VMIAC Policy Position Paper #2: Preventing and responding to violence, abuse and neglect

Purpose

To eradicate violence, abuse and neglect against consumers.

The Issue

Consumers are at great risk of violence, abuse and neglect when they access mental health services. Many of the experiences of violence, abuse and neglect fall under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ('CAT'). The CAT defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person'.[1] Cruel, inhuman or degrading treatment is generally accepted to be a less severe form of ill-treatment than would amount to torture, and does not need to have been intentionally inflicted.[2]

When consumers access mental health services, particularly under the *Mental Health Act 2014* (Vic) ('the Act') they are at risk of violence, abuse and neglect.[3] Risks to consumers include:[4]

- **Violence from first responders –** consumers report experiences of violence and abuse from first responders such as Crisis Assessment and Treatment Teams, Ambulance services and Police.[5]
- **Compulsory treatment and restrictive practices** – the use of compulsory treatment, seclusion and restraint for "mental illness" under the Act is incompatible with Australia's obligations under the Convention on the Rights of People with a Disability ('CRPD')[6] and can amount to torture and other forms of ill-treatment.[7] In particular, compulsory antipsychotic treatments give rise to concerns about chemical restraint as well as short and long-term harmful effects. Consumers and advocacy organisations have found wide-spread breaches of the Act by services.[8] [9]
- **Violence and abuse –** experiences of violence – including gendered violence – within mental health inpatient units, both from fellow consumers and staff, violate consumers' rights to liberty and security,[10] to be free from violence abuse and neglect,[11] as well as cruel, inhuman, or degrading treatment.[12] These experiences may be compounded by further forms of marginalisation faced by First Nations, LGBTIQA+, Culturally and Linguistically Diverse consumers and those given a dual diagnosis.

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[1] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 8 August 1989) art 1.
[2] State of Victoria, 'Charter Guidelines - Section 10: Protection from Torture and Other Cruel, Inhuman or Degrading treatment' (Department of Justice and Regulation, July 2008), 67.
[3] This also includes individuals who are 'at-risk' of being placed under the Act due to coercive practices by mental health services. We also note the experiences of violence, abuse and neglect are experienced by consumers in other parts of the system, such as in group homes, supported residential services and in the provision of services under the National Disability Insurance Scheme.
[4] While our position paper focuses on inpatient mental health services; we note that these issues are also present in varying degrees within other services.
[5] Victoria Legal Aid, 'Your Story, your say: Consumers' priority issues and solutions for the Royal Commission into Victoria's Mental Health System ' (Victoria Legal Aid, 2020); Kesic, Dragana, Stuart Thomas and James Ogloff, 'Use of Nonfatal Force on and by Persons with Apparent Mental Disorder in Encounters with Police' (2013) 40(3) *Criminal justice and behaviour* 321; Kesic, Dragana, Stuart Thomas and James Ogloff, 'Mental Illness among Police Fatalities in Victoria 1982–2007: Case Linkage Study' (2010) 44(5) *Australian & New Zealand Journal of Psychiatry* 463. As an example of police brutality against a man suffering mental distress, see Simone Fox Koob & Rachael Dexter, 'Held to justice: Father of man at centre of dramatic arrest wants action taken', *The Age* (online), 14 September 2020 <https://www.theage.com.au/national/victoria/police-head-stomping-incident-referred-to-professional-standards-command-20200914-p55va1.html>
[6] *Convention of the Rights of People with Disabilities ('Convention of the Rights of People with Disabilities')*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 16 August 2008) art 16.
[7] Juan E. Mendez, Special Rapporteur on Torture, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* UN Doc A/HRC/43/49, 10 & 37.
[8] Chris Maylea et al, 'Evaluation of the Independent Mental Health Advocacy Service' (RMIT University, 2018).
[9] Victoria Legal Aid, 'Your Story, your say: Consumers' priority issues and solutions for the Royal Commission into Victoria's Mental Health System ' (Victoria Legal Aid, 2020), 19.
[10] *International Covenant on Civil and Political Rights ('International Covenant on Civil and Political Rights')*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.
[11] Convention of the Rights of People with Disabilities, art 16.
[12] Ibid, art 7. Several reports point to alarming rates of sexual assault and gendered violence in inpatient units: VMIAC, *Zero tolerance for sexual assault: A safe admission for women*. (VMIAC, 2013); Mental Health Complaints Commissioner, *The right to be safe: Ensuring sexual safety in acute mental health inpatient units: Sexual safety project report* (Mental Health Complaints Commissioner, 2018); Juliet Watson et al, 'Preventing gender-based violence in mental health inpatient units' (Australia's National Research Organisation for Women's Safety, 2020). Weller states that even if experiences of sexual assault in inpatient units are not considered torture under the UNCAT, they clearly constitute cruel, inhuman or degrading treatment: Penelope Weller, 'OPCAT monitoring and the Convention on the Rights of Persons with Disabilities' (2019) *Australian Journal of Human Rights*, 25(1), 130–149, 140.

