VMIAC Policy Position Paper #8: Discrimination & Mental Health

Purpose

To identify and advocate for ways to prevent and address discrimination against people who experience mental and emotional distress.

The Issue

Under the Convention on the Rights of People with Disabilities ('CRPD'), all people who experience disability have the right to 'full and equal enjoyment of all human rights and fundamental freedoms',[1] however, mental health consumers regularly experience discrimination in ways which lead to worse mental health outcomes for them. Examples such as inequities in social determinant outcomes, discrimination in public life, the right to equality before the law and structural discrimination demonstrate the widespread nature of this issue. VMIAC are deeply concerned about the following:

- **Inequities in social determinant outcomes contribute to poorer mental health outcomes for consumers –** Social determinants of health act collectively to strengthen or undermine the health of individuals and communities [2]. Social determinants of mental health include a person's level of access to housing, employment, income, education, and services provided by governments, public authorities and others.[3] The World Health Organization note social determinants of health can also include early life circumstances, levels of social exclusion, social support, whether people experience addiction, levels of food security and access to transport.[4] Social determinants have the ability to impact a person's mental health, and, conversely, inequities in social determinant outcomes tend to overwhelmingly affect people who experience mental health issues.[5]

  Discrimination towards people related to characteristics such as race, ethnicity, sexuality and gender or gender identity places people at further risks of poorer outcomes in a range of domains.[6] The interaction between these inequalities and discrimination is known as 'structural vulnerability,' which arises when people with pre-existing experiences of inequality are subjected to structural discrimination.[7] For example gender discrimination can compound risks to homelessness among women. The Australian Institute of Health and Welfare reported during 2019 - 2020, 34.8% of specialist housing services clients reported current mental health issues.[8] Women already experience an increased risk of poor mental health,[9] and other factors such as childhood abuse, gender-based and domestic violence and financial concerns compound risks to homelessness.[10]

  Victoria's mental health system largely treats poor mental health separately to social determinants by focusing on diagnosis and individualised treatments. This creates a highly fragmented system for many of us who require multiple services, making it difficult to navigate.[11]

- **Discrimination in public life –** Discrimination in public life impacts consumers in a range of ways and includes inequitable responses within the mental health system, such as where diagnoses like schizophrenia and borderline personality disorder are highly stigmatized or lead to refusals of treatment [12]. Additionally, the risk averse nature of medical models can lead to discrimination against people who are either at risk of or have attempted self-harm or suicide. Current legislation permits compulsory treatment,[13] and it has been noted some clinicians simply refuse to treat consumers viewed as too high

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[1] *Convention of the Rights of People with Disabilities ('CRPD')*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 16 August 2008) art 1.
[2] Australian Institute of Health and Welfare, Australian Government, *Australia's Health 2020: Social Determinants of Health* (23 July 2020) https://www.aihw.gov.au/reports/australias-health/social-determinants-of-health
[3] *Equal Opportunity Act 2010* (Vic) ss 4 & 16 – 74.
[4] Richard Wilkinson & Michael Marmot (eds) *The social determinants of health: the solid facts* (World Health Organization, 2nd ed, 2003) 14 – 29.
[5] Margarita Alegria et al, 'Social Determinants of Mental Health: Where We Are and Where We Need to Go' (2018) 20 *Current Psychiatry Reports* 94, 94.
[6] Ibid, 95.
[7] Lawrence Yang et al, '"What matters most:" A cultural mechanism moderating structural vulnerability and moral experience of mental illness stigma' (2014) 103 *Social Science and Medicine* 84, 84.
[8] Australian Institute of Health and Welfare, *Specialist Homelessness Services Annual Report* (11 December 2020) <https://www.aihw.gov.au/reports/homelessness-services/specialist-homelessness-services-annual-report/contents/summary>
[9] Victorian Mental Illness Awareness Council, 'Gender Inequality and Discrimination' (Position Paper #4, VMIAC, November 2020) 1.
[10] Alison Duke & Adam Searby, 'Mental Ill Health in Homeless Women: A Review' (2019) 40(7) *Issues in Mental Health Nursing* 605,
[11] Australia's National Research Organisation for Women's Safety ('ANROWS'), 'Violence Against Women and Mental Health' (ANROWS Insights, April 2020), 3.
[12] Victorian Mental Illness Awareness Council, above n 9, 1.
[13] *Mental Health Act 2014* (Vic) s 5.

