

Mental health law reform – the *Mental Health Bill Exposure Draft* and beyond...



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Of all the tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive... [for] those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.

So remarked C S Lewis, and so quoted Mary O’Hagan, psychiatric survivor, internationally renowned consumer educator and former New Zealand Mental Health Commissioner, in her presentation entitled ‘Compulsory treatment – risky business’, during her visit to Melbourne in September 2010.

The quotation serves as a poignant reminder of how insidious paternalism and so-called beneficence can be. Although not everyone will necessarily identify with the language of ‘oppressor’ and ‘victim’, the power imbalance it invokes is all too keenly felt by people living with mental illness who find themselves subjected to forced psychiatric treatment and

detention under the *Mental Health Act 1986*. The Victorian Government’s *Review of the Mental Health Act 1986*—its first whole scale review in nearly 20 years—has brought pause to challenge this dynamic and the culture of service provision and provide alternatives in law, which further the rights of, and empower people with, mental illness in Victoria.

After the waves of hope, scepticism and criticism in the government’s community consultation process, a draft of what a new Act might look like (called the *Mental Health Bill Exposure Draft 2010*) was released for public comment in October 2010. At 400-odd pages, just reading through the Draft Bill is, in itself, an achievement. It is another thing again to navigate through the detail and the density of the proposed Draft Laws to try to determine its impact on the people ‘about’ whom and ‘for’ whom it is written: mental health consumers.

Prompted by the complexity and, in some cases, ambiguity of the Draft Laws and the desire to find out directly how mental health consumers felt about the proposed new laws, the Mental Health Legal Centre (MHLC), in February 2011, held a consumer discussion forum on key topics. As a statewide specialist community legal centre providing legal services to people with or labelled as having a mental illness, the MHLC undertakes education, policy and law reform activities, which aim to further the rights of mental health consumers. It was fitting therefore that the discussions, views and experiences shared by consumers at the forum, entitled 'What mental health consumers want from mental health laws', fed directly into the MHLC's submission to the Draft Bill.

Many people will already have perused the Explanatory Guide, which the government produced to accompany the Draft Bill. Within it states that the proposed new laws reflect a 'rights-based approach' to laws governing the provision of public mental health services, which, as we know, have traditionally focused on regulation of involuntary treatment and detention, based on defined criteria. Consumer participants at the forum however, remained sceptical about whether the culture of mental health service provision, so focussed on coercive treatment, would shift to an 'empowering and participatory' framework where voluntary treatment really is the focus of care.

As one person remarked:

Is there anything in this Act that's going to change what happens now? 'Cos you can... get attended to at a clinic if you are made "involuntary". Everyone talks about voluntary patients but [try] showing up saying, "I'm in distress" and you won't get in if they don't see you're serious enough... [as a voluntary patient] you'll be the first one kicked out.

Such attendant problems in people accessing services they desire, consistently with their expressed needs, reinforces the findings of the government-commissioned report by the Boston Consulting Group in 2006. Even when people are in acute distress or mental health crises, their needs are not prioritised and rather, it is other concerns that determine the actions of services, including staff attitudes and pressures around lack of training and resources.

Consumers continue to clamour to have their voices heard and their concerns and views seriously taken into account and acted

upon by clinical services. As a party to the Convention on the Rights of Persons with Disabilities (CRPD), Australia has an obligation under Article 4 to ensure and promote the full realisation of all human rights and fundamental freedoms without discrimination of any kind on the basis of disability, including mental illness. This includes adopting all appropriate legislative and administrative measures for implementation of these rights and ensuring public authorities act consistently with human rights. The Preamble rightly recognises that:

Persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.

Supported decision-making

Reform of the law should start from the premise that all people, regardless of diagnosis of disability or otherwise, have equal rights to exercise control over, and participate in, their own decision making, and the right to have access to appropriate supports to facilitate this. If there is to be a separate mental health law at all—a question which is beyond any doubt in the Government's Review—it must facilitate the reality of supported decision making for people consistent with Article 12 of the CRPD. That is, the law must provide mechanisms for a person to make decisions for themselves, for example when they are well, in advance of a crisis, and to be provided with support in doing so.

In this respect, consumers at the forum were resoundingly in favour of the introduction in the Draft Bill of measures to enable themselves to appoint a legally-recognised support person ('nominated person') and to draft their wishes and preferences in a legally-recognised document ('advance directive'). Nevertheless, what the proposed laws provide is not necessarily commensurate with what consumers want such measures to achieve.

People at the consumer forum were generally in support of the nominated person scheme, which, to some, was the only benefit they could see in the compulsory treatment and treatment planning provisions in the Draft Bill. It was consistently felt, however, that the scheme, as envisaged under the proposed laws, was too restrictive. Why should a person be limited to nominating only one support person to be informed of, and consulted about, every aspect of care and treatment? Why shouldn't the person determine what and how much information

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should be shared and with whom? Why should the nominated person’s role not include the power to make decisions in the same way a medical power of attorney can?

Similarly, consumers generally welcomed the fact that recognition of an advance statement to outline wishes and preferences for treatment would encourage more people to formally execute such a document. However, whilst generally supportive of the requirement to report any potential decision inconsistent with the person’s advance statement to the newly established mental health commissioner, the weight and enforceability of the documents needed to be strengthened considerably. Advance directives, if given greater weight in the law, were seen as a key means of operationalising supported decision making. But, as many consumers remarked:

We really dislike the language... We want it to be stronger. We want it to say that “[the advance statement] must be followed unless there are compelling reasons not to”, rather than they “must have regard to” because that’s wishy washy and we want it to be more “person first”.

When it comes to refusal of specific treatments, including electroconvulsive therapy (ECT), one group of consumers stated emphatically:

What do we want the law to do? Advance directives that override everything else, i.e. if I say I don’t want ECT or a certain medication in my advance directive when I’m capable, that should be respected even if I’m made involuntary. It shouldn’t be able to be overridden.

Safeguards and external review of compulsory treatment orders

Where a person is subjected to involuntary treatment, robust legislative safeguards including independent reviews and appeal mechanisms are critical to ensure that a person’s rights are not disproportionately infringed, consistent with the *Victorian Charter of Human Rights*. Key rights in this respect, are the rights to be free from medical treatment without consent, to be free from cruel, inhuman and degrading treatment, to privacy and bodily integrity and to humane treatment when deprived of liberty.

In the Draft Bill, despite the move to a staged system of involuntary treatment orders (now named Compulsory Treatment Orders, or CTOs), some tightening of the ‘five criteria’ for compulsory treatment, and a shift in the process to one of prior Mental Health Tribunal (Tribunal) authorisation, before the making of extended compulsory orders, many people at the consumer forum clearly felt there was unlikely to

be any really significant change in the compulsory treatment regime as a whole. Some proposed changes might even be described as taking one step forward, only to then take two steps backward. For example, while the Draft Bill's limiting of an 'initial' CTO to three-months was seen as an improvement on the current 12-month (maximum) length, the fact that beyond that, an order would be longer – up to 18 months – was roundly criticised. It is well known that Victoria has the highest use of forced community outpatient treatment of anywhere else in the world where, as Psychiatrist Dr Gunvent Patel describes, mental health clinicians have 'actively engaged in their use with an almost religious, unquestioning zeal'.

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[The treatment plan] should be looked at, at least weekly and [the person] should have explanations given to them as to what decisions are being proposed and why they're being proposed so they are then in a position to give informed consent. It's very hard to give informed consent if you do not know and have not had... explained to you the reasons... why the decisions are being made.

Overall, the external review and oversight of compulsory orders by the Tribunal—to the extent that this is seen as a sufficiently independent body—appear to be weakened in the Draft Bill. The introduction of a new position of review officers to conduct an initial 'procedural check' on orders and provide rights advice was problematic, not least of all because of their lack of independence of the Department and decision-making power. It was clear that a review officer could not be said to be acting on behalf of and for the benefit of the person, rather they appeared to be a check and balance for clinical services. One consumer said at the forum:

... You wouldn't need a review officer if everyone's doing their job! Why's the person there in the first place?

Consumers are understandably gravely concerned that a person may be subjected to involuntary treatment in the community for up to three or four months without a Tribunal hearing to review the validity of the order, and for inpatients, up to around seven weeks, which represents no meaningful improvement on the current Act's eight-week initial review – a statutory review period, which was roundly criticised during the Review's community consultation, as far too long and which violates a person's rights.

One aspect of the Tribunal's additional powers in the Draft Bill of which consumers were overwhelmingly in favour, is a new system requiring prior Tribunal authorisation of ECT before it can be performed – the first time that Victoria has had such a system.

Conclusion

Mental health consumers, advocates, lawyers and the community at large keenly await the outcome of the reform of mental health laws through both the government's Review, as well as the Victorian Law Reform Commission's review of guardianship laws. The Commission is also considering similar issues such as supported decision making and the interaction between guardianship and mental health laws and is due to report later in the year.

Genuine meaningful reform to promote the rights of consumers consistently with the CRPD is desperately needed. As Tina Minkowitz, psychiatric survivor and lawyer, commented in an earlier issue of this very journal:

If reform cannot deliver any real improvement, it does not serve the purpose of social justice and instead functions as a junk substitute that deflects the energy of a movement and limits people's imaginations.

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