- **Conditions and environment –** consumers have raised concerns about the loss of dignity due to a lack of food that meets their preferences and requirements, clothing and toiletries, poor and interrupted sleep environments, buildings and facilities that lack warmth, comfort and space, as well as a lack of therapeutic supports and safe sensory spaces.[13]
- **Lack of privacy –** regimes in inpatient units that monitor consumers but fail to respect their privacy are degrading and result in experiences of powerlessness.[14] VMIAC members report that the failure to respect consumers' right to privacy may also place them at risk in the context of family violence.
- **Risks to physical health –** health risks posed to consumers include a lack of access to health supports within hospitals, lack of access to meaningful exercise, as well as temporary and permanent harmful effects from psychotropic medications and treatments.
- **Failure of safeguards –** current safeguards are insufficient to protect people from human rights abuses occurring within the system. Consumers report to VMIAC and other stakeholders that bodies such as the Mental Health Tribunal, Office of the Chief Psychiatrist, Office of the Public Advocate, Mental Health Complaints Commissioner as well as the Department of Health and Human Services, have failed to prevent and respond to human rights violations.[15]

Our Position

- **Human rights should not be erased by the *Mental Health Act* –** any legislation on mental health must be consistent with our human rights. Compulsory treatment and other restrictive practices are inconsistent with the CRPD, CAT and we view them as an unjustified restriction on consumers rights under *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter').
- **Human rights should be protected by courts –** consumers who have their human rights breached, such as their rights under the Charter, should be able to ask courts and tribunals for remedies.
- **Consumer-led and community-based services reduce the risk of abuse and mistreatment.** Inpatient treatment places people at greater risk of abuse and mistreatment.[16] Many initiatives to provide trauma-informed care are undermined by systems that are built on the use of force and breaches of human rights. VMIAC rejects the inevitability that crisis care must be provided in hospitals by medical professionals. Consumer-led and community-based services provide realistic, cost-effective and less-restrictive alternatives to hospital treatment, which has been shown to abuse and mistreat consumers.[17]
- **Consumers can expect effective oversight of services.** Consumers treated within the existing mental health system deserve effective oversight of those tasked with funding, regulating and delivering mental health services. This includes transparency over which services are funded and why, how oversight bodies use or do not use their powers in protecting our rights, and the quality and compliance of mental health services with our human rights.

Our recommendations

VMIAC calls upon the Victorian government to repeal the current Act and to bring mental health legislation in line with international human rights law in order to protect consumers from violence, abuse and neglect.

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[13] Mental Health Complaints Commissioner, Submission to the Royal Commission into Victoria's Mental Health System*, Royal Commission into Victoria's Mental Health* System, July 2019, at 86; Victoria Legal Aid, 'Your Story, your say: Consumers' priority issues and solutions for the Royal Commission into Victoria's Mental Health System' (Victoria Legal Aid, 2020), 12.

[14] Consumers have reported regular breaches of their privacy in inpatient units: Victoria Legal Aid, 'Your Story, your say: Consumers' priority issues and solutions for the Royal Commission into Victoria's Mental Health System' (Victoria Legal Aid, 2020), 19. Privacy is also protected under article 22 of the Convention of the Rights of People with Disabilities.

[15] See for example, concerns by consumers about existing oversight bodies: Victoria Legal Aid, 'Your Story, your say: Consumers' priority issues and solutions for the Royal Commission into Victoria's Mental Health System' (Victoria Legal Aid, 2020), 16-17, 31.

[16] Bronwyn Naylor, Julie Debeljak and Anita Mackay, 'A strategic Framework for Implementing Human Rights in Closed Environments' (2018) 41(1) *Monash Law Review* 218; Victorian Equal Opportunity and Human Rights Commission, Submission to the Royal Commission into Victoria's Mental Health System, *Royal Commission into Victoria's Mental Health System*, July 2019, 38.

[17] L. Ostrow and B. Croft, 'Peer respites: A research and practice agenda,' (2015) 66(6) *Psychiatric Services* 638–40; 2 Pathways Vermont, 'Soteria House' [accessed 22 August 2020]; Piers Gooding, Bernadette McSherry, Cath Roper & Flick Grey, 'Alternatives to coercion in mental health settings: A literature review' (Melbourne Social Equity Institute, University of Melbourne, 2018).

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Until the Act is repealed, VMIAC recommends that:

- **The Victorian Government immediately fund and co-produce a strategy to shift from hospital-based care to consumer-led, community-based services and care.** Consumers should lead and co-lead this process within and outside the existing mental health system structures. This strategy must reject the inevitability of inpatient care and include substantial efforts to divert crisis-based care from current hospital settings where consumers experience violence, abuse and neglect.
- **The Victorian Government immediately fund full access to legal and non-legal advocacy.** All consumers who are placed on a compulsory treatment order must be given the opportunity to access advocacy at the time they are placed on an order. People who are placed on an order must be given access to legal representation at the Mental Health Tribunal.
- **The Victorian Government reform section 39 of the Charter.** The Charter should be reformed so that consumers who experience violence, abuse and neglect in services enjoy a direct cause of action for breaches of the Charter to a court or tribunal. Courts and tribunals should be empowered to grant relief or remedies such as awarding damages, and complaints bodies should be able to facilitate conciliation outside of court as a more accessible mechanism.
- **The Victorian Government overhaul the safeguarding and oversight system.** The safeguarding and oversight system must be examined and rebuilt, co-produced with consumers, to ensure transparency, independence, role-clarity, consumer leadership and accountability for mental health services. Most importantly, the oversight system must prove so complete that it is structurally incapable of allowing human rights violations (see forthcoming position paper on Safeguarding and Oversight).

