

04 June 2015

Mr Michael Brett Young
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Dear Mr Brett Young

Submission to 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*

We welcome the opportunity to provide a brief submission to the above review. Our comments are limited to our experience in relation to the conduct of our functions under the *Mental Health Act 2014* as relevant to the *Charter of Human Rights and Responsibilities Act 2006 (the Charter)*, in particular: the importance of the Charter in improving Victoria's mental health law; using the Charter in our work; human rights issues raised in complaints to us; measures to build Charter compliance as a new agency.

1. The importance of the Charter in improving Victoria's mental health law

A key aim of the review of Victoria's mental health law leading up to the *Mental Health Act 2014* was to ensure the law promoted and supported mental health best practice and was compatible with:

- the Charter of Human Rights and Responsibilities Act 2006 (Vic)
- the United Nations (UN) Convention on the Rights of Persons with Disabilities
- the UN Convention on the Rights of the Child.

The *Mental Health Act 2014* (the Act) provides for the assessment and treatment of people with mental illness. Through its compatibility with the Charter, it significantly advances mental health assessment and treatment in Victoria by introducing a range of initiatives and safeguards that help protect human rights, improve treatment outcomes and promote recovery. These include:

- establishing a supported decision-making model to enable people, including compulsory patients, to make or participate in decisions about their treatment and determine their individual path to recovery
- promoting voluntary treatment above compulsory treatment wherever possible, and strengthening the safeguards around compulsory treatment to ensure it is provided in the least restrictive and intrusive manner possible
- establishing a comprehensive suite of safeguards, oversights and service improvements to ensure rights are protected in assessment and treatment

Importantly, the Act legislates a set of rights-focused mental health principles that services must have regard to when providing mental health services. These principles aim to:

- ensure people receive assessment and treatment in the least restrictive way, with the least possible restrictions on rights and dignity
- protect the rights of people receiving assessment and treatment and ensure they are informed of these rights and able to exercise them
- enable and support people to make or participate in decisions about their assessment, treatment and recovery
- recognise the role of carers in assessment, treatment and recovery
- ensure people receiving mental health services have their individual needs (whether as to culture, language, communication, age, disability, religion, gender, sexuality or other matters) recognised and responded to
- ensure Aboriginal people have their distinct culture and identity recognised and responded to
- ensure children and young people have their best interests recognised and promoted as a primary consideration and have their needs, wellbeing and safety recognised and protected.

We note also that Charter rights are regularly raised in legal proceedings in relation to compulsory treatment, including the recent Supreme Court case of [*XX v WW and Middle South Area Mental Health Service \[2014\] VSC 564*](#) (17 December 2014).

2. Using the Charter in our work

The Mental Health Complaints Commissioner (MHCC) plays a critical role in protecting the human rights of people who receive public mental health services.

A key component of the safeguard, oversights and service improvement provisions in the Act, the MHCC was established to provide expertise in dealing with complaints about mental health services and to address the barriers that people with mental illness experience in accessing and participating in complaints processes. Our role includes:

- accepting, assessing, managing and investigating complaints relating to public mental health services
- attempting to resolve complaints in a timely manner using formal and informal dispute resolution
- providing information, education and advice on complaints to services about their responsibilities in managing complaints and helping services improve policies and procedures to resolve complaints
- helping consumers and people acting on behalf of, or in the genuine interest of, consumers to resolve complaints directly with services, either before or after the Commissioner accepts the complaint
- identifying, analysing and reviewing quality, safety and other issues arising out of complaints and making recommendations for improvement to services, the chief psychiatrist, the Secretary and the Minister

- investigating and reporting on any matter relating to services at the request of the Minister.

We have broad jurisdiction to accept complaints about any matter arising out of the provision of services by designated mental health services and publicly funded mental health community support services. This includes NDIS funded supports and services that fall within the broad definition of a mental health community support service.

We can accept complaints from consumers, a person acting at the request of a consumer, or someone who has a genuine interest in a consumer's wellbeing. In most cases, we seek the consumer's consent before we accept a complaint. However, the Act allows us to accept complaints without the consumer's consent, if we are satisfied there are special circumstances and accepting the complaint will not harm the consumer's wellbeing. As discussed in 4, this engages the right to privacy.

Importantly, we consider a range of factors in determining an appropriate response to a complaint. Complaints that raise serious human rights issues are given priority attention, and a key factor in deciding whether we should undertake an investigation under the Act is whether an allegation raises a breach of the Charter (for example, when a complaint raises the right to humane treatment when deprived of liberty, such as an alleged assault by a staff member in an inpatient setting – see 4).