a risk.[14] Both these practices are inconsistent with the Equal Opportunity Act Vic 2010 (EOA)[15] and the CRPD, that assign the human right to the highest possible standards of health.[16] Discrimination is also a major issue in employment, where people who experience mental health issues are more likely to experience workplace discrimination and avoid seeking employment as a result of their mental health condition.[17] Discrimination has also been challenged in relation to insurance, where exemptions under the Disability Discrimination Act have enabled insurance companies to deny coverage.[18]

- **Consumers deserve rights and equality before the law –** Under the *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter'), all Victorians have the right to equality before the law. This right contains a number of specific protections, including: the right to equal recognition as a person, the right to enjoyment of human rights without discrimination; the right to equal protection without discrimination and equal protection from discrimination.[19] International human rights legislation provides additional protections for people with disabilities from deprivation of liberty,[20] cruel or inhuman treatment,[21] and confers rights to attain the highest possible level of physical and mental health, "without discrimination on the basis of disability."[22] Despite rights this legal context, consumers are routinely subjected to arbitrary deprivation of liberty,[23] gender-based violence and abuse,[24] nor have the same opportunities as other people to receive appropriate and helpful treatment – rather treatment is often to the contrary.[25]

- **Structural discrimination in relation to 'mental illness' is widespread –** Structural discrimination has been defined as a network of rules and practices disadvantageous to less empowered groups while simultaneously benefiting the dominant group.[26] Existing laws are not sufficient to protect consumers from this type of discrimination.[27] Structural discrimination can occur at government, legislative, policy and organisational levels. This can lead to discrimination in areas like housing, the justice system, employment and crucially, mental health where the use of force and violence against consumers is accepted [28] as a needed measure due to beliefs we cannot make our own decisions.[29] One impact of this is a significantly reduced life expectancy among people with poor mental health – estimates suggest it is 30+ years less than the general population.[30] This issue is compounded for groups such as First Nations people, where vulnerabilities to different types of discrimination (such as racism, combined with mental health discrimination) interacts during their contact with systems thereby increasing disadvantage and widening life expectancy gaps further.[31]

Our Position

- **We need better avenues to respond to and address discrimination –** presently, responsibility falls on consumers to be aware of their rights and to bring complaints about discrimination to the Equal Opportunity and Human Rights Commission. While the Commission has the power to conciliate complaints, given the serious impacts of discrimination on our lives and our sense of power and agency, conciliation is inappropriate and inaccessible for many to resolve complaints about breaches of the EOA.

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[14] J. Russel Ramsay & Cory F. Newman, 'After the Attempt: Maintaining the Therapeutic Alliance Following a Patient's Suicide Attempt' (2005) 35(4) *Suicide and Life Threatening Behaviour* 413, 415.
[15] *Equal Opportunity Act 2010* (Vic) ss 44 & 45.
[16] *Convention on the Rights of People with Disabilities,* art 25; International Covenant on Economic, Social and Cultural Rights ('ICESCR'), opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.
[17] Jeromey B. Temple, Margaret Kelaher & Ruth Williams, 'Discrimination and avoidance due to disability in Australia: evidence from a National Cross Sectional Survey' (2018) 18 *BMC Public Health* 1347, 1355.
[18] Mental Health Council of Australia, Submission to Australian Law Reform Issues paper: Mental Health and Insurance, *Inquiry into Equality, Capacity and Disability in Commonwealth Laws,* 18 February 2014, 2.
[19] *Charter of Human Rights and Responsibilities 2006* (Vic) s 8.
[20] *Convention on the Rights of People with Disabilities,* art 14.
[21] *Convention on the Rights of People with Disabilities,* arts 15 & 16.
[22] *Convention on the Rights of People with Disabilities,* art 25.
[23] Victorian Mental Illness Awareness Council, 'Compulsory Treatment' (Position paper #1, VMIAC, 2020) 1.
[24] Victorian Mental Illness Awareness Council, above n 9, 1 – 2.
[25] Assuming that we receive treatment – the crisis driven nature of the system means many people are unable to receive treatment at all, if they are not considered 'sick enough.'
[26] New Zealand Human Rights Commission, 'A Fair Go for All? Addressing Structural Discrimination in Public Services' (Discussion Paper, New Zealand Human Rights Commission, July 2012) 8.
[27] State of Victoria, Royal Commission into Victoria's Mental Health System, *Final Report* (2021) vol 3, 566.
[28] See, for example, the *Mental Health Act 2014* (Vic), especially ss 46, 53 & 105 which permit consumers to be treated against their will, and also permit the use of restrictive interventions such as seclusion and restraint.
[29] Cath Roper, 'Ethical Peril, Violence, and "Dirty Hands": Ethical Consequences of Mental Health Laws' (2019) 10 *Journal of Ethics in Mental Health* 1, 8 – 9.
[30] Joanne Suggett et al, 'Natural cause mortality of mental health consumers: A 10-year retrospective cohort study' (2021) 30 *International Journal of Mental Health Nursing* 390, 393.
[31] Aboriginal and Torres Strait Islander, Health Performance Framework (Tier 1 - Health status and outcomes, 1.18 Social and emotional wellbeing), AIHW and National Indigenous Australians Agency website (accessed 14.9.21) https://www.indigenoushpf.gov.au/measures/1-18-social-emotional-wellbeing

