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Submission on the Review of Victoria's Mental Health Act

About the Author

I am a psychiatric survivor and a member and former board member of the World Network of Users and Survivors of Psychiatry (WNUSP), who are a member of the International Disability Alliance (IDA) and played a major role in the drafting of the UN Convention on the Rights of Persons with Disabilities (CRPD). I am currently the International Representative of the Australian Federation of Disability Organisations (AFDO) and have represented both WNUSP and AFDO at various UN forums on the rights of persons with disabilities in Geneva, Bangkok and New York. I am a member of the Victorian Mental Illness Awareness Council (VMIAC) and have served on its Management Committee for three years including one year as Chair. I have also served on the Management Committee of the Victorian Mental Health Legal Centre (MHLC). I currently sit on the Disability Reference Group of the Victorian Equal Opportunities and Human Rights Commission (VEOHRC). I have a PhD in Suicidology and have presented numerous seminars and forums on my research in Europe and the US, as well as here in Australia. Of my numerous publications (details available on request), I specifically draw your attention to a paper I was invited to give at a forum hosted by the MHLC and the VMIAC titled "Do our Mental Health Laws Help or Hinder Suicide Prevention?" This remains the only paper I have seen that does a careful analysis of mental health laws, human rights and suicide, and concludes that our current Mental Health Act is quite likely contributing to the suicide toll rather than reducing it. The book from my PhD, "Thinking About Suicide", was published in the UK earlier this year. The views expressed in this submission are not necessarily endorsed by any of the above organisations – though I am very confident of WNUSP's support in the same way that I support their efforts on behalf of people with psychosocial disabilities throughout the world.

1. Preamble and Disclaimer

This submission follows my submission to the review, dated February 27, 2009, but I do not re-state here all the concerns expressed in that submission, none of which have been adequately addressed by the review since that time.

My position on involuntary psychiatric treatment is well known. I am part of a growing global campaign to see it abolished entirely. We recognise, however, that this will not be achieved any time soon but it remains the long term goal of this movement. In this 2

submission I may appear to compromise on this goal but that is not the case at all. This submission merely recognises that the Victorian government has been committed to maintaining involuntary treatment from the outset of the review, even though it has never presented to the people of Victoria its justification for involuntary psychiatric treatment, as required under the Human Rights Charter. This was the central complaint in my previous submission and is re-stated below.

This submission therefore responds mainly to the Draft Exposure Bill released in September and in particular one very specific provision in it that is found in Section 125-1(a) of the Draft Bill. This provision represents such a gross disregard for one of the most fundamental rights of people with disabilities that all the other human rights limitations in the Draft Bill, serious though they are, become almost meaningless in comparison.

I have therefore focused my efforts in this submission on ensuring that this provision of the Draft Bill is removed. This is followed by a few comments on some of the other major human rights concerns in the Draft Bill, though this is not an exhaustive catalogue of all of them, which I know other parties with more resources than myself will raise. I then re-state the review's failure to observe its obligations under the Charter, followed by some concluding remarks and a single recommendation.

I repeat, though, that the specific issues I raise here do not in any way represent an endorsement of others provisions in the Draft Bill that are not raised here.

2. Section 125-1(a) of Draft Bill is Gross Disability Discrimination

Section 125-1(a) of the Draft Bill permits substituted decision-making (involuntary medical treatment) even on a person who has capacity according to the definition of capacity in the Draft Bill (Section 3(2)). This is such an egregious disregard of one of the most fundamental principles of the rights of persons with disabilities that it can only be interpreted as complete contempt for the rights of people with psychosocial disabilities.

Part of my role as AFDO's International Representative, as well as my close association with WNUSP, is to keep up to date on developments with the CRPD. Over the last few years I have participated in many forums on the CRPD including, most recently, the Conference of States Parties in New York in September and a UN ESCAP meeting on the CRPD in Bangkok in October.

The use of "capacity tests" – or tests of a person's decision-making abilities – is controversial among people with disabilities as they are seen as inherently discriminatory, which violates the underlying principle of the CRPD. But this is not the issue I raise here.

In all the many discussion on the CRPD that I have participated in, I have *never* heard anyone suggest that it is acceptable to impose substituted decision-making on a person who demonstrates capacity – however it is defined. Section 125-1(a) says that that state of Victoria either does not understand disability rights or does not care about them at all.

I have brought this to the attention of Graeme Innes, Disability Discrimination Commissioner at the Australian Human Rights Commission, and also Professor Ron McCallum, Chair of the CRPD Committee, as well as others in the international disability rights community. If this section of the Draft Bill is allowed to proceed it will bring great shame to Victoria. 3

[NB: this issue applies to all other sections of the Draft Bill that permit involuntary treatment of persons with capacity – e.g. Section 126-1(b).]

3. Other Concerns with the Draft Exposure Bill

Section 125-1(a) is so disgraceful that it makes the other human rights concerns in the Draft Bill almost irrelevant. But I mention a few others here to further illustrate the complete disregard for human rights principles and the contempt for the rights of persons with psychosocial disabilities in this Draft Bill.

