Regulation and Oversight of the Mental Health System

The Victorian Mental Illness Awareness Council (**VMIAC**) is the peak body for mental health consumers in Victoria. Our vision is a world where all mental health consumers stand proud, live a life with choices honoured, rights upheld, and these principles are embedded in all aspects of society. VMIAC is run and governed by people who have lived experiences of mental health challenges and undertake individual and systems advocacy.

VMIAC has long held concerns that the Mental Health Complaints Commission (MHCC) and other oversight bodies that regulate the public mental health system are not functioning as well as they could. This position paper outlines some of the issues VMIAC has identified.

Role clarity

Regulation of the public mental health system is complex, with multiple bodies being responsible for various regulatory actions. Role clarity is critical for regulation to be effective.

In addition to the MHCC other oversight bodies include:

- *The Mental Health and Wellbeing Commission (MHWC)*
- *The Chief Psychiatrist*
- *The Secretary of Health*
- *The Chief Officer of Mental Health*
- *The Mental Health Tribunal*

Each oversight body should know what it is responsible for and what enforcement mechanisms are available to it. For example, both the Secretary of Health and the Chief Officer for Mental Health are responsible for overseeing, funding, and monitoring mental health services. However, it is not clear which powers this gives the Secretary and Chief Officer, resulting in confusion over which entity is responsible for taking actions.

Without role clarity, there exists the risk that responsibilities are avoided on the basis that another organisation is perceived as responsible for the regulated matter.

The roles and powers of regulators in the system must also be transparent to enable the public to hold the regulators to account for failing to take actions they should have.

VMIAC Recommendations

1. *That Government clarify the responsibilities of each regulatory body intersecting with the mental health system (including the MHWC, the Chief Psychiatrist, the Secretary of Health and the Chief Officer of Mental Health)*
2. *The Government ensure the regulatory powers available to each body are clearly defined and communicated both within the mental health system and to the public*

Enforcement powers

Regulation exists on a continuum, with educative and supportive activities at one end, and more coercive actions at the other.[1] While softer regulatory actions should be preferred, it is important to note that these are only effective when regulators have demonstrated a willingness to use harder measures.[2] The Secretary of Health and the newly created Chief Officer for Mental Health are responsible for promoting human rights, quality, and safety in services. However, in the absence of stronger regulatory powers, this is unlikely to ensure compliance. The Secretary and Chief Officer are also responsible for funding services, so they could take a stronger regulatory role by, for example, *attaching funding to KPIs, respect for human rights, and compliance with the Act*. However, these powers must be clearly defined (either by inclusion in the Act, or in regulations made pursuant to the Act) and include a mandate to use them for them to be meaningful. Regulators must have a legal obligation to ensure that services are safe for consumers.

The mental health services oversight system has so far been reactive in nature, relying predominantly on consumer complaints. Consumers should not have to experience harm from the mental health system before regulatory bodies act. At a minimum, the Mental Health and Wellbeing Commission (MHWC) must have powers to take preventive action. Both the MHWC and the OCP have the power to compel services to provide information or respond to a complaint.[3] These powers could be used to prevent harm, for example by requiring a service to explain how it plans to protect a consumer's rights, or by obtaining further information that could provide grounds for taking pre-emptive, coercive regulatory action in order to protect consumers.

Recommendations

3. *Government strengthens the regulatory powers of the Secretary and Chief Officer by granting the power to attach funding for services to Key Performance Criteria, compliance with human rights and compliance with the Act*
4. *Government strengthens the preventive powers of the Mental Health and Wellbeing Commission and Office of the Chief Psychiatrist*
5. *Government ensures regulators have sufficient power to safeguard compliance with quality standards, human rights, and legal obligations*

Accountability

A significant issue with the oversight system under the *Mental Health Act 2014* is that the bodies responsible for regulation have not been using their powers. For example, during its eight years of operation, the MHCC has not issued a single compliance order.[4] VMIAC welcomes the new powers granted to the MHWC, however unless it is willing to use them, they remain tokenistic. Oversight bodies, and particularly the MHWC must have a clear mandate to use their powers when necessary and be held accountable for any failure to use their powers. This could be done by creating a legislative duty under the Act to ensure services are safe for consumers, and by identifying clear pathways for appeal of decisions adverse to consumers.

Transparency via public reporting enables accountability and maintains public confidence. Public reporting will also help to ensure mandates that services are safe for consumers are enforced. For regulators, public reporting and transparency of process also help to assess the effectiveness of enforcement actions.[5] Transparency and oversight would also be increased if service level complaint data were consistently available, and the oversight bodies were obligated to report on systemic issues and steps taken to improve service quality.[6]

VMIAC believe public reporting obligations for oversight bodies should include:

1 Chris Maylea, Witness Statement, Royal Commission into Victoria's Mental Health System, 30 April 2020, 22.
2 Chris Maylea, Witness Statement, Royal Commission into Victoria's Mental Health System, 30 April 2020, 22.
3 Mental Health and Wellbeing Bill 2022 (Vic), cl 298(1)(b); cl 458 & 497 (for investigations).
4 Adeshola Ore & Melissa Davey, 'No action taken against Victorian mental health services despite more than 12,000 complaints', *The Guardian* (online) 26 May 2022 <https://www.theguardian.com/society/2022/may/26/no-action-taken-against-victorian-mental-health-services-despite-more-than-12000-complaints>
5 Simon Katterl, 'Regulatory oversight, mental health and human rights' 2021 46(2) *Alternative Law Journal* 149, 152.
6 Victoria Legal Aid, Submission to the Royal Commission into Victoria's Mental Health System, Royal Commission into Victoria's Mental Health System, June 2020, 27.

- Data from the Office of the Chief Psychiatrist on human rights issues arising in the course of its work and the rationale for using/or not using its powers[7]
- Data from the MHWC, including de-identified thematic reports provided to services, recommendations the MHWC has made and their implementation status, number of compliance orders made and the level of compliance, and outcomes data (including outcomes of its investigations and inquiries, as well as consumer outcomes)[8]
- Rates of compulsory treatment and restrictive practices in services, including data on consumer demographics.

Recommendations

6. *Government establishes a mandate for oversight bodies and regulators to use their enforcement powers, when necessary, by creating a legal obligation for them to ensure services are safe for consumers*
7. *Government work across Mental Health/Health and Justice portfolios to create clear appeal pathways for consumers to appeal decisions made by regulators and oversight bodies*
8. *Regulators and oversight bodies be obligated to report publicly on data relating to their functions and consumer outcomes*
9. *Government commits to codesigning and coproducing service KPIs with consumers*
10. *Codesign a regulatory monitoring and evaluation framework with consumers*

Lived Experience Representation

Underpinning the above recommendations is a need for meaningful lived experience representation and engagement within the regulatory and oversight system. People with lived experience can provide a unique perspective on arising issues within services and what needs to be done to overcome them. Furthermore, lived experience of the complaints process can support quality improvement and increase understanding of challenges faced by consumers who make a complaint. In particular, ensuring people with lived experience are in senior positions within the mental health and complaints system will support accountability.

Recommendations

11. *Government ensures meaningful lived experience representation and engagement at all levels of the regulatory and oversight system.*
12. *Government introduce quotas of lived experience representation at senior levels of the mental health and its regulatory systems, including two consumer commissioners in the Mental Health and Wellbeing Commission, one of whom is to act as Chair.*

7 Chris Maylea, Witness Statement, Royal Commission into Victoria's Mental Health System, 30 April 2020, 25.
8 Chris Maylea, Witness Statement, Royal Commission into Victoria's Mental Health System, 30 April 2020, 26.