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27 February 2009

REVIEW OF THE MENTAL HEALTH ACT

LIBERTY SUBMISSION

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Introduction

About Liberty Victoria

The Victorian Council for Civil Liberties Inc (**Liberty Victoria**) is an independent non-government organisation which traces its history back to the first civil liberties body established in Melbourne in 1936.

Liberty Victoria is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law. Liberty Victoria has campaigned extensively in the past on issues concerning rights and freedoms, democratic processes, government accountability, transparency in decision-making and open government.

Scope of this Submission

Liberty Victoria welcomes this invitation to participate in the review of the *Mental Health Act 1986* (Vic) (**MHA**). In many respects, the MHA has served Victoria well for more than a decade. However, we believe that there are now significant reasons for its reform.

In particular, Liberty Victoria emphasises the need for new legislation to enshrine domestic and international human rights standards, with a particular view to the realisation of the rights to autonomy and non-discrimination in accordance with the *Convention on the Rights of Persons with Disabilities* (**CRPD**).¹

In this submission Liberty Victoria makes specific comments in relation to involuntary treatment and external review. Liberty Victoria also endorses certain recommendations made by the Human Rights Law Resource Centre (listed below).

Recommendations

Liberty makes the following recommendations:

1. Any involuntary treatment regime must respect the human rights of people with mental illness. This requires, at a minimum, that people with mental illness are presumed to have legal capacity unless it can clearly be demonstrated that they are incapable of providing informed consent to their treatment or care.
2. Given that involuntary detention and treatment of people with mental illness represents a radical curtailment of their fundamental rights and freedoms, any decision to institute involuntary detention or treatment must be made subject to a process of independent and impartial review that is both timely and comprehensive.

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008) (**CRPD**).

Further, Liberty endorses the following recommendations contained in the submission provided by the Human Rights Law Resource Centre:

3. The purpose of the new legislation should explicitly recognise those principles set out in Article 3 of the Disability Convention, namely:
 - (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
 - (b) Non-discrimination;
 - (c) Full and effective participation and inclusion in society;
 - (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
 - (e) Equality of opportunity;
 - (f) Accessibility;
 - (g) Equality between men and women;
 - (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
4. Mental health laws, regulations and policies should recognise the diverse needs of groups including women, children, Indigenous and CALD populations and should ensure that additional and tailored support and independent advocacy services are provided to people with diverse needs.
5. Determining whether a consumer requires under s 8(1)(b) treatment involves the following steps:
 - (a) a person is diagnosed with a mental illness of a kind or degree warranting compulsory confinement;
 - (b) continued treatment depends on a continuing assessment of whether the mental illness requires treatment;
 - (c) the responsible mental health practitioner determines that the treatment is proportionate to the treatment's aim (being the mental health of the consumer);
 - (d) if the responsible mental health practitioner determines that the conditions required for involuntary treatment are no longer satisfied the above requirements, the treatment must cease; and
 - (e) the responsible mental health practitioner must provide written reasons to the consumer that articulates why, in their opinion, the consumer requires the specific treatment imposed.

6. To satisfy s 7(2) of the Charter, involuntary treatment may only be imposed under s 8(1)(c) where it is proportionate to the risk of harm to self or others; the risk meets a threshold level of severity and probability; and there is a clear relationship between the identified risk and the imposed treatment to address that risk.
7. Freedom from medical treatment without full, free and informed consent requires consumers be supported in making treatment and care decisions. Practicable steps should be taken by medical health practitioners to support a consumer to make treatment and care decisions. Further, consumers must be provided with written information on the proposed treatment and care (including the medication and its effects) in a language they can read.

Involuntary treatment

Involuntary treatment engages several fundamental human rights, including, among others:

- (a) the right to be free from medical treatment without full free and informed consent;²
- (b) protection from torture and cruel, inhuman and degrading treatment;³
- (c) the right to liberty and security of the person;⁴ and
- (d) the right to privacy.⁵

Liberty Victoria acknowledges that sometimes human rights conflict. It is often argued that the realisation of certain rights – such as the community’s right to safety or a patient’s right to the highest attainable standard of health – are difficult to reconcile with the right to be free from medical treatment without consent. The extent to which this is in fact the case is the subject of considerable debate and disagreement.⁶

As a matter of principle, a person’s right to liberty and security may be limited, but only where the limitation can be ‘demonstrably justified in a free and democratic society based on human dignity, equality, freedom and taking into account all relevant factors’.⁷ In other words, any limitation on the right to liberty must be a reasonable, proportionate, evidence-based response to an ascertainable individual or social problem.

² *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), section 10(c)

³ Charter section 10 (a)-(b)

⁴ Charter, section 21.

⁵ Charter, section 13.

⁶ See, for example, Tina Minkowitz, ‘The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Non-consensual Psychiatric Interventions’, *34 Syracuse Journal of International Law and Commerce* (2006-2007).

⁷ These principles are reflected in section 7(2) of the Charter.

In this regard, we note further that the right to equality is violated whenever a person with a disability is treated differently from others in the community and that differential treatment is not adequately justified by reference to a compelling and competing public interest.⁸

It is generally accepted that people with physical disabilities are able to refuse treatment that they need, even when they place themselves at risk as a result. It is also generally accepted that people cannot be detained preventively, regardless of the likelihood that they may cause harm to others in the future.⁹ Under the MHA these standards do not apply to people with mental illness. Consequently, if the Government wishes to perpetuate this differential treatment, it must demonstrate clearly that the involuntary treatment and care of people with mental illness is demonstrably necessary either for the sake of their health or for the protection of members of the public.

Former Special Rapporteur on the Right to Health, Paul Hunt, has stated that, in his experience:¹⁰

decisions to administer treatment without consent are often driven by inappropriate considerations. For example, they sometimes occur in the context of ignorance or stigma surrounding mental disabilities, and expediency or indifference on the part of staff. This is inherently incompatible with the right to health, the prohibition of discrimination on the ground of disability, and other provisions in the Mental Illness Principles.

A re-evaluation of the justification for involuntary treatment is also called for by the CRPD, the purpose of which is to:¹¹

promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote and respect their inherent dignity.

The CRPD provides that people with disabilities have a right to equality before the law;¹² to enjoy legal capacity on an equal basis with others in all aspects of life;¹³ and are entitled to the support they may require in exercising their legal capacity.¹⁴ Collectively, these provisions impose as a minimum requirement that:

- (a) people with mental illness are presumed to have legal capacity; and
- (b) a person exercising legal capacity (including through supported decision-making) must not be made subject to involuntary treatment.

⁸ See the Committee on Economic, Social and Cultural Rights, *Draft General Comment No. 20 on non-discrimination*, E/C.12/GC/20/CRP.2, 9 September 2008.

⁹ Brenda Hale, "The Human Rights Act and Mental Health Law: Has it Helped?", 7 *Journal of Mental Health Law* (2007).

¹⁰ Paul Hunt, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2005/51 (11 February 2005) [89].

¹¹ CRPD, article 1.

¹² CRPD, articles 5 and 12(1)

¹³ CRPD, article 12(2)

¹⁴ CRPD, article 12(3)

In cases where a person with mental illness is found not to be capable of exercising legal capacity, their treatment and care must proceed on the basis that their inherent dignity and autonomy will at all times continue to be respected.

From this analysis we draw two conclusions regarding the provisions of the present MHA. First, in s.8(1)(a) of the Act, a determination must be made not just that a person 'appears to be mentally ill'. Consistent with human rights principles, a person must be determined to be mentally ill before their involuntary detention is contemplated.

Secondly, a person's involuntary detention should not be contemplated in a situation in which they are found to possess legal capacity but refuse to consent to their treatment. Where a person is judged to have capacity, it should be presumed that they can exercise their capacity to make informed decisions about their treatment. Not to permit them to do so constitutes a substantial violation of their liberty and is, in any case, contrary to the provisions of s.10 of the Charter.

External Review

Liberty is of the view that the present system of review of decisions with respect to involuntary detention and treatment meets the requirements of independent and impartial review provided for in international human rights conventions. Nevertheless, there are aspects of the present system of review that ought to be reformed. Two in particular require careful consideration.

First, under the present provisions of the MHA, a compulsory review of a person's involuntary detention need not take place until eight weeks after their initial admission to a psychiatric facility. Given that it is a person's liberty that is in question, we submit strongly that a wait of almost two months before compulsory review is far too long. Such a review should take place at the earliest possible opportunity after admission so as to ensure that it is demonstrably justified. No person should languish in detention for a lengthy period prior to having an opportunity to have the justification for that detention reviewed. This is particularly the case where, as in the instance of people with mental illness, the individual involved may not be capable of making a case that their detention is unjustifiable.

Secondly, it follows that given the particular disability and vulnerability of people with mental illness, effective advocacy on their behalf is critical. Apart from the system of criminal law, there is no other area in which a person may forfeit their liberty in the manner applicable to people with mental illness. The seriousness of that consequence and the particular vulnerability of the group in question, in our view necessitates a system in which legal advice, assistance and representation is made available to every person facing a Tribunal review, if they request it and after being fully informed of their rights.

Thirdly, and further, it follows that the provision of legal advice and advocacy is essential to hold the reviewing body effectively to account. Presently, without effective legal

representation, the Mental Health Review Board is less pressed to inquire in detail as to the circumstances of a person's illness and the deprivation of their liberty than would otherwise be the case. And figures provided in the Review Board's annual reports suggest that the likelihood of person's discharge from involuntary detention increases significantly when they are legally, or in some other manner effectively, represented.

Finally, Liberty is of the view that the present composition of the Mental Health Review Board panels is appropriate and should be maintained. The balance of membership between a lawyer, psychiatrist and community member brings a range of different perspectives to the decisions of the Board, while founding those decisions on the basis of appropriate expertise. We note in this regard that it sometimes suggested that the tri-partite membership of the Board should be replaced by review by a single member of the Victorian Civil and Administrative Review Tribunal. Such a system of review, in our opinion, would not be as sensitive to the situation of people with mental illness; as expert as the present system; or as informal as the special disability of this client group requires.