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Key Findings Discussion Paper Responses
SA Mental Health Commission
PO Box 189
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By email: samhc@sa.gov.au

Dear Commissioner Burns,

RESPONSE TO KEY FINDINGS DISCUSSION PAPER FOR THE NEW SA MENTAL HEALTH STRATEGIC PLAN

Australian Lawyers for Human Rights (ALHR) thanks the Commissioner for the opportunity to provide this response in relation to the key findings discussion paper for the new SA Mental Health Strategic Plan.

1. Australian Lawyers for Human Rights

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and Specialist Thematic Subcommittees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

2. Summary

ALHR commends the SA Mental Health Commission for undertaking this review and for recognising a number of key themes related to the mental well-being of individuals with mental illness, including reducing the stigma associated with mental illness and promoting tailored responses for those experiencing mental illness.

However, it is the view of the ALHR that the discussion paper omits consideration of two important themes:

1. the recognition of the human rights of individuals with mental illness, and
2. what the future for mental health law might look like.

ALHR calls for the SA Mental Health Strategic Plan to be consistent with the UN *Convention on the Rights of Persons with Disabilities* (CRPD). ALHR urges the SA Mental Health Commission to review the *Mental Health Act 2009* (SA), including the *Mental Health (Review) Amendment Act 2016* (SA), with particular consideration to limiting the use of involuntary treatment, ending restrictive practices in all settings, and creating awareness campaigns for the broader public to end stigma and discrimination.

3. Background – utilising a human rights framework

ALHR strongly believes that Australian legislation should adhere to international human rights law and standards.

We endorse the views of the Parliamentary Joint Committee on Human Rights expressed in Guidance Note 1 of December 2014[1] as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in legislation is directly relevant to Australia's compliance with those obligations.

In general terms, there is no hierarchy of human rights – although they all represent different aspects of the concept of protection of the dignity of the individual personhood which can in that sense be described as the core of a human rights framework. All human rights are equally valuable (the principle of indivisibility) and all should be protected together to the maximum possible (the principle of interdependence). Some rights are expressed as absolutes: the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law.

Subject to those absolutes, all rights must be balanced where they conflict and must provide reasonable accommodation to other rights. A balance may need to be sought by reference to other human rights, to other rights such as property rights, and to other principles and considerations such as reasonableness or proportionality – consistently with the principle of good legislative drafting that legislation should only impinge to an extent which is proportionate to the harm being addressed.

The concepts of balancing and maximising human rights are commonly understood in international law and in jurisdictions where human rights are enshrined in national constitutions, such as Canada and all European countries. In Australia, being alone amongst first world countries in not having constitutionally protected human rights, there is not a common understanding of these well-established points.

We argue here that application of a human rights framework to South Australian mental health legislation - in accordance with international human rights jurisprudence – is an easy and effective way of testing whether the legislation has achieved the appropriate balance of protecting all human rights of the mentally ill to the maximum extent possible. The framework is transparent, neutral and fair. It does not favour any group or any individual. It is likely to be perceived as just.

4. Response to Key Findings Discussion Paper

4.1 The recognition of the human rights of individuals with mental illness

All mental health legislation is discriminatory and stigmatising because it violates human rights norms by treating persons with mental illness on the basis of their disability, denying them the right to exercise their legal capacity and allowing practices such as restraint and seclusion.

ALHR submits that South Australian mental health law should adhere to international human rights law and standards.

ALHR reiterates the call for the SA Mental Health Commission to consider the international human rights obligations guaranteed in the *Convention on the Rights of Persons with*

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1 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note* 1 which was replaced by the Guidance Note, available at< https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>, accessed 16 January 2015.

Disabilities (CRPD). The CRPD protects, promotes and ensures the fundamental rights and freedoms of individuals with disabilities, including mental illness.[2]

Article 12 of the CRPD recognises the equal recognition before the law of persons with disabilities, the recognition of their legal capacity on an equal basis with all others, as well as the provision of support in the exercise of legal capacity. Persons with disabilities are denied their personhood on the basis of their disability.[3] Persons with mental illness are frequently denied their right to exercise their legal capacity under mental health legislation on the basis of their disability.[4] In 2014, the UN Committee on the Rights of Persons with Disabilities (UN Committee) made General Comment No.1 which states that denying a person legal capacity on the basis of diminished mental capacity is inconsistent with article 12 of the CRPD.[5]

Article 14 of the CRPD addresses the liberty and security of the person. Persons involuntarily detained under the *Mental Health Act 2009* (SA) lose their liberty. Persons with disabilities who are deprived of their liberty on the basis of their disability through any process, should, on an equal basis with others, be entitled to the benefit of guarantees of their rights in accordance with international human rights law and should be treated in compliance with the objectives and principles of the CRPD, including by the provision of reasonable accommodation.

Further, article 17 of the CRPD provides that every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others. The involuntary detention and treatment of individuals with mental illness under sections 21, 25 and 29 of the *Mental Health Act 2009* (SA) deprives persons with mental illness of their liberty and denies their right to physical and mental integrity.