3. Human rights issues raised in complaints to us

Complaints made to the MHCC frequently raise Charter rights. The most common Charter rights raised in complaints are:

- protection from torture and cruel, inhuman or degrading treatment (s 10)
- freedom of movement (s 12)
- right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 13(a))
- right to liberty and security of person (s 21)
- humane treatment when deprived of liberty (s 22).

Other rights raised include:

- recognition and equality before the law (s 8)
- right to life (s 9)
- freedom of thought, conscience, religion and belief (s 14)
- freedom of expression (s 15)
- protection of families and children (s 17)
- taking part in public life (s 18)
- cultural rights (s 19)
- fair hearing (s 24).

Example 1: Right to liberty and security of person (s 21) / Freedom of movement (s 12)/ Treatment without full, free and informed consent (s 10(c))

The MHCC receives complaints from people concerned about being subject to a compulsory treatment order. We provide advice to the person about seeking review of their compulsory treatment order by the Mental Health Tribunal. Where appropriate, we will help the person lodge an application for review to the Tribunal.

We can do this by contacting nursing staff if the person is an inpatient, or contacting a case manager if the person is in the community.

If a compulsory patient has concerns about the treatment they are receiving for their mental illness, the MHCC may assist the person to exercise their rights under the Act, including to communicate their views and preferences about treatment, and to obtain a second psychiatric opinion. Depending on the circumstances, we may respond to these complaints using formal or informal dispute resolution.

Example 2: Humane treatment when deprived of liberty (s22)

Many complaints to the MHCC also raise the right to humane treatment when deprived of liberty. Examples include:

- an alleged assault of a person in an inpatient setting by a mental health nurse
- alleged rough treatment by security staff of a person in an inpatient setting
- alleged undignified treatment when a patient was secluded in a mental health service.

Complaints such as these that raise serious issues of human rights are given priority attention. A range of factors will determine the appropriate response, including whether an investigation is warranted and whether a notification to the Australian Health Practitioner Regulation Agency is required.

Our procedures are flexible and proportionate to the concerns raised in each complaint, with most complaints resolved through informal processes rather than formal investigation. However, the Commissioner can exercise a range of powers to investigate and take action to resolve serious cases.

Importantly, the Act enables the Commissioner to consult with other persons or bodies, such as the Health Services Commissioner, in order to coordinate complaints that straddle the mental health and general health sectors.

The Commissioner may also refer complaints or accept referrals from other bodies to simplify the processes for people making complaints.

4. Measures to build Charter compliance as a new agency

The MHCC has an explicit mandate to have regard to the mental health principles in performing our duties and functions, including the principle that persons receiving mental health services should have their rights, dignity and autonomy respected and promoted.

Key human rights relevant to the way we perform our functions are the right to equality before the law and the right to privacy and reputation.

Right to equality before the law

The MHCC's principles of being accessible and supportive reflect our commitment to a non-discriminatory approach that ensures everyone can access and use our information and services, and that we treat all people with respect.

Right to privacy and reputation

The right to privacy is a key Charter right that has guided our approach to accepting complaints from a person who is not the consumer.

Under s 232 of the Act the MHCC can accept a complaint from a person who is acting at the request of the consumer, or satisfies the Commissioner that she or he has a genuine interest in the wellbeing of the consumer, if the consumer consents to the complaint being made.

The MHCC can also accept a complaint without obtaining the consent of the consumer, if the Commissioner is satisfied that:

- there are special circumstances that warrant the Commissioner accepting the complaint without the consumer's consent; and
- accepting the complaint will not be detrimental to the wellbeing of the consumer.

Accepting a complaint without the consent of the consumer raises the right to privacy of the consumer. The MHCC has adopted the following principles to ensure any interference with a person's privacy is lawful and not arbitrary:

- a consumer should be presumed to have capacity to consent to a complaint being made, and should be supported to make a decision about whether or not to provide consent a consumer has capacity to consent to a complaint being made, if the consumer understands what it means to make a complaint to the MHCC and the consequences of MHCC accepting the complaint
- any special circumstances which may warrant accepting a complaint without the consent of the consumer need to be determined on a case by case basis, having regard to the mental health principles in s 11 of the Mental Health Act and the human rights in the Charter
- every effort must be made to involve the consumer in the resolution of the complaint at the earliest appropriate opportunity, if the complaint is accepted in circumstances where the consumer is not well enough to provide consent at that time.

In conclusion, the Charter has been critical to strengthening the rights of people with mental illness as reflected by the provisions and principles of the Act, including by the creation of new oversight mechanisms such as the MHCC. The Charter continues to be a significant driver for promoting respect for human rights for this vulnerable group in our community.

Thank you for the opportunity to make this submission. If you have any questions or would like further information, I invite you to contact our principal legal officer Isabel Anton on 9032 3312.

Yours sincerely



Lynne Coulson Barr
Commissioner