Background

- Psychiatric services in Australia and abroad have a history of violence, abuse and neglect of consumers.[18] Royal Commissions, national inquiries and research in Australia have revealed routine human rights abuses and "treatments" such as deep sleep therapy,[19] leucotomies and lobotomies.[20]
- In 2013, 2018 and 2019, VMIAC, the MHCC and ANROWS released reports detailing alarming rates of sexual assault and gendered violence within mental health inpatient settings.[21] In the MHCC report, it recommended the trial of single-gender units, which as yet, have not been implemented by the Victorian Government (see forthcoming position papers on Gender Equality and Sexual Safety).
- In 2019, the Royal Commission into Victoria's Mental Health System Interim Report identified that the use of interventions such as seclusion and restraint has a profound and dehumanising impact on people.[22] People living with mental health and emotional distress use terms such as 'triggering', 'disempowering', 'traumatizing' and 'controlled' to describe these experiences.[23]
- In 2020 Victoria Legal Aid released a report detailing consumer experiences of poor conditions in mental health units, feelings of powerlessness and lack of control while admitted to mental health

[18] Giese details how early late 19th and 20th century asylums in Victoria were increasingly build on Darwinian notions of "fitness" that saw consumers as 'the biologically inferior unfit, destined for elimination as the race evolved': Jill Giese, *The Maddest Place on Earth* (Australian Scholarly Publishing, 2018), 167. See also: Phil Virden, 'Garth Daniel's struggle against vindictive psychiatry. Asylum: the magazine for democratic psychiatry' (2016) 23(4), 18-24; Michael Foucault, *Madness and Civilization* (Random House, 1961/1988). Bonnie Burstow, *Psychiatry and the business of madness: An ethical and epistemological accounting* (Springer, 2015).

[19] Walton, Merrilyn 'Deep sleep therapy and Chelmsford Private Hospital: have we learnt anything?' (2013) 21(3) *Australasian Psychiatry* 206-212; Human Rights and Equal Opportunity Commission, 'Human rights and mental illness: report of the national inquiry into the human rights of people with mental illness' (1993) *Burdekin Report*.

[20] Richard T White, Martin McGee-Collett, 'The advent of psychosurgery in Australia – with particular attention to its introduction into Sydney' (2016) 24(5) *Australasian Psychiatry* 425-427; Philippa Matyr and Aleksandar Janca, '"A matter for conjecture": leucotomy in Western Australia, 1947-1970' (2018) 29(2) *History of psychiatry* 199-215.

[21] VMIAC, 'Zero tolerance for sexual assault: A safe admission for women' (VMIAC, 2013); Mental Health Complaints Commissioner 'The right to be safe: Ensuring sexual safety in acute mental health inpatient units: Sexual safety project report' (VMHCC 2018); J Watson et al. 'Preventing gender-based violence in mental health inpatient units' (Research report, Sydney, ANROWS, 01/2020.

[22] State of Victoria, Royal Commission into Victoria's Mental Health System, *Interim Report* (2019), 207.

[23] Ibid.

services, routine disregard for the law and human rights, as well as a failure of oversight bodies to protect them.[24]

- These experiences highlight several questions about Australia's compliance with the CAT, OPCAT, ICCPR and the CRPD, all of which provide protection against violence abuse and neglect.
- Despite this, consumers still find it difficult to report these kinds of abuse, and for such reports to be believed as well as acted upon by the community and oversight bodies.[25] This is in part due to defensive reasoning by the psychiatric profession which often denies the real obstacles to a rights-based mental health system, such as the biomedical model, power asymmetries and biased use of evidence.[26]

[24] Victoria Legal Aid, 'Your Story, your say: Consumers' priority issues and solutions for the Royal Commission into Victoria's Mental Health System' (Victoria Legal Aid, 2020).
[25] Karen Newbigging & Judlie Ridley, 'Epistemic struggles: The role of advocacy in promoting epistemic justice and rights in mental health' (2018) 219 *Social science & medicine*, 36-44.
[26] For example: Ian Hickie, 'Building the social, economic, legal and health-care foundations for "Contributing Lives and Thriving Communities"' (2019) 7(2) *Lancet Psychiatry*, 119-121. A response by consumers to this article: Indigo Daya, Chris Maylea, Melissa Raven, Bridget Hamilton and Jon Jureidini, 'Defensive rhetoric in psychiatry: an obstacle to health and human rights' (2020) *Lancet Psychiatry* 3(1), 231.