ALHR submits that the *Mental Health Act 2009* (SA) breaches international human rights law by allowing the involuntary treatment of individuals with mental illness on the basis of their disability,[6] with no consideration of their legal capacity, and without their consent.[7]

ALHR submits that immediate reform needs to be made to the provisions in the *Mental Health Act 2009* (SA) and the *Mental Health (Review) Amendment Act 2016* (SA) relating to involuntary mental health treatment to align with Articles 12, 14 and 17 of the CRPD.

4.2 The future of mental health law

During the submission process to the Mental Health Strategic Plan, the SA Mental Health Commission sought feedback on “what the future might look like”. This theme was not addressed in the Key Findings Discussion Paper.

ALHR stresses the importance of authorising mental health interventions with the free and informed consent of persons with mental illness. Practices and legislation that permit the exercise of mental health intervention without consent on the basis of a person’s disability should be abandoned immediately. These practices are a breach of the fundamental human rights of persons with disabilities and have no place in the future of mental health law.

In Australia, we are seeing a shift from the traditional approach to mental health law, which allows for the detention and involuntary treatment of individuals on the basis of their having a mental illness and posing a risk of harm to self or others, whilst disregarding their capacity and consent, to a revised approach which incorporates mental capacity provisions.[8]

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2 *Convention on the Rights of Persons with Disabilities,* signed for Australia 30 March 2007, [2008] 999 UNTS 171 (entered into force in Australia 16 August 2008) Art 1.

3 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014).

4 For example, see the *Mental Health Act 2014* (Vic).

5 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [13].

6 *Mental Health Act 2009* (SA) ss 21(1)(a), 25(2)(a), 29(1)(a).

7 For example, see: *Mental Health Act 2009* (SA) s 31(2).

8 For example, see *Mental Health Act 2014* (Vic).

Ostensibly, this means that individuals possessing mental capacity in those jurisdictions cannot be treated coercively. However, there are exceptions to this starting position, for example, "emergency situations" where persons experiencing mental health crisis can be treated coercively even when retaining full decision-making ability.[9] Such provisions effectively deny persons with mental illness the ability to exercise their legal capacity and consent to treatment in breach of article 12 of the CRPD.

The current mental health legislation of South Australia takes the traditional approach, but will be consistent with other States next year, and prohibit persons with mental capacity being treated coercively except in emergency situations, when amendments under the *Mental Health (Review) Amendment Act 2016* (SA) are implemented.

The revised mental health legislation is an advance on the traditional approach because it considers the mental capacity of individuals rather than merely detaining them of the basis of having a mental illness and risk. However, the revised mental health legislation continues to violate the CRPD as it allows persons to be treated coercively if they lack mental capacity. This is inconsistent with the view of the UN Committee that mental capacity deficits must not lead to the denial of the legal capacity of the individual.[10] To act consistently with the CRPD, ALHR recommends that the SA Mental Health Commission consider recent developments in mental health law in Northern Ireland as a desirable precedent when formulating its Strategic Plan and considering how mental health law may be conceptualised in the future.

Northern Ireland is the first jurisdiction in the world to be actively engaged in the innovative process of abolishing mental health legislation for persons aged 16 years of age and over.[11] Mental health legislation is being replaced by mental capacity legislation that applies to all individuals, whether physically or mentally ill. This process has taken many years and is the result of reviews and extensive consultation with stakeholders in government, NGOs, mental health charities, and other stakeholders.

ALHR submits that the approach taken in Northern Ireland is an advance on the revised mental health legislation seen in Australian jurisdictions because it promotes supported decision-making in line with Article 12(3) of the CRPD, it does not allow a mental capacity assessment to take place without support first being offered to the individual to enable them to make their own decision, and it is non-discriminatory as it does not target persons on the basis of their disability, but rather applies to all individuals, whether mentally or physically ill.

ALHR supports the principles of supported decision-making and the provision of supports to engage persons with mental illness in order to obtain their informed consent to mental health treatment.

A respectful approach to supported decision-making where persons lacking mental capacity and subjected to involuntary treatment are involved in the decision-making process makes the individual feel less coerced, and more fairly and respectfully treated, with their concerns heard.[12] Genuine and exhaustive efforts to present mental health treatment decisions in an accessible format, including explaining treatment information in simple terms in order for the person to be able to make an informed decision, must be implemented in South Australian legislation in order to achieve best practice.

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9 For example, see: *Mental Health Act 2013* (Tas) s 55.

10 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [13].

11 This is happening under the *Mental Capacity Act 2016* (Northern Ireland). The legislation is available at: http://www.legislation.gov.uk/nia/2016/18/contents/enacted.

12 Patricia Galon and Margaret Wineman, 'Coercion and Procedural Justice in Psychiatric Care: State of the Science and Implications for Nursing' (2010) 24 *Archives of Psychiatric Nursing* 307, 309.

If you would like to discuss any aspect of this response, please contact Benedict Coyne, ALHR President, at: president@alhr.org.au.

Yours faithfully,

President

Australian Lawyers for Human Rights

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