Severe Substance Dependence Treatment Bill 2009

Submission to the Scrutiny of Acts and Regulations Committee

Summary and Recommendations

The Human Rights Law Resource Centre (**HRLRC**) is concerned that aspects of the *Severe Substance Dependence Treatment Bill 2009* (Vic) (**Bill**) are incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter).

The Bill proposes to introduce short-term involuntary detention and treatment for persons with severe substance dependence in circumstances where it is necessary as a matter of urgency to save a person's life or prevent serious damage to a person's health. The Bill repeals the *Alcoholics and Drug-dependent Persons Act 1968* (Vic).

The Statement of Compatibility recognises that the Bill engages and potentially limits several human rights, including: the right not to be subjected to medical treatment without consent (s 10(c) of the Charter); freedom of movement (s 10); privacy (s 13); liberty and security of the person (s 21); fair hearing (s 24); and equality (s 8).

Section 7(2) of the Charter provides that limitations on rights are only permissible when they:

> can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
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> (a) the nature of the right; and
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> (b) the importance of the purpose of the limitation; and
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> (c) the nature and extent of the limitation; and
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> (d) the relationship between the limitation and its purpose; and
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> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The HRLRC recommends that the Scrutiny of Acts and Regulations Committee (**SARC**) include five things in its report to Parliament on the human rights compatibility of the Bill. SARC should:

1. request that the Minister for Health provide strong empirical evidence to support the effectiveness of civil commitment in order to demonstrably justify the potential limitations of rights protected in the Charter. If the Minister is unable to provide this evidence, then SARC should find that the Bill is incompatible with the Charter;
2. recommend that the Victorian Government substantially increase funding to, and the affordability and accessibility of, comprehensive and coordinated voluntary drug treatment programs;

3. recommend that clause 8 of the Bill expressly provide that individuals must not be made subject to a detention and treatment order in instances where they retain legal capacity and choose to refuse treatment;

4. recommend that the Bill be amended to guarantee that all persons subject to a detention and treatment order have effective access to legal representation and advocacy support in order to ensure a fair hearing, including by ensuring that the Public Advocate and Victoria Legal Aid receive notice of the hearing and have a right to appear; and

5. recommend that the Bill be amended to guarantee that persons made subject to a detention and treatment order can access voluntary treatment services once the order has expired.

Each of these recommendations is examined and expanded below.

1. Evidence that the limitations on rights are 'demonstrably justified'

The onus of establishing that a limitation on human rights is reasonable and demonstrably justified rests on the party imposing the limitation.[1] The standard of proof is generally the balance of probabilities, although it may change in given circumstances, requiring 'a degree of probability which is commensurate with the occasion'.[2] That is, the more serious the infringement of rights, the more important the objective of the limitation of those rights must be to a free and democratic society, and the higher the standard of proof will be for the State.[3] Evidence required to prove the elements in section 7 of the Charter should be 'cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit'.[4]

Involuntary detention and treatment of an individual who has committed no offence is a significant interference with their rights. Accordingly, the Government must provide strong evidence based justification for the proposed measures.

The Victorian Government contends that 'research has shown that for this very small group of people a brief period of civil detention and treatment can be beneficial and life saving'[5] and that 'there is evidence that compulsory treatment can be an effective harm reduction mechanism for some people.'[6] In support, the Government refers to the 2007 Turning Point Alcohol and Drug Centre Report on compulsory treatment[7] (Turning Point 2007 report), a

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[1] *R v Oakes* [1986] 1 SCR 103, 66. *Kracke v Mental Health Review Board* [2009] VCAT 646, 108

[2] See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009), [147] citing *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).

[3] See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009), [150].

[4] Ibid, [147].

[5] Statement of Compatibility in Hansard, Thursday 10 December 2009, p 4579.

[6] Ibid.

[7] E Pritchard, J Mugavin and A Swan, 'Compulsory Treatment in Australia: A Discussion Paper on the Compulsory Treatment of Individuals Dependent on Alcohol and/or Other Drugs' (Australian National Council on Drugs, 2007).

2004 review also conducted by Turning Point Alcohol and Drug Centre[8] and a 2008 New Zealand report that extensively reviews literature on the effectiveness of compulsory drug and/or alcohol treatment on non-offenders (NZ report).[9]

The NZ report, prepared for the NZ Ministry of Health's Mental Health Group, concluded that:

- 'There is minimal evidence reporting on the effectiveness of compulsory residential treatment of non-offenders alone. There is however some weak evidence to suggest that at least some people benefit from compulsory treatment.'[10]
- 'There is evidence, mainly anecdotal, that civil commitment for short periods can be an effective harm minimisation mechanism. That is, to provide short term involuntary care in life threatening circumstances.'[11]
- 'While alcohol and drug abuse is generally viewed as a chronic condition, acute emergency situations do occur, and if compulsory civil commitment is one mechanism to prevent deaths and minimise harm, then it can be considered to play a useful role. Nevertheless, there may be other mechanisms that are as effective, or more so, as compared with compulsory treatment and this has not been robustly investigated.'[12]

Similarly, the Turning Point 2007 review found:[13]

> While there is some evidence, mainly anecdotal, that civil commitment for short periods can be an effective harm reduction mechanism, there is little evidence to support its effectiveness in rehabilitating or achieving long-term behavioural change.

It is evident from these reports is that there is no conclusive empirical evidence regarding the effectiveness or ineffectiveness of short-term compulsory treatment for non-offenders. The HRLRC submits that weak, anecdotal evidence is insufficient to meet the high standard of proof that would justify the significant limitation on rights this bill presents. Without better evidence, the limitations on rights imposed by the bill will not be 'demonstrably justified' to the extent required to meet the requirements of s 7(2) of the Charter.

Recommendation 1:

SARC should request that the Government provide strong empirical evidence to support the effectiveness of civil commitment in order to demonstrably justify the potential limitations of rights protected in the Victorian Charter. If the Government is unable to provide this evidence, then SARC should find that the Bill is incompatible

[8] A Swan and S Alberti, *The Alcoholics and Drug-Dependent Persons Act (ADDPA) 1968: A Review* (Turning Point Alcohol and Drug Centre, 2004).

[9] Marita Broadstock, David Brinson and Adele Weston, 'A Systematic Review of the Literature: The Effectiveness of Compulsory, Residential Treatment of Chronic Alcohol or Drug Addiction in Non-Offenders' (Health Services Assessment Collaboration, 2008.

[10] Ibid, iv.

[11] Ibid, iv.

[12] Ibid, 36.

[13] Ibid, xii.

with the Charter.

2. Access to voluntary treatment services

The HRLRC recognises that the Government does not intend that involuntary civil detention under the Bill constitute a substitute for voluntary treatment. In its consideration of whether there are any less restrictive means of achieving the purposes of the Bill, the Statement of Compatibility acknowledges that:[14]

> engaging persons voluntarily in treatment would be less restrictive. However, this option is not reasonably available since the persons who are eligible for a detention and treatment order are not able to be engaged voluntarily.

However, the application of detention and treatment orders to individuals who cannot engage voluntarily does not obviate the need to consider the availability of voluntary services for individuals who retain capacity. All those made subject to detention and treatment orders will, at some point, have had capacity to engage in voluntary treatment.

Many people with substance abuse issues currently experience significant difficulty accessing voluntary treatment and rehabilitation programs. It is vital that those who wish to access treatment are able to do so. [15] While supply outstrips demand in this area, involuntary treatment will not be the 'least restrictive means' of saving a person's life or preventing serious damage to their health and will therefore fail to meet the requirements of s 7(2) of the Charter.

Recommendation 2:

SARC should recommend that the Victorian Government substantially increase funding to, and the affordability and accessibility of, comprehensive and coordinated drug treatment programs as a pre-condition to meeting the requirement that the limitations on rights imposed by the Bill comply with section 7(2) of the Charter, particularly the requirement under s 7(2)(e) that the limitations be the minimal impairment.

3. The right to refuse treatment

Human rights principles require that people be allowed to refuse treatment that they need, even when they place themselves at risk as a result. This right is protected by s 10 of the

[14] Statement of Compatibility, above n 5, p.4581.

[15] Research shows that the most effective drug treatment strategies are holistic, long-term and integrated and that treatment of drug and alcohol disorders is less likely to be successful if it is compulsory or compelled than if it is voluntary. See House of Representatives Standing Committee on Family and Community Affairs, Road to Recovery: Report on the Inquiry into Substance Abuse in Australian Communities (August 2003) 34; Alcohol and Other Drugs Council of Australia, Policy Positions of the Alcohol and Other Drugs Council of Australia: Prevention (2003) 1. Alcohol and Other Drugs Council of Australia, Policy Positions of the Alcohol and Other Drugs Council of Australia: Treatment (September 2003) 1; C P O'Brien and A T McLellan, 'Myths About the Treatment of Addiction' (1996) 347 Lancet 237.

Charter, which states that a person must not be subjected to medical treatment without their full, free and informed consent. The 'starting point' under s 10 is the 'paramount consideration that a person is entitled to make decisions about his or her life'.[16]

Also of particular relevance is Article 12 of the *Convention of the Rights of Persons with Disabilities* which provides, among other things, that persons with disabilities have the right to 'recognition everywhere as persons before the law' and to 'enjoy legal capacity on an equal basis with others in all aspects of life'.[17] In accordance with this principle, individuals should not be made subject to a detention and treatment order under the Bill in instances where they retain legal capacity and choose to refuse treatment.

The Bill's Second Reading Speech and the Statement of Compatibility suggest that detention and treatment orders are only to be made in circumstances where a person has lost capacity. However, this requirement is not listed as a criterion for detention and treatment in clause 8 of the Bill. Rather, it is indirectly applied through the definition of 'severe substance dependence' in clause 5 which requires that 'the person is incapable of making decisions about his or her substance use and personal health, welfare and safety due primarily to the person's dependence on the substance.'

The HRLRC is concerned that clause 5 is broadly drafted and liable to be interpreted in a manner which does not adequately protect the right of a person with legal capacity to choose to refuse treatment. We repeat and endorse the concerns outlined in Harm Reduction Victoria's submission to the present inquiry in this regard.

> ***Recommendation 3:***
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> SARC should recommend that clause 8 of the Bill expressly provide that individuals must not be made subject to a detention and treatment order where they retain legal capacity and choose to refuse treatment.

4. Access to legal representation and the right to a fair hearing

Clause 18(1) of the Bill provides that the person who is subject to a proposed detention and treatment order is entitled to be represented by a legal practitioner at the hearing of an application. The HRLRC is concerned that this provision is insufficient to ensure the *positive* protection of the right to a fair hearing in s 24 of the Charter.[18] As Bell J stated in *Kracke v Mental Health Review Board*, 'persons detained for being of unsound mind should not have to take the initiative to obtain legal representation'.[19] Indeed, there is authority that if a person

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[16] *Kracke v Mental Health Review Board* [2009] VCAT 646, [569]. See also *Rogers v Whitaker* (1992) 175 CLR 479, 487.

[17] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008). Section 32 of the Charter states that international law (which includes the *Convention on the Rights of Persons with Disabilities*) may be considered in interpreting a statutory provision.

[18] See, for example, *Tomasevic v Travaglini* [2007] VSC 337.

[19] *Kracke v Mental Health Review Board* [2009] VCAT 646, [569]. See also *Megyeri v Germany* (1993) 15 EHRR 584.

subject to an application is considered to be capable of acting on their own behalf, they should not be subject to an involuntary order in the first place.[20]

Victoria's *Mental Health Act 1986* includes a similar provision to clause 18(1). Nevertheless, of the 5447 hearings conducted under the *Mental Health Act 1986* in 2006–07, only 5.6 per cent involved legal representation.[21] The Community Consultation Report of the review of the *Mental Health Act 1986* noted community support for accessible representation at external review hearings.[22]

> ***Recommendation 4:***
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> SARC should recommend that:
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> - clause 10(3) of the Bill be amended to additionally provide that the applicant must take reasonable steps to 'serve a copy of the application, together with a copy of the recommendation and any other documents filed with the application on the Public Advocate and Victoria Legal Aid'; and
> - clause 15 of the Bill be amended to additionally provide that the Public Advocate and Victoria Legal Aid have the right to appear at the application; and
> - Victoria Legal Aid Guidelines be amended to ensure that persons subject to an application under the Bill have a right of access to funded legal representation.

5. Access to voluntary treatment after the expiry of an order

One of the stated aims of the Bill is to 'create an opportunity for a person to engage with services for voluntary treatment.'[23] However, the Bill does not guarantee that persons made subject to an involuntary treatment and detention order will have effective access to voluntary services once the order has expired.

Access to voluntary treatment services following medically assisted withdrawal is essential. Reduced tolerance produced by withdrawal followed by a return to drug use increases the chances of fatal overdose.

The Government has obligations under the Charter (particularly in the relation to the right to life) and under common law principles to prevent foreseeable harm caused by the imposition

[20] *Fijalkowska v Poland*, communication no 1061/2002, UN Doc CCPR/C/84/D/1061/2002 at [8.3].

[21] Review of the *Mental Health Act 1986*: Consultation Paper (December 2008), p 55.

[22] Review of the *Mental Health Act 1986*: Community Consultation Report (July 2009) pp.27 and 29.

[23] Second Reading Speech in Hansard, Thursday 10 December 2009, p 4579, p 4585.

of involuntary medical withdrawal.[24] These obligations require that once an order expires the subject of the order has guaranteed access to voluntary facilities.

> ***Recommendation 5:***
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> SARC should recommend that the Bill be amended to guarantee that persons made subject to a detention and treatment order can access services for voluntary treatment once the order has expired.

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[24] *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 9; for a discussion of relevant common law principles see *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549 and *Wyong Shire Council v Shirt* (1980) 146 CLR 40.