Submission to the Mental Health and Drugs Division, Department of Human Service

Mental Health Reform Strategy

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Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
www.hrlrc.org.au
ABN 31 117 719 267

Contact: Philip Lynch and Phoebe Knowles
Human Rights Law Resource Centre Ltd
Level 1, 550 Lonsdale Street
Melbourne VIC 3000
Tel: + 61 3 9225 6695
Fax: + 61 3 9225 6686
Email: hrlrc@vicbar.com.au
Web: www.hrlrc.org.au

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1. Introduction

1.1 Impetus for the Mental Health Reform Strategy

1. The Victorian Government has commenced a broad review of mental health services in Victoria. The reform aims to shift focus from a response based on illness and acute intervention to one emphasising wellness, early intervention and recovery.

2. In May 2008 the Department of Human Services (***Department***) prepared a Consultation Paper entitled *Because mental health matters: a new focus for mental health and wellbeing in Victoria* (***Consultation Paper***) as part of the Mental Health Reform Strategy (***Reform***). The Consultation Paper invites submissions on a series of questions and seeks comments on seven main areas including:

   (a) prevention;

   (b) early intervention;

   (c) access;

   (d) specialist care;

   (e) complex clients;

   (f) workforce; and

   (g) partnerships.

1.2 Scope of this Submission

3. This submission focuses on the relevance of human rights to certain questions raised in the Consultation Paper. In this context, this submission discusses the application of human rights relevant to mental health and protected by the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***).

4. This submission advocates first, that a human rights approach to mental health reform is necessary to ensure that rights are protected and promoted in a meaningful way. Second, this submission considers the relevant areas outlined in the Consultation Paper which engage rights protected by the Victorian *Charter*. As the Consultation Paper did not raise in any detail the way in which the Reform might be carried out compatibly with human rights, the third part of this Submission considers how the human rights protected under and promoted by the *Charter* are relevant to mental health generally and the Reform.

1.3 About the HRLRC

5. The Human Rights Law Resource Centre (***HRLRC***) is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law. The HRLRC's activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.

6. The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

   (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;

(b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and

(c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

2. Executive Summary

2.1 Summary

7. People with mental illness in Australia experience discrimination within society and the health care system which causes significant social disadvantage. Despite advances in legislation and policy, the reality for people in Australia with a mental illness continues to be a denial of fundamental human rights in practice. The enactment of the *Charter* means that the mental health system and strategy in Victoria can now be assessed and implemented with reference to a clear legislative framework which protects and promotes human rights.

8. The HRLRC encourages the Department to adopt a human rights approach to mental health reform to ensure that rights are protected and promoted in a meaningful way. This submission considers the relevant areas raised in the Consultation Paper which engage rights protected by the Victorian *Charter*. The third part of this Submission considers how the human rights protected under and promoted by the *Charter* are relevant to the mental health generally and the Reform.

2.2 Recommendations

Recommendation 1:

Proposed reforms to Mental Health in Victoria must be consistent with Australia's international human rights obligations and the Victorian *Charter*. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that all people are treated with respect for their rights and inherent dignity.

Recommendation 2:

Mental health law, policy and practice is likely to engage the following rights under the *Charter*:

(a) right to recognition and equality before the law (s 8);

(b) right to life (s 9);

(c) protection from torture and cruel, inhumane and degrading treatment (s 10);

(d) freedom of movement (s 12);

(e) right to privacy and reputation of person (s 13);

(f) right to liberty and security of person (s 21);

(g) right to humane treatment when deprived of liberty (s 22); and

(h) right to a fair hearing (s 24).

Any limitations or restrictions on these rights must be consistent with s 7(2) of the *Charter*, requiring that may be subject under law only to such reasonable limits as 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:

(a) the nature of the right;

(b) the importance of the purpose of the limitation – this means that any limitation must fulfil and pressing need and pursue a legitimate aim. The aim sought to be achieved should be 'specific' and not general. Financial considerations alone are insufficient grounds for a limitation on rights.

(c) the nature and extent of the limitation – this means that any limitation must be proportionate to the aim sought to be achieved by the limitation;

(d) the relationship between the limitation and its purpose – this requires a rational, evidence based approach to limiting human rights such that a limitation should not be arbitrary or unfair; and

(e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Recommendation 3:

The *MHA* must be interpreted compatibly with human rights, so far as it is possible to do so consistently with the *MHA's* statutory purpose.

Recommendation 4:

In conducting the Reform, the Department should consider how the activities proposed by the Reform would engage obligations under the *Charter* on the part of the Victoria Police, approved mental health services as defined in the *MHA*, the Chief Psychiatrist of Victoria, authorised psychiatrists appointed under s96 of the *MHA* as staff of approved mental health services, psychiatrists operating in the public health system and registered medical practitioners as defined by the *MHA* when they are performing functions pursuant to the *MHA*.

Recommendation 5:

In considering how to improve social inclusion under the Reform, the Department should use the language and framework of human rights.

Recommendation 6:

Any alteration to mental health law, policy or practice in relation to children must comply with the rights of the child and ensure that any limitation on this right is necessary and proportionate to the aim of the limitation. The HRLRC recommends that in seeking appropriate mental health support for particular groups of young people, the Department adopt a human rights-based approach. This will ensure that any response is appropriate in terms of ensuring respect for the young person's freedom, dignity and equality.

Recommendation 7:

The HRLRC recommends that outcomes proposed by the Reform should ensure that all public authorities providing services in the area of mental health take positive steps to ensure that there are adequate safeguards, facilities and conditions preventing indignity and debasement. Further, where allegations are raised, public authorities must take steps to investigate the allegation and provide adequate and effective remedies.

Recommendation 8:

The HRLRC recommends that the Reform look in greater detail at the incidence of and response to mental illness in prisons. The HRLRC recommends that additional funding and resources be allocated to ensure adequate mental health care for prisoners who are experiencing mental illness. All Victorian prisons have an absolute and non-derogable obligation to provide adequate mental health care to those prisoners in their care.

Recommendation 10:

In conducting the Reform, the Department should review involuntary treatment provisions to ensure that:

(a) decisions are taken on the basis of the person's best interests;

(b) the person be helped to participate as fully as possible in the decision-making process;

(c) the person's past and present wishes, feelings, beliefs and values, be considered;

(d) a specified list of people, including family, friends and carers, be consulted and their views taken into account in determining what is in the person's best interests;

(e) where serious medical treatment is proposed, an Independent Mental Capacity Advocate be instructed to support and represent the person if there is no one

to consult among friends, family and carers; and

(f) treatment decisions be determined by a valid and applicable advance directive, or by the consent of an attorney if within the authority given to them by the person, or by a deputy if within the authority granted by the Court of Protection.

3. A Human Rights Framework

3.1 A Human Rights Approach to the Reform

9. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. Human rights are about the fair and respectful treatment of all people and they enable people to live lives of dignity, equality and value.

10. The HRLRC considers that the Reform raises issues that relate to Australia's international human rights obligations. These obligations are found in a number of the major international human rights treaties to which Australia is a party, including:

(a) the International Covenant on Civil and Political Rights (***ICCPR***);[1]

(b) the International Covenant on Economic, Social and Cultural Rights (***ICESCR***);[2]

(c) Convention on the Rights of Persons with Disabilities (***CRD***);[3]

(d) Convention on the Rights of the Child (***CROC***).[4]

11. Australia's ratification of these instruments has created international law obligations that require all arms of the federal system – including the Victorian Government (legislature, executive and judiciary) – to act to respect, protect and fulfil human rights.

12. In conducting the Reform, the Government should also consider the United Nations *Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care*.

13. In considering the goals raised in the Consultation Paper, the Victorian Government should consider and this submission draws on learnings from the United Kingdom House of Lords and House of Commons Joint Committee on Human Rights (***Joint Committee***) recent review of the *Mental Health Bill*. The two reports produced by the Joint Committee, the *Legislative Scrutiny: Seventh Progress Report – Fourth Report of Session 2006-07* (***House of Lords 4th Report***) and the *Legislative Scrutiny: Seventh Progress Report – Fifteenth Report of Session 2006-07* (***House of Lords 15th Report***) provide useful analysis of reform to mental health legislation which is carried out compatibly with human rights protected under the *Human Rights Act 1998* (UK).

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[1] The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980.

[2] The ICESCR was signed on 18 December 1972 and ratified on 10 December 1975.

[3] *Convention on the Rights of Persons with Disabilities*, adopted by the UN General Assembly on 13 December 2006, was signed on 30 March 200 and ratified on 17 July 2008.

[4] The CROC was ratified on 17 December 1990 and entered into force on 16 January 1991.

3.2 Social and Economic Benefits of Human Rights-Based Reform

14. The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:[5]

    (a) a 'significant, but beneficial, impact on the development of policy';

    (b) enhanced scrutiny, transparency and accountability in government;

    (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;

    (d) 'new thinking', as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';

    (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and

    (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.

15. In this sense, the experience of legislative human rights instruments is that they have far greater impact at the 'front end' by influencing policy development and implementation, rather than as an avenue for litigious remedy. In other words, legislative human rights instruments provide mechanisms for a less litigious and less reactive framework that is more focused on individuals. This serves to address some of the underlying, systemic causes of human rights violations, rather than react in a limited, ad hoc way.

16. Exclusion and social fragmentation may result from inappropriate mental health care and discrimination on the basis of mental illness. This in turn leads to an inability to participate in fields such as employment, education and the market generally, which ultimately results in a variety of inequalities and a waste of human potential. It is clear that inequalities caused by such exclusion may have broader social costs:

> The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies.[6]

17. The HRLRC submit that a human rights approach to the Reform will ensure that Australia's international obligations are fulfilled and will also assist to develop laws and policies that will best promote the ends that are sought to be achieved by the Reform in an efficient and effective way.

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[5] See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

[6] United Kingdom Equalities Review, Fairness and Freedom: The Final Report of the Equalities Review (28 February 2007), 21.

***Recommendation 1*:**

Proposed reforms to Mental Health in Victoria must be consistent with Australia's international human rights obligations and the Victorian *Charter*. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that all people are treated with respect for their rights and inherent dignity.

4. The Victorian *Charter*

4.1 Overview of the Victorian *Charter*

18. The Victorian *Charter* enshrines a body of civil and political rights derived from the *ICCPR*.

19. The Victorian *Charter* establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements. The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities'[7]) and the courts — is facilitated through a number of mechanisms relevant to the Reform.

    (a) All bills must be assessed for the purpose of consistency with the human rights contained within the Victorian *Charter*, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament.

    (b) All legislation, including subordinate legislation, must be considered by the parliamentary Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights.

    (c) Public authorities, including both public and private bodies undertaking functions of a public nature, must act compatibly with human rights and also give proper consideration to human rights in any decision-making process.

    (d) So far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.

20. The Victorian *Charter* entered into full force on 1 January 2008.

4.2 Application of the Victorian *Charter* to the Reform

21. The following overarching principles should be considered in the interpretation and application of the Victorian *Charter* in conducting the Reform:

    (a) The human rights contained in the Victorian *Charter* are largely modelled on the civil and political rights enshrined in the *ICCPR*.[8] There is a vast body of international and comparative jurisprudence that can and should therefore be considered in the elucidation of the content and application of the Victorian *Charter* to the Reform.

[7] Victorian *Charter*, section 4 defines public authority.

[8] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

(b) The Victorian *Charter* is founded on the principle that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom. Having regard to this, the rights should be interpreted broadly. In situations where a person alleges that their rights have been breached, the rights should be interpreted in favour of that person, particularly where they bear on issues of civil liberty, equality or human dignity.[9] The UN Human Rights Committee (***HRC***) has, on a number of occasions, been critical of the tendency of states to interpret and apply rights too narrowly.[10]

(c) The rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.[11] Consistently with the nature of human rights obligations articulated by the HRC (namely, that states have obligations to *respect*, *protect* and *fulfil* human rights)[12] and the approach adopted by UK courts under the *Human Rights Act 1998* (UK) and the European Court of Human Rights under the *European Convention on Human Rights*,[13] rights may impose both negative and positive obligations on public authorities. The right to life, for example, may require public authorities to not only refrain from taking life but to take positive measures to protect human life.

(d) The Victorian *Charter* is a 'living document' which should be interpreted and applied in the context of contemporary and evolving values and standards.[14] The European Court of Human Rights has stated that:

> The Convention is a living instrument which must be interpreted in light of present day conditions…the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires firmness in assessing breaches of the fundamental values of democratic societies.[15]

This view has recently being reiterated by the House of Lords.[16]

(e) Recognising that human rights are interdependent and indivisible, the rights should be read so as to complement and reinforce each other.

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[9] See generally, Conor Gearty, *Principles of Human Rights Adjudication* (2004).

[10] See, eg, UN Human Rights Committee, *General Comment No 6: The Right to Life* (1982) [5], available from http://www.ohchr.org/english/bodies/hrc/comments.htm**.**

[11] *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

[12] See,eg, UN Human Rights Committee, *General Comment 3: Implementation at the National Level*, UN Doc HRI\GEN\1\Rev.1 (1981) available at http://www.ohchr.org/english/bodies/hrc/comments.htm **i**n which the HRC stated:

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the *Covenant* is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

[13] See, eg, Marckx v Belgium (1979) 2 EHRR 330; Gaskin v United Kingdom (1989) 12 EHRR 36; Airey v Ireland (1979) 2 EHRR 305; Plattform Artze fur das Leben v Austria (1988) 13 EHRR 204.

[14] Tyrer v United Kingdom (1978) 2 EHRR 1, 10.

[15] *Selmouni v France* (2000) 29 EHRR 403, [101].

[16] House of Lords 15th Report, page 23

4.3 Permissible Limitations on Human Rights

22. At international law, it is well established that some human rights are absolute while, in certain circumstances and subject to certain conditions, other human rights may be limited. The general principles relating to the justification and extent of limitations have been developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (***Siracusa Principles***). Among other things, the Siracusa Principles provide that:

    (a) no limitations or grounds for applying them may be inconsistent with the essence of the particular right concerned;

    (b) all limitation clauses should be interpreted strictly and in favour of the rights at issue;

    (c) any limitation must be provided for by law and be compatible with the objects and purposes of the *ICCPR*;

    (d) limitations must not be arbitrary or unreasonable;

    (e) limitations must be subject to challenge and review;

    (f) limitations must not discriminate on a prohibited ground;

    (g) any limitation must be 'necessary', which requires that it:

        (i) is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);

        (ii) responds to a pressing need;

        (iii) pursues a legitimate aim; and

        (iv) is proportionate to that aim.[17]

23. Reflecting the Siracusa Principles, the Victorian *Charter* contains a limitation provision, section 7(2) which provides that:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society[18] based on human dignity, equality and freedom and taking into account all relevant factors.

24. Section 7(2) also sets out the following inclusive list of these relevant factors:

    (a) the nature of the right;

    (b) the importance of the purpose of the limitation;

    (c) the nature and extent of the limitation;

    (d) the relationship between the limitation and its purpose; and

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[17] UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985).

[18] According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

(e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

25. These factors should be interpreted and applied in the following way:

(a) the nature of the right

While there is no 'hierarchy' of rights as such, human rights that are considered absolute and non-derogable under international law, such as the prohibition on torture, would clearly require a much higher level of justification so far as limitations are concerned than, say, the right to freedom of expression.

(b) the importance of the purpose of the limitation;

The limitation must fulfil a pressing need and pursue a legitimate aim;[19]

The aim sought to be achieved should be 'specific' and not merely general and must be compelling and important, not 'trivial'.[20]

It is the aim of the limit itself that should be the subject of scrutiny rather than the aim of the law as a whole.[21]

Financial considerations in and of themselves will almost never constitute a legitimate aim or justify a limitation on human rights.[22]

(c) the nature and extent of the limitation;

The limitation must be proportionate;[23]

(d) the relationship between the limitation and its purpose;

The limitation must be reasonably, rationally and by evidence connected to the aim. It should be accompanied by 'relevant and sufficient reasons'.[24] It should not be, or operate in a way which is, arbitrary, unfair or not based on rational considerations.[25]

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

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[19] See, eg, *Derbyshire County Council v Times Newspapers* [1993] AC 534, 550; *Handyside v UK* [1976] 1 EHRR 737. See also *R v Oakes* [1986] 1 SCR 103, in which the Supreme Court of Canada stated that the aim must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom', which required that it must 'relate to concerns which are pressing and substantial'.

[20] See, eg, *Zundel v R* [1992] SCR 731.

[21] See, eg, *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, 335.

[22] See, eg, *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 38; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.

[23] See, eg, *Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

[24] See, eg, *Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

[25] See, eg, *R v Oakes* [1986] 1 SCR 103, 139.

This involves a consideration of whether the objective of the limitation be achieved in a way that does not interfere with, or interferes less with, human rights.[26]

26. While the Victorian *Charter* does not provide that certain rights are non-derogable, unlike many other human rights instruments, the preferable view is that, consistently with article 4(2) of the *ICCPR*, certain human rights are absolute and must not be subject to limitation or derogation. Pursuant to article 4(2) of the *ICCPR*, these rights relevantly include the right to life (article 6 of the ICCPR and section 9 of the *Charter*), freedom from torture, cruel, inhuman or degrading treatment (article 7 of the ICCPR and section 10 of the *Charter*), and right to recognition as a person before the law (article 16 of the ICCPR and section 8 of the *Charter*).

Recommendation 2:

Mental health law, policy and practice is likely to engage the following rights under the *Charter*:

(a) right to recognition and equality before the law (s 8);

(b) right to life (s 9);

(c) protection from torture and cruel, inhumane and degrading treatment (s 10);

(d) freedom of movement (s 12);

(e) right to privacy and reputation of person (s 13);

(f) right to liberty and security of person (s 21);

(g) right to humane treatment when deprived of liberty (s 22); and

(h) right to a fair hearing (s 24).

Any limitations or restrictions on these rights must be consistent with s 7(2) of the *Charter*, requiring that may be subject under law only to such reasonable limits as 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:

(a) the nature of the right;

(b) the importance of the purpose of the limitation – this means that any limitation must fulfil and pressing need and pursue a legitimate aim. The aim sought to be achieved should be 'specific' and not general. Financial considerations alone are insufficient grounds for a limitation on rights.

[26] These factors are drawn from s 36(1) of the *South African Constitution* which, in turn, was informed by the decision of Chaskalson P in *State v Makwanyane* (1995) Case No CCT/3/04 (Constitutional Court of the Republic of South Africa) where it was stated at [104] that:

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality…[P]roportionality…calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

(c) the nature and extent of the limitation – this means that any limitation must be proportionate to the aim sought to be achieved by the limitation;

(d) the relationship between the limitation and its purpose – this requires a rational, evidence based approach to limiting human rights such that a limitation should not be arbitrary or unfair; and

(e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

5. Mental Health Policy and Practice in Australia

5.1 History of Mental Health Reform

27. Between 1960 and 1980 major reform to mental health policy and service delivery recognised the need to create a more humane system of treatment and care. However, people with mental illness in Australia continue to experience discrimination within both society and even within the health care system which causes significant social disadvantage. In 1993, the National Inquiry into the Human Rights of People with Mental Illness (***Burdekin Report***)[27] sought to assess how well the human rights of the mentally ill in Australia were being honoured. The findings uncovered overt human rights abuses within mental health institutions, as well as covert neglect in the wider community. The Burdekin Report's major conclusions were that:

(a) people affected by mental illness suffered from widespread systemic discrimination and were consistently denied the rights and services to which they are entitled; and

(b) health and other services which would enable people with a mental illness to live effectively in the community were found to be seriously under funded or in some areas just not available at all.

5.2 Denial of human rights to those with mental illness

28. Despite significant advances in legislation and policy, the reality for people in Australia with a mental illness continues to be a denial of fundamental human rights in practice. The enactment of the *Charter* means that the mental health system and strategy in Victoria can now be assessed and implemented with reference to a clear legislative framework which protects and promotes human rights.

29. Many people are denied proper access to treatment because insufficient resources are allocated to mental health services. In addition to a lack of resources, people with a mental illness are often denied access to services because they do not meet diagnostic criteria or due to the stigma surrounding mental health. Rigid or inflexible application of policy to determinations regarding access to health care may engage the *Charter* and amount to a breach of rights under the *Charter*.

30. Within mental health services, there are many reports of abuses, such as hostile environments, mental health staff ignoring or dismissing consumers' personal feelings,

[27] Human Rights and Equal Opportunity Commission, Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness (1993).

physical abuse and forced treatment.[28] Treatments provided for mental illness often have serious, debilitating and stigmatising side effects. In addition, seclusion or restraint are often used inappropriately and without proper regard to the person and often expressions of distress, depression or other mental health issues are responded to punitively. In some cases, voluntary patients are often coerced into treatment by the threat of being made involuntary patients, or are deceived, tricked or bullied into taking potent psychotropic drugs with harmful side effects. These reports raise serious concerns about the extent to which the rights of those suffering from a mental illness are upheld.

31. In addition, the right of people with mental illness to live, work and participate in the community to the full extent of their capabilities is still being compromised by a lack of available community based services and care options. It is a central principle of the international human rights framework that all people have the right, and should have the opportunity without discrimination, to participate in public affairs and, in particular, in decision-making processes that affect them.

6. Mental health reform and human rights

32. The Consultation Paper notes that Victoria has enacted the *Charter*[29] but the fails to adequately deal with how the Reform might engage or infringe human rights protected under the *Charter*. Similarly, the Consultation Paper does not acknowledge that any reform to mental health must comply with the *Charter*.

33. As the Consultation Paper raises questions and discussion as part of the broader Reform to be carried out over the next two years, this section discusses the way in which the *Charter* may impact on mental health services and delivery in Victoria.

6.1 The *Mental Health Act* and the *Charter*

34. Like all Victorian legislation, the *Mental Health Act 1986* (Vic) (***MHA***) will now be subject to the *Charter*. This means that the *MHA* must be interpreted and applied consistently with the *Charter*. Further, any proposed legislation as a result of the Reform which amends the *MHA*, including any new or amending subordinate legislation, must be developed compatibly with the *Charter* and independently reviewed by the Parliamentary Scrutiny of Acts and Regulations Committee.

35. It is important to note that the requirement to interpret the *MHA* in accordance with the *Charter* overrides any previous interpretation of the *MHA* that is not consistent with the *Charter*. Thus, settled law and policy on the meaning of provisions of the *MHA* may need to be revisited to ensure that interpretation of the *MHA* accords with the *Charter*.

36. Importantly, public authorities (as defined in the *Charter*) who administer the *MHA* or take their authority from that Act must act compatibly with *Charter* rights and give proper consideration to *Charter* rights in any decisions made. This means that 'public

[28] Senate Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community* (First Report, 30 March 2006), [3.18].

[29] Consultation Paper, page 52.

authorities' will need to re-consider their policies, practices and decision-making processes under the *MHA* and ensure that they are aligned with the *Charter*.

37. The key ways in which the *Charter* will impact the *MHA* are through:

    (a) section 32 – interpretation of laws: the *MHA* must be interpreted compatibly with human rights, so far as it is possible to do so consistently with the *MHA's* statutory purpose. This interpretive requirement is not limited to courts interpreting the *Charter* but extends to all persons (whether a court or tribunal, public authority or not) who are interpreting the *Charter*;

    (b) section 38 – obligations on public authorities: any entity that is a public authority within the meaning of the *Charter* must act compatibly with human rights and, in making decisions, give proper consideration to relevant human rights. This has significant implications for the operations of individuals and entities performing functions under the *MHA* in connection with involuntary treatment orders and treatment choices; and

    (c) section 24 of the *Charter* – the right to a fair hearing: the Mental Health Review Board is required to ensure a fair hearing (see discussion below at 8.2).

Recommendation 3:

The *MHA* must be interpreted compatibly with human rights, so far as it is possible to do so consistently with the *MHA's* statutory purpose.

6.2 *Charter* rights relevant to the Reform

38. The key rights contained in the *Charter* which may be relevant to the *MHA* and to reform of mental health law, policy and practice include:

    (a) right to recognition and equality before the law (section 8);

    (b) protection from torture and cruel, inhumane and degrading treatment (section 10);

    (c) freedom of movement (section 12);

    (d) right to privacy and reputation of person (section 13);

    (e) right to liberty and security of person (section 21);

    (f) right to humane treatment when deprived of liberty (section 22); and

    (g) right to a fair trial (section 24).

39. The engagement of these rights is discussed further in Parts 7 and 8.

6.3 Individuals and organisations involved in mental health that may be "Public Authorities"

40. There are key individuals and organisations that provide mental health services under or in connection with the *MHA* that are likely to be considered public authorities for the purposes of the *Charter.* These include:

(a) Victoria Police;[30]

(b) Approved mental health services as defined in the *MHA*;[31]

(c) The Chief Psychiatrist of Victoria;[32]

(d) Authorised psychiatrists appointed under s96 of the *MHA* as staff of approved mental health services;[33]

(e) Psychiatrists operating in the public health system are likely to be subject to the obligations of public authorities under the *Charter*;

(f) Registered medical practitioners as defined by the *MHA* are public authorities when they are performing functions pursuant to the *MHA*;[34]

(g) 'Prescribed' persons (section 7 of the *MHA*), if not referred to above, are public authorities when they perform functions in accordance with the *MHA*;[35]

(h) Public and private hospitals and their staff where established by a statutory provision are likely to fall under the definition of public authority pursuant section 4(1)(b) of the *Charter*. Otherwise they are likely to be considered functional public authorities pursuant to section 4(1)(c), to the extent that they are providing hospital services on behalf of the State or a public authority.

Recommendation 4:

In conducting the Reform, the Department should consider how the activities proposed by the Reform would engage obligations under the *Charter* on the part of the Victoria Police, approved mental health services as defined in the *MHA*, the Chief Psychiatrist of Victoria, authorised psychiatrists appointed under s96 of the *MHA* as staff of approved mental health services, psychiatrists operating in the public health system and registered medical practitioners as defined by the *MHA* when they are performing functions pursuant to the *MHA*.

[30] The Victoria Police is a core public authority pursuant to s4(1)(d) of the *Charter*.

[31] *Charter*, ss 4(1)(a) and (b).

[32] *Charter*, s (4)(1)(b)

[33] *Charter*, s4(1)(b).

[34] *Charter*, s4(1)(b) and (c).

[35] *Charter*, s4(1)(c).

7. Specific human rights engaged by the Reform

41. The Reform considers a number of key areas including:

    (a) prevention;

    (b) early intervention;

    (c) access;

    (d) specialist care;

    (e) complex clients;

    (f) workforce; and

    (g) partnerships.

42. This Submission considers the discussion in the Consultation Paper relating to prevention, early intervention and access.

7.1 Goal 1.2: strengthening social inclusion efforts

43. This goal recognises the World Health Organisation's definition of mental health as 'a state of wellbeing in which the individual realises his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully and is able to make a contribution to his or her community.' The Reform in turn recognises that mental health requires supportive living conditions and environments.

44. The Consultation Paper asks: what aspects of current work can most effectively be built upon to promote social inclusion and reduce inequalities in mental health outcomes? The HRLRC notes that all human rights are interdependent. Protection of all human rights enables and creates the conditions in which people may be included in society. In this way, human rights establish the enabling framework and necessary conditions for social inclusion and participation.

45. Further, the HRLRC notes that the Victorian Government must ensure that all departments engaged in areas relating to mental health in turn ensure that their activities comply with the *Charter*. For example, in order to create supportive living conditions and effectively implement preventative strategies, respect for the rights to life and non-discrimination is essential.

Recommendation 5:

In considering how to improve social inclusion under the Reform, the Department should use the language and framework of human rights.

7.2 Goal 1.4: renewing Victoria's suicide prevention focus

46. This goal engages the right to life protected under section 9 of the *Charter*. The Victorian Government and those authorities with responsibilities for those suffering from mental illness, have an obligation to protect such people. The HRLRC submits that this obligation is of particular importance for Victorian public hospitals, the Department of Human Services and Corrections Victoria.

47. The death of Indigenous Australians in custody is also serious concern, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody that were made over 15 years ago.[36] In 2003, 75 per cent of deaths in custody were of Indigenous Australians detained for nothing more serious than public order offences.

48. The widespread use of solitary confinement (or 'segregation' as it is also known) as a management tool for people incarcerated in Australian prisons is an issue of significant concern, particularly in regard to those incarcerated who are also suffering from a mental illness. Research suggests that solitary confinement can cause and significantly exacerbate symptoms of mental illness, such as paranoia.[37] It is well established that prolonged solitary confinement may amount to torture or other cruel, inhuman or degrading treatment.[38]

49. According to Forensicare, the high incidence of mental illness in prison, in combination with the lack of adequate mental health care, means that it is very common for mentally ill prisoners displaying acute and disturbing psychiatric symptoms to be placed in a 'management and observation cell' (also known as a 'Muirhead cell'). This placement is often not a mental health decision, but one made by correctional administrators where there is no other accommodation available to guarantee the safety of a prisoner displaying disturbing psychiatric symptoms. Forensicare noted that solitary confinement and strict observation and control in these cells may prevent suicide, but may also cause 'enormous destruction to the psychological and human aspects' of the individual concerned.[39]

50. In *Savage v South Essex Partnership NHS Foundation Trust*,[40] the UK Court of Appeal held that the right to life includes a positive obligation to actively safeguard life and that the negligent failure of a psychiatric hospital to take adequate steps to prevent the suicide of a patient may amount to a violation of that patient's right to life.

51. Further, in *Kucheruk v Ukraine*[41] a man with chronic schizophrenia was subjected to restraint and seclusion while detained. The applicant successfully complained to the European Court of Human Rights of violations of article 3 (prohibition on cruel, inhuman or degrading treatment or punishment) and article 5 (right to liberty and security of person and freedom from arbitrary detention) of the *European Convention on Human Rights* in relation to his detention, seclusion, restraint, and the investigation by the authorities of his subsequent complaints. This case will be authority for the Victoria Supreme Court in a decision regarding limitations on the rights contained in the *Charter*

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[36] Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

[37] NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (17 July 2006).

[38] See, eg, Human Rights Committee, General Comment 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7) (1992), para 6; Larossa v Uruguay, HRC Communication No 88/1981, para 10.3.

[39] Forensicare, *Submission to Senate Select Committee on Mental Health* (May 2005) 21; Official Committee Hansard, Senate Select Committee on Mental Health, 6 July 2005, 48-9. See also the comments of the Victorian Court of Appeal in respect of the use of solitary confinement, normally viewed as a form of punishment, to protect a mentally disturbed prisoner in *R v SH* [2006] VSCA 83 at [22]; Senate Select Committee on Mental Health, A National Approach to Mental Health: From Crisis to Community, First report (March 2006) [13.110] – [13.111].

[40] [2007] EWCA Civ 1375 (20 December 2007)

[41] [2007] ECHR 2570/04 (6 September 2007)

and their reasonableness for the purposes of s 7 when authorities are exercising their powers under the *Mental Health Act 1986* (Vic).

7.3 Goal 2.2: providing earlier and age-appropriate treatment and support to children with emerging or existing mental health problems

52. The HRLRC notes that this goal engages and promotes the rights of the child under the *Convention on the Rights of the Child* in addition to section 17(2) of the *Charter*. Section 17(2) of the Charter provides:

> Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

53. The *CRC* requires that in all actions concerning children, the best interest of the child should be a primary consideration (article 3(1)). Further, a child should not be separated from his or her parents against their will except in accordance with law and where the separation is necessary for the best interests of the child (article 9(1)). In addition to all rights which adults enjoy, the CRC emphasises that children capable of forming a view have the right to express that view on all matters affecting them and should be given due consideration and weight in accordance with their age and maturity (article 12(1)).

54. The forcible treatment of children without consent engages human rights including the right to privacy and family (sections 13 and 17 of the *Charter* respectively). Any policies or procedures relating to forcible feeding must be a justified limitation pursuant to section 7(2) of the *Charter*. In the United Kingdom, the Children's Commissioner for England and the House of Lords, have expressed concerns these rights may be infringed, particularly when children are exposed to abuse or unpleasant treatment in adult wards.[42]

7.4 Goal 2.3: delivering appropriate mental health support for particular groups of young people

55. The HRLRC welcomes the Consultation Paper's recognition that vulnerable young people's circumstances reflect significant and often overlapping risk factors, including homelessness. Goal 5.2 of the Consultation Paper also recognises the needs of young people with mental illness who are homeless or at risk of homelessness.

56. Poor health has been demonstrated to be a contributor to and consequence of homelessness.[43] While homelessness exacerbates and complicates the treatment of many health problems, some health problems are consequences of homelessness.[44]

57. At a Homelessness Consumer Forum in Melbourne run by the Homeless Persons' Legal Clinic in July 2008, 51 per cent of people surveyed reported that they became homeless as a result of mental health problems and a lack of access to health care, 62 per cent stated that their mental health had worsened as a result of their experience of homelessness, and 78 per cent of people indicated that they had ongoing physical or mental health issues.

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[42] House of Lords Joint Committee, Fifteenth Report, page 44

[43] Adrienne Lucy, 'South Eastern Sydney Area Health Service Homelessness Health Strategic Plan 2004-09' (2004) 17(8) *Parity* 6.

[44] Institute of Medicine (US), *Homelessness, Health and Human Needs* (1998), 39.

58. Identified barriers to adequate health care for people experiencing homelessness include, among others, financial barriers, lack of transportation to medical facilities, competing needs where basic subsistence needs in relation to food, accommodation and income take precedence over health care, and lack of health insurance.[45]

59. Improving health outcomes for homeless people requires specifically targeted health care services, delivered together with programs to address underlying causes of homelessness.[46]

60. In the HRLRC's opinion, delivering appropriate mental health support for young people, including homeless youth engages rights which must be protected and promoted under the *Charter* such as the right to life and freedom from cruel, inhuman and degrading treatment (sections 9 and 10 respectively of the *Charter*).

61. The *Limbuela Case*[47] before the House of Lords concerned a man who arrived in the UK from Angola and claimed asylum. He was provided with emergency accommodation under the Secretary of State's power to provide accommodation for people given temporary admission to the UK. Shortly afterwards, however, the Secretary of State decided that he had not claimed asylum 'as soon as reasonably practicable', and his accommodation was taken away. The man was left destitute, and his health deteriorated as slept rough outside a police station and begged for food from passers by. The House of Lords held that The obligations imposed by the prohibition against torture and ill-treatment are threefold.

    (a) First, there is a 'negative' obligation on the part of the state and public authorities to not engage in ill-treatment.

    (b) Second, there is a 'substantive' obligation on the part of the state and public authorities to enact and establish the safeguards, facilities and conditions necessary to ensure that people are not debased.

    (c) Third, the prohibition against torture carries with it a 'procedural' obligation to adequately investigate, punish and remedy breaches of the negative and substantive obligations.

62. This means that the Victorian Government is under an obligation to take positive steps to ensure that there are adequate safeguards, facilities and conditions preventing indignity and debasement. In addition, where allegations are raised, the Government must take steps to investigate and provide an adequate remedy.

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[45] L Gelberg, L S Linn, R P Usatine and M H Smith, *Health, Homelessness and Poverty: A Study of Clinic Users* (1996) 2325-30; National Mental Health Working Group, *Homelessness and Mental Illness: Bridging the Gap – Discussion Paper* (2003) 5; Margaret Eberle et al, *Homelessness: Causes and Effects – A Review of the Literature* (2001) 16-17.

[46] Paula Braveman and Sofia Gruskin, 'Poverty, Equity, Human Rights and Health (2003) 81(7) *Bulletin of the World Health Organization* 539, 540.

[47] *Limbuela v Secretary of State for Home Department* [2006] 1 AC 396, [7].

Recommendation 6:

Any alteration to mental health law, policy or practice in relation to children must comply with the rights of the child and ensure that any limitation on this right is necessary and proportionate to the aim of the limitation. The HRLRC recommends that in seeking appropriate mental health support for particular groups of young people, the Department adopt a human rights-based approach. This will ensures that any response is appropriate in terms of ensuring respect for the young person's freedom, dignity and equality.

Recommendation 7:

The HRLRC recommends that outcomes proposed by the Reform should ensure that all public authorities providing services in the area of mental health take positive steps to ensure that there are adequate safeguards, facilities and conditions preventing indignity and debasement. Further, where allegations are raised, public authorities must take steps to investigate the allegation and provide adequate and effective remedies.

7.5 Goal 2.4: building stronger families where there is a risk related to mental health problems

63. The HRLRC recognises that families where a parent has a mental illness require support. The Consultation Paper notes 'We aim to intervene earlier and more systematically in promoting the safety and well-being of children at risk' (page 67).

64. The HRLRC submits that any intervention must be compatible with the *Charter*, specifically the rights to privacy (section 13), family (section 17) and children (section 17(2)) and any limitations on these rights must accord with section 7(2) of the *Charter*.

7.6 Goal 4.4: Tailoring services for clients with particular needs

65. The Consultation Paper recognises that inpatient capacity in Victoria's prison system for mental health patients is under signification pressure.[48] The Consultation Paper asks, "*what reforms are required to improve the efficiency and effectiveness of the community and bed-based forensic service system"*?[49]

66. The HRLRC notes that people with a mental illness are overrepresented in all types of custody, including the criminal justice system and the immigration detention system. Concerns raised in the Burdekin Report include:

    (a) procedures for detecting and treating mental illness in the criminal justice system were found to be inadequate in each and every Australian jurisdiction;[50]

    (b) mentally ill people detained by the criminal justice system were found to be frequently denied treatment;[51]

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[48] Consultation Paper, page 87.

[49] Consultation Paper, page 88.

[50] Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

[51] Ibid.

(c) in some cases, the response of the system to mental illness was not treatment but brutality or an increase in harshness or length of detention;[52] and

(d) children with mental illnesses and/or intellectual deficiencies are over-represented in the juvenile justice system.[53]

67. Recent research indicates that, of a total Australian prison population of around 25,000 people, approximately 5000 inmates suffer serious mental illness.[54] As the Consultation Paper recognises, rates of major mental illnesses are between three and five times higher in the prison population than in the general Australian community.[55] There is both a causal and consequential link between imprisonment and mental illness.

68. The symptoms and behaviour of people with mental illness, once they are in custody, are frequently misunderstood by untrained custodial officers to the extent that human rights abuses are a common occurrence. A failure to notify the family or carer of a person with a mental illness of their detention has resulted in the inappropriate detention of consumers. Where consent to talk to family or primary carers is refused by acutely ill consumers, custodial services rely on the ability of a vulnerable consumer to represent their own histories accurately and advocate for their own needs. This is compounded where the person is from a culturally diverse background or does not speak English well.

69. There is significant evidence that mental health care in Victorian prisons is manifestly inadequate and may amount to a level of neglect that constitutes degrading treatment or punishment. According to evidence given by Forensicare (the Victorian Institute of Forensic Mental Health) to a recent Senate Select Committee on Mental Health:

(a) adequate mental health services are very rare in prisons;

(b) the seriously mentally ill are often poorly managed in prisons and regularly wait in prison for admission under conditions which are not conducive to well being and recovery and may cause 'enormous destruction to the psychological and human aspects' of the individual concerned; and

(c) there is a pressing and increasing requirement for additional in-patient beds to meet the needs of the criminal justice system.[56]

70. Forensicare concluded that:

> Currently in Australia the provision of care to mentally ill prisoners is rudimentary at best. Rarely are proper provisions made.[57]

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[52] Ibid.

[53] UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), [73].

[54] J P R Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

[55] J P R Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

[56] Forensicare, *Submission to Senate Select Committee on Mental Health* (May 2005) 4, 5, 19 and 20.

[57] Ibid.

71. The inadequate provision of mental health care in prisons raises serious concerns in relation to the rights to be free from torture and treated humanely while deprived of liberty.[58]

72. The European Court of Human Rights has consistently held that a failure to provide adequate facilities so as to ensure that prisoners are not subject to degrading conditions, including particularly the failure to provide adequate health care to mentally ill prisoners, may amount to a violation of the prohibition against torture.[59] This right is protected in section 10 of the *Charter*.

73. In *Dyebeku v Albania*,[60] the European Court held that public authorities have a particular duty and responsibility for the health and well-being of those in its custody or detention. The Court further held that a failure to provide adequate mental health care to detainees in circumstances which do not adequately accommodate, or which result in the deterioration of, a person's mental health, may amount to a violation of the prohibition on torture and ill-treatment. In this case, the European Court held that as the prohibition against torture and ill-treatment is absolute and non-derogable, 'a lack of resources cannot in principle justify detention conditions which are so poor as to reach the threshold of severity for art 3 to apply'.

74. As the European Court stated in *Mamedova v Russia* [2007] ECHR 7064/05, [63], 'it is incumbent on the…Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties'.

75. The EWCA similarly held in *Noorkoiv v Secretary of State for the Home Department* that the Government could not be excused from what were otherwise breaches of the right to liberty and freedom from cruel treatment in the prison context 'simply by pointing to a lack of resources that are provided by other arms of government'.[61]

76. Finally, both UK courts and the European Court have held that the quality of healthcare to those imprisoned by the action of the state is not relative. The European Court held that while an individual in society may have no right to healthcare under the Convention, let alone adequate healthcare, where he or she is in the state's custody, the state must ensure that he receives the medical care he or she requires.[62]

Recommendation 8:

The HRLRC recommends that the Reform look in greater detail at the incidence of and response to mental illness in prisons. The HRLRC recommends that additional funding and resources be allocated to ensure adequate mental health care for prisoners who are experiencing mental illness. All Victorian prisons have an absolute and non-derogable

[58] *Charter*, sections 10 and 22 respectively.

[59] See especially, *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii and others v Moldova* [2007] ECHR 8721/05.

[60] [2007] ECHR 41153/06 (18 December 2007)

[61] [2002] EWCA Civ 770, [31].

[62] *Holomiov v Moldova* [2006] ECHR 30649/05 (7 November 2006).

obligation to provide adequate mental health care to those prisoners in their care.

8. Human Rights engaged by the *Mental Health Act*

8.1 Summary

77. In addition to the discussion above, there are a number of practices and policies currently implemented in Victorian mental health services that engage human rights under the *Charter*. This section considers the following with reference to the *Charter* and relevant international jurisprudence:

(a) the conduct if the Mental Health Review Board

(b) involuntary treatment;

(c) review of involuntary treatment;

(d) detention without consent; and

(e) restraint and seclusion.

8.2 The Mental Health Review Board and the *Charter*

78. A recent case of the Mental Health Review Board, *P* 09-003 [2008] VMHRB 1 (8 July 2008) considered the relevance of the *Charter* to the failure of the Board to conduct a review of involuntary treatment of a patient under the *Mental Health Act*. The applicant, P, was placed on a community treatment order ('CTO'), pursuant to which he was subject to involuntary mental health treatment, by an authorised psychiatrist on 15 February 2007. Pursuant to s 30(4) of the *Mental Health Act 1986* (Vic), the Mental Health Review Board '*must* conduct a review of the extension of a community treatment order *within* 8 weeks after the order is extended'. While the Board listed a review of X's CTO, the review was adjourned and ultimately did not occur until more than one year later. A number of aspects of the decision are noteworthy as to the obligations on the Mental Health Review Board:

(a) the parties agreed that the *Charter* did apply to the Board's conduct and to the application of the interpretative principle to events occurring after 1 January 2008;

(b) the Board's staff are 'clearly' public authorities and are required to act compatibly with and give proper consideration to human rights under s 38;

(c) the Board itself is a public authority when acting in an administrative capacity, including listing cases, scheduling hearings and sending out notices for hearing;

(d) when acting in a judicial or quasi-judicial capacity, the Board it is a tribunal (and thereby subject to the *Charter* under s 6(2)(b)) having regard to factors including that:

(i) it is established by statute and comprises a President and members;

(ii) the Act refers to 'proceedings' and 'parties' and requires that the Board exercise 'court-like' duties and functions, including affording natural justice; and

(iii) the decisions of the Board are substantive, binding and have significant consequences for the rights and duties of parties.

(e) the Board is required by the *Charter* to ensure a 'fair hearing'. The Board considered that this obligation reinforces the Board's obligation under the *Mental Health Act* to ensure natural justice.[63]

79. In regards to the obligations of the Board and its staff as public authorities, the Board recognized that 'the *Charter* may require the Board to reconsider and, if necessary, adapt its practices, procedures and processes to ensure compliance with patients' *Charter* rights'.

80. More broadly, the case considered which *Charter* rights were engaged by involuntary mental health treatment. It was submitted for P that his continued involuntary treatment engaged and limited his rights to freedom from medical treatment without consent (s 10(c)) and to privacy (s 13(a)). While the Board did not consider the content of these rights in detail, it appeared to accept that, at the least, they are engaged by involuntary treatment.

81. Finally, the Board accepted that, under s 32(1) 'in cases where it is required and able to do so in order to apply the Act, the Board must make a *Charter* consistent interpretation of the [Mental Health] Act'. In terms of an approach to s 32, the Board adopted the five step approach of the New Zealand Supreme Court in *Hansen v The Queen* [2007] NZSC 7.[64]

8.3 Involuntary treatment

82. This *MHA* power may burden the *Charter* rights to protection against torture, cruel and inhumane or degrading treatment, humane treatment while detained and recognition and equality before the law. As section 10 of the *Charter* requires that medical treatment only occur with the full, free and informed consent of the patient, section 12AD of the *MHA* is prima facie incompatible with this right. Further, it is arguable that the extent of the limitation on this right to protection against torture, cruel, inhumane and degrading treatment is not reasonable when measured against international standards which, amongst other things, state that where consent is refused by a patient with capacity, treatment may nonetheless be administered without consent only where that refusal is *unreasonable*.

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[63] In our opinion, the powers of the Board include the power to interfere substantially with a person's human rights, including the right to liberty and freedom from detention and involuntary treatment. Recognising this, Principles 17 and 18 of the UN *Principles for the Protection of Persons with Mental Illness* apply the elements of the right to a fair hearing (such as: the right to legal representation; access to documents before the review body; the right to a public hearing; the right to reasons; and the right to an expeditious hearing) to mental health review bodies. It is notable that, overwhelmingly, the UK courts and the European Court of Human Rights have simply accepted that mental health review bodies within their jurisdictions are subject to the right to a fair hearing.

[64] The Board also appeared to endorse the approach taken by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] AC 557, stating that 'every reasonable effort' should be taken 'to interpret the Act's provisions in a way that is compatible with *Charter* rights'. In that case, Lord Nicholls stated that:

> the interpretive obligation…is of an unusual and far reaching character. [It] may require a court to depart from the unambiguous meaning the legislation would otherwise bear.

83. Notwithstanding this clear inconsistency, the court's assessment of whether this limitation upon this *Charter* right is permissible will depend on the facts of the case. An absence of any requirement in the *MHA* that the refusal to consent be unreasonable may also be considered a disproportionate limitation on the right to the freedom of movement and the right to freedom from inhumane treatment while deprived of liberty.

84. The House of Lords has said that the right to respect for private and family life may be interfered with when medical treatment is prescribed to protect and improve a person's health.[65] The European Court of Human Rights uses the test of "medical necessity" to determine whether the use of treatment without consent reaches the threshold to be considered as inhuman or degrading. This test may be relevant in interpreting section 10 of the *Charter*, for example when treatment may be considered to constitute inhumane or degrading treatment.

85. In the United Kingdom, the House of Lords has emphasized that people who lack the capacity to consent to their treatment and care (and subsequently may be deprived of their liberty), must be protected by 'robust' and adequate safeguards.[66] Relevant considerations when a person is not able to consent to treatment include:[67]

(a) decisions must be taken on the basis of the person's best interests;

(b) the person must be helped to participate as fully as possible in the decision-making process;

(c) the person's past and present wishes, feelings, beliefs and values, must be considered;

(d) a specified list of people, including family, friends and carers, must be consulted and their views taken into account in determining what is in the person's best interests;

(e) where serious medical treatment is proposed, an Independent Mental Capacity Advocate (IMCA) must be instructed to support and represent the person if there is no one to consult among friends, family and carers;

(f) an IMCA, or any of the others who need to be consulted, has the right to request a second opinion; and

(g) treatment decisions may be determined by a valid and applicable advance directive, or by the consent of an attorney if within the authority given to them by the person, or by a deputy if within the authority granted by the Court of Protection.

86. The above requirements aim to protect a person's human rights, notably their right to respect for privacy and humane treatment when deprived of liberty.

Recommendation 10:

In conducting the Reform, the Department should review involuntary treatment provisions to

[65] House of Lords 15th Report, page 30.

[66] House of Lords 15th Report, page 33.

[67] House of Lords 15th Report, page 38.

ensure that:

(a) decisions are taken on the basis of the person's best interests;

(b) the person be helped to participate as fully as possible in the decision-making process;

(c) the person's past and present wishes, feelings, beliefs and values, be considered;

(d) a specified list of people, including family, friends and carers, be consulted and their views taken into account in determining what is in the person's best interests;

(e) where serious medical treatment is proposed, an Independent Mental Capacity Advocate be instