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New SA Mental Health Strategic Plan Submissions
SA Mental Health Commission
PO Box 189
Rundle Mall SA 5000

By email: samhc@sa.gov.au

Dear Commissioner Burns,

SUBMISSION ON THE NEW SA MENTAL HEALTH STRATEGIC PLAN

Australian Lawyers for Human Rights (ALHR) thanks the Commissioner for the opportunity to provide this submission in relation to the development of a new SA Mental Health Strategic Plan.

1. Australian Lawyers for Human Rights

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 practice and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. 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 calls for the SA Mental Health Strategic Plan to be consistent with the UN Convention on the Rights of Persons with Disabilities (CRPD), by reviewing the *Mental Health Act 2009* (SA) with particular consideration to:

- stopping the use of involuntary treatment,
- ending restrictive practices in all settings,
- creating specific programs to educate mental health staff, and
- creating awareness campaigns for the broader public to end stigma and discrimination.

3. Submission on the new SA Mental Health Strategic Plan

International human rights law

ALHR submits that South Australian mental health legislation should adhere to international human rights law and standards. ALHR calls on the SA Mental Health Commission to consider the international human rights obligations guaranteed in the CRPD. The CRPD protects, promotes and ensures the fundamental rights and freedoms of individuals with disabilities, including mental illness.¹

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. Historically, individuals with disabilities have been denied their personhood on the basis of their disability.² Today, persons with mental illness are frequently denied their right to exercise their legal capacity under mental health legislation on the basis of their disability.³ 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.⁴

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,⁵ with no consideration of their legal capacity, and without their consent.⁶ 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.

¹ *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.

² 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).

³ For example, see the *Mental Health Act 2014* (Vic).

⁴ 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].

⁵ *Mental Health Act 2009* (SA) ss 21(1)(a), 25(2)(a), 29(1)(a).

⁶ For example, see: *Mental Health Act 2009* (SA) s 31(2).

Involuntary mental health treatment

Sections 21, 25 and 29 of the *Mental Health Act 2009* (SA) permit the involuntary detention and treatment of individuals with mental illness on the dual bases of that person having a mental illness and posing a risk of harm to themselves or others, regardless of their capacity and without their consent. Section 8 of the *Mental Health (Review) Amendment Act 2016* (SA) will insert into the *Mental Health Act 2009* (SA) a mental capacity test provision. Under the new section 5A of the *Mental Health Act 2009* (SA), the threshold test for involuntary mental health treatment will be a test of the individual's mental capacity. While this is an improvement upon the old threshold test of having a mental illness and posing a risk of harm to self or others, it is still inconsistent with the CRPD because a lack of mental capacity will lead to a denial of the legal capacity of the individual which is a breach of article 12 of the CRPD.

The UN Committee has observed in General Comment No. 1 that 'under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.'⁷ Further, the UN Committee has stated repeatedly in its concluding observations to Australia's Initial Report under the CRPD and in its General Comment No. 1, that States Parties must take action to develop laws and policies to replace regimes of substitute decision-making such as that in the *Mental Health Act 2009* (SA), with supported decision-making arrangements which respect the individual's autonomy, will and preferences.⁸ Supported decision-making arrangements include advance directives, care and treatment plans, involving all persons in treatment decisions whether they have mental capacity or not and explaining treatment information in simple terms.

ALHR stresses the seriousness of authorising mental health interventions without the free and informed consent of persons with mental illness. These practices are a breach of the fundamental human rights of persons with disabilities. Practices and legislation that permits the exercise of mental health intervention without consent on the basis of a person's disability should be abandoned immediately.

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.⁹ Genuine and exhaustive efforts to present mental health treatment decisions in an accessible format for the person to make an informed decision must be implemented.

The personal autonomy of persons with mental illness and their right to choice¹⁰ must be paramount.

Further, article 17 of the CRPD requires the respect of the physical and mental integrity, on an equal basis with others. This fundamental right should be recognised in the prohibition of involuntary mental health treatment of persons with mental illness on the basis of their disability.

⁷ 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].

⁸ 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) [26].

⁹ 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.

¹⁰ *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) Preamble (n).

Clearly, there will be times for all people, with or without disability, where they are unable to make treatment decisions. ALHR makes cogent objection to the unique application of laws to imposing substitute decision-making about treatment decisions upon people on the basis of disability.

Restrictive Practices

ALHR is gravely concerned with the prevalence of restrictive practices and the involuntary treatment of individuals with mental illness in South Australia.

In its Annual Report for the period 2015-16, the Office of the Chief Psychiatrist reported that 3,597 individuals with mental illness were subjected to restrictive practices,¹¹ while 8,757 individuals with mental illness were treated involuntarily under inpatient treatment orders.¹² These practices violate the protections afforded to individuals with mental illness under the Convention on the Rights of Persons with Disabilities and must be addressed in your Mental Health Strategic Plan.

Education of Mental Health Staff and the Public

ALHR believes that people living with mental illness also face disproportionate experiences of discrimination and stigma when accessing health care, particularly in the emergency department setting. For example, it is in the emergency department setting that most cases of the mechanical restraint of individuals in mental health crisis occurs. The SA Mental Health Strategic Plan must incorporate awareness training for professional staff within the healthcare sector and awareness campaigns for the broader public to reduce stigma.

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

Yours faithfully,

President

Australian Lawyers for Human Rights

Contributor:

Susan Peukert

Co-Chair

Disability Rights Subcommittee

¹¹ Office of the Chief Psychiatrist, The Annual Report of the Office of the Chief Psychiatrist South Australia 2015-16 (Government of South Australia, 2016) p 19.

¹² Office of the Chief Psychiatrist, The Annual Report of the Office of the Chief Psychiatrist South Australia 2015-16 (Government of South Australia, 2016) p 24.