available. Further, premature diagnosis can, in certain circumstances mean premature stigmatization. This consequence ought also to be avoided. For these reasons Liberty favours the existing criterion that a person should 'appear to be mentally ill'.
- We support the criterion with respect to ensuring that a person has the capacity to make decisions about their treatment and care. The fourth leg of the definition of capacity needs, however, to be clarified. At present the criterion reads as if a person's capacity to make a decision may be found to be significantly impaired because 'the person cannot communicate their decision in a manner such that another person can understand what the decision is'. However, it does not follow at all that a person does not have the capacity to make a decision about their treatment, simply because they cannot communicate it. They may, for example, have a physical disability that prevents them from doing so. This leg of the capacity definition, therefore, needs either to be abandoned or modified.
- We are concerned about some aspects of the harm criterion. For instance, there may not be an imminent risk that a person may cause serious harm either to themselves or others, but the risk may still be significant. We doubt the wisdom of discharging a person in circumstances where such a significant risk remains. The use of the word 'serious' also causes some difficulty. Does its use mean that if there remains a significant risk of harm (rather than serious harm) to the person or

some other person, that this is inadequate to justify short term involuntary detention to avoid such harm?

- The matter is similar in relation to the second leg of the harm criterion. Should a person be discharged from an involuntary treatment order if there remains a significant risk that a person's physical or mental state will deteriorate, even though such a deterioration may not be predicted, in the foreseeable future, to be 'serious'. And plainly, if a person is discharged because there is not a foreseeable risk of serious harm, but there remains a significant risk of deterioration nevertheless, might it not be reasonably predicted that, absent effective treatment, the significant risk of harm might develop into the risk of serious harm?
- The final leg of the harm criterion requires that all reasonable options, short of involuntary detention, must have been explored and found not to be suitable. It might perhaps be better to require that all reasonable steps have been taken to explore alternative less restrictive options.

To require that every reasonable option must have been explored may involve a standard of detailed inquiry that may be difficult to meet, particularly when tested before the Mental Health Tribunal.

## **5. Electro-Convulsive Therapy and Psychosurgery**

Liberty supports the insertion of new monitoring and approval mechanisms for the administration of ECT and the performance of psychosurgery. In relation to both procedures however, Liberty believes that an application to the Mental Health Tribunal to undertake procedures should be determined within 5 working days rather than 10 as proposed. In both cases it is likely that the intervention proposed will be in response to some psychiatric emergency and in these circumstances an early review of any application will be highly desirable.

## 6. Further Protections for the Rights of Persons with Mental Illness

In relation to the further protection of rights, Liberty supports:

- The provision for making advance statements
- The provision providing that a person with a mental illness may choose a person to be their nominated person
- The provision to a person with mental illness of a clearly expressed statement of their human rights.
- The continuation of visits by community visitors
- The establishment of a new Office of Mental Health Commissioner to hear and determine complaints by people with mental illness, their nominated persons, or advocates concerning their treatment and care.
- The provisions of Schedule 2 of the draft legislation.

### Concluding Observations

In conclusion, Liberty makes the following observations about the context in which the present, proposed comprehensive revision of the *Mental Health Act* is set. The Exposure Draft has as its clear objective, the promotion of the human rights of people with mental illness. In that way, the draft seeks to make Victorian mental health legislation more consistent with Australia's obligation to implement the terms of the *International Convention on the Rights of Persons with Disabilities*. Fundamental to this Convention is the right of people with mental illness to be free from arbitrary detention. Similarly, the Convention also provides that, as far as is possible, people with disabilities, including people with mental illness, should, exercise their capacity to make their own decisions with respect to their medical treatment. Where they are deemed incapable of exercising that capacity, they should still be provided with the maximum support to enable them to make informed decisions in as many areas of their lives as is possible and feasible. These are worthwhile and desirable objectives. Liberty strongly supports them.

At the same time, however, it must be recognized that the exercise of these rights takes place in a particular societal and governmental context. In this submission, we have already referred to the difficulty that will attach to a tightening of the criteria for involuntary

detention in the absence of adequate psychological and physical support and services for people with mental illness in the wider community.

It is also appropriate to remark on the position with respect to the provision of inpatient treatment facilities. The Exposure draft appears to proceed on the assumption that the major problem facing people with mental illness who come into contact with psychiatric services is that they may be detained unnecessarily or unjustifiably. In fact, a problem of equal, if not greater weight, is the inability of people with serious mental disturbance to gain access to the emergency inpatient treatment they may require, and at a level of excellence that is clearly desirable.

All too often people who are seriously ill are turned away from psychiatric hospitals in Victoria because there are no beds available for them. All too frequently, people who are admitted to psychiatric hospitals in Victoria find that the adequacy of resources to treat them, the prospect of early intervention and the level of expertise of psychiatric staff in the public psychiatric system, is simply insufficient to enable them to be treated and to recover in the way that they might wish. This problem has been consistently raised in the context of youth services by Professor Patrick McGorry of the Orygen Youth Treatment Centre and recently nominated as Australian of the Year. His views are well known and Liberty supports them unreservedly.

The logical conclusion to be drawn from this situation is that, as with community services, so with inpatient hospitals, the Government must provide more than adequate resources so that services may operate effectively and people with mental illness may be treated effectively and with proper regard for their dignity and human rights. In both circumstances, it will be counter-productive to be seen to be affording greater freedom to people with mental illness, if that freedom is to be exercised in the absence of high quality psychiatric services and appropriately extensive community support.

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