In many cases it magnifies discrimination, inequalities, and compounds existing vulnerabilities some of us may have.

- **The success of responses to mental health consumer needs is influenced by inequality and poor social determinant outcomes –** it is critical to recognize that, as a group, consumers experience poor social determinant outcomes. Social determinants frameworks are important to understand these outcomes – differences in social determinants often develop from unequal distribution of resources, and therefore inequalities can be addressed by utilising targeted social and economic policies and programs.[32].
- **Cultural shifts are required to reduce discrimination toward consumers –** this must occur community wide, including across mental health services, employers, public authorities and policy makers. Discrimination against people with 'mental illness' is deeply embedded within societies and ongoing, targeted initiatives are needed to drive cultural change and ensure we are treated and seen as equals.
- **Consumers must have the right to equality before the law –** it is discriminatory for legislation to limit or enable limits of human rights based on mental health status. While consumers theoretically have the right to equality before the law, presently we are not always treated this way. Discrimination related to mental health status (and other characteristics) needs to be systematically addressed, alongside recognition of how different levels and types of discrimination are a social determinant of mental health in and of themselves.[33]
- **Factors that contribute to structural discrimination must be addressed –** multiple *types* of discrimination can intersect thereby increasing disadvantage due to accumulative negative impacts on wellbeing and impairing safe access to services. Discriminatory mental health legislation, systemic discrimination against particular cohorts of consumers over others, and additional 'system culture' factors that lead to indirect discrimination (e.g. medical models or stigma) are embedded in society. It is critical to dismantle enablers of discrimination related to the multiple characteristics' consumers may have.

Our Recommendations:

VMIAC calls upon the Victorian Government to:

- **Fund and resource increased legal protections against discrimination for consumers –** breaches of the EOA are largely unprosecuted. It should not be left to consumers to complain about discrimination they experience. The Commission must be proactive, using its power to initiate prosecutions and have increased capacity to enforce compliance to the EOA and redress for harms. In line with recommendation 41 from the Royal Commission, to 'enhance individual access to legal protection from mental health discrimination',[34] the government must increase funding and resourcing to consumer legal services to build health justice partnerships with consumer led bodies, services and programs. Furthermore, wider powers to the Equal Opportunity and Human Rights Commission should be granted.[35]
- **Co-design, co-produce, strategically targeted education campaigns disseminated through media, schools, workplaces, and health services that explain obligations under (and consequences of) the relevant Acts and Charters**. VMIAC welcomed the the Royal Commission Recommendation 41 calling for the Mental Health and Wellbeing Commission to design and deliver anti-stigma programs to address discrimination based on mental health status.[36] However obligations imposed by legislation to prevent discrimination and uphold consumer rights must also be clear to service providers and organisations. Research in this area is also crucial to determine the legal advocacy and education needs of cohorts at high risk of human rights breaches in mental health settings (such as non-English speaking populations, First Nations peoples and trans and gender diverse consumer cohorts).
- **Fund and resource initiatives to address inequalities and poor social determinant outcomes in mental health which target communities at high risk of marginalisation and who need multiple concurrent services**. An integrated, holistic approach is required to address not only mental health, but other concerns which may drive or result from poor mental health such as housing insecurity/homelessness, poverty, domestic violence and unemployment. This approach requires:

    - *effective and meaningful integration of and cross communication between mental health supports and other specialist services*

[32] Margarita Alegria et al, above n 5, 94 – 95.
[33] N C Priest et al, 'Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth' (2011) 194(10) *Medical Journal of Australia*, 546-550.
[34] State of Victoria, Royal Commission into Victoria's Mental Health System, *Final Report* (2021) vol 3, 564.
[35] Ibid, 567.
[36] Ibid, 564.

- additional resourcing for specialist services partnerships to increase accessibility for consumers
- consumer driven (cohort specific) initiatives targeting unique needs and service seeking approaches

- **Ensure consumers have the right to equality before the law and in practice through:**

1) review and amend current mental health legislation to ensure it is compliant with human rights obligations [37]

2) improved regulatory oversight of mental health services, including*:*

- *greater enforcement of human rights by the Mental Health Complaints Commission and Office of the Chief Psychiatrist, and demonstration of how Charter obligations are adhered to by these regulatory oversight bodies*
- *Improved systems management and departmental leadership (Department of Health), including a new framework to adhere to the Charter in the public mental health system*
- *greater obligations to demonstrate compliance with the Charter in funding specifications*

The failure of public mental health services to adhere to basic human rights standards – including those in the Charter and the Mental Health Act is a failure to systemically embed the Charter. Specifically, to adhere to the second limb of the Charter and 'give proper consideration to a relevant [Charter] right'. This often results in incompatibility with Charter rights and obligations 'on the ground'. Government departments and publicly funded mental health services – must demonstrate consideration of human rights in decision making.

Background

- Discrimination against consumers has been historically evidenced by inhumane treatments used to control the behaviour of the 'insane,' and degrading asylums. Fear, prejudice and stigma, have led to cultural attitudes that see people who experience mental and emotional distress as dangerous and unpredictable, thus perpetuating further discrimination[38].
- Australia has been bound under international law to prevent discrimination and ensure the equality of people who experience mental health issues for over 40 years by multiple international treaties and covenants,[39] the most significant of these being the CRPD. As a signatory to these international agreements, Australia is obligated to take steps to ensure their realisation under domestic law. Despite this, consumers continue to experience widespread discrimination.[40]
- In Victoria, both the EOA and the Charter confer rights of non-discrimination and equality on people who experience mental and emotional distress and provide additional protections for a range of characteristics.[41] Unfortunately, the protections against discrimination under the EOA are rarely enforced. The MHA is inconsistent with many rights conferred by the Charter and, in many cases, permits discrimination against people who are experiencing 'mental illness.' Despite purported changes to the MHA and more widespread acceptance of mental health issues, we are still ultimately subjected to 'behaviour control' techniques such as sedation, restraint and seclusion which does not represent a dramatic shift from the cultural attitudes of the 19th and 20th centuries.
- In March 2021, the Royal Commission into Victoria's Mental Health System handed down its final report, which explicitly acknowledged the issue of discrimination against consumers and recommended that specific mechanisms be established to address this issue.[42]

[37] Including rights under the CRPD, Convention Against Torture, International Covenant on Economic, Cultural and Social Rights and the International Covenant on Civil and Political Rights; as well as rights under domestic legislation, such as those under the Charter and the EOA
[38] A. M. Foerschner, 'The History of Mental Illness: From *Skull Drills* to *Happy Pills*' (2010) 2(9) *Inquiries Journal* 4, 4.
[39] Although arguably this obligation dates back as far as 1948, with the adoption of the Universal Declaration of Human Rights.
[40] State of Victoria, Royal Commission into Victoria's Mental Health System, *Final Report* (2021) vol 3, 562.
[41] Equal Opportunity Act, s 6.
[42] State of Victoria, Royal Commission into Victoria's Mental Health System, *Final Report* (2021) vol 3, 517.