ECT without consent

 the World Health Organisation (WHO) says that ECT without consent should be prohibited – without exception

Assessor of capacity must not become the substitute decision-maker

 if substituted decision-making is to be allowed, then it is essential that whoever makes the assessment of a person's capacity in order to authorise substituted decision-making must **not** be then become the substitute decision-maker

 having the same person as both the assessor of capacity and then the subsequent substituted decision-maker is universally regarded as a recipe for abuse by anyone familiar with disability rights

 the Draft Bill does not specify this essential separation of powers so it must be assumed that it permits the current status quo where the assessor of capacity routinely becomes the substituted decision-maker

Assessing decision-making ability is not a medical decision

 the new test of a person's decision-making in Section 64(d) specifies criteria that are psychological, not medical, and should therefore be only conducted by persons with appropriate professional qualifications in psychological assessments, **not** a medical practitioner (unless they also have the appropriate qualifications)

Assessment of decision-making ability discriminates against people with disabilities

 Section 64(d) discriminates against people with disabilities in numerous ways, which the review team should have been aware of

 for instance, the requirement of being able to "communicate the decision in a manner such that another person can understand what the decision is" discriminates against people who are non-verbal

 given the history of abuse in this area, the Draft Bill should have made it clear that disagreeing with a doctor's diagnosis or recommended treatment should **not** be considered as any indicating that a person lacks decision-making ability

Independent second opinions

 when the state is considering depriving a person of their basic rights, including the right to refuse unwanted medical treatment (Charter Section 10), that person should be entitled

to an automatic second opinion at this time, which in the Draft Bill is as part of the Assessment Order process

 postponing the right to a second opinion until after three months on a Treatment Order shows once again a contempt for the rights of people with psychosocial disabilities

Confusion between capacity and decision-making ability
 the definition of capacity in Section 3(2) is remarkably similar, but also significantly different, to the criteria for testing a person's decision-making ability in Section 64(d)

Confusion between capacity and legal capacity
 more importantly, the Draft Bill fails to recognise *legal capacity* as defined in Article 12 of the CRPD, which is a right **not** an ability to be measured and tested

 the right to legal capacity is now protected by CRPD Article 12 "on an equal basis with others in all aspects of life" and, in particular, should *never* be limited on the basis of a person's disability or medical status

 i.e. a psychiatric diagnosis should *never* be a factor in any decision to limit a person's right to legal capacity

4. Failure to Respect Human Rights Charter Obligations

At the DHS briefing on the Draft Bill on October 15, I once again asked the DHS officials when the people of Victoria would be given the justification for the human rights limitations in the Bill, as required by Section 7 of the Charter. Interestingly, the DHS officials confirmed that this had not yet occurred, saying that this Charter obligation will be met when the Statement of Compatibility is table in parliament with the Draft Bill.
Postponing this important Charter obligation until the very last minute of what will be a three year review once again demonstrates the government's contempt for the rights of people with psychosocial disabilities.
It was notable that the Executive Director of Mental health and Drugs at the DHS, Dr Karleen Edwards, also responded to my query by inviting me to submit my views on this to the review team, which I said was an unacceptable response. Under the Charter I now explicitly have these rights and do not have to say or do anything to claim them. Rather, as the Charter makes very clear in Section 7, the onus is now upon those who wish to limit my rights to present their justification which must be "demonstrably justified in a free and democratic society".
The review has already been going for more than two years and will likely be more than three years before the Draft Bill goes to parliament. It is extraordinary that there has been no public debate whatsoever of any justification for the limitations of Charter Rights because the DHS has simply refused to present to the people of Victoria the justification required under the Charter.
The DHS' contempt for the rights of people with psychosocial disabilities has been apparent throughout the entire review. Their contempt for the Charter is even more serious as it is contempt for democracy in Victoria. 5

5. Conclusions and Recommendations

From its inception in May 2008, the conduct of this review has been a sham and a scandal that can be traced to the original decision to give the review to the DHS rather than to Law Reform Commission. This has been compared to giving a review of criminal justice legislation to the police department.

It has been clear from the outset and through every step of the review that medical treatment without consent was going to remain the foundation of any new Mental Health Act. But there has not been any public discussion at all on the justification for this decision because no justification has ever been presented to the people of Victoria. Furthermore, requests to provide such justifications have been consistently ignored by the DHS.

And now, with the Draft Bill, this contempt for the rights of people with psychosocial disabilities – and for the Charter and the CRPD – has reached a new low-point for human rights in Australia in Section 125-1(a).

There is only one recommendation in this submission:

Recommendation

That the review of the Mental Health Act be transferred to the Law Reform Commission, which is the relevant competent authority for the review of legislation with such serious human rights implications. This could be done quite easily by expanding the terms of reference for the review of the Guardianship Act that the Law Reform Commission is currently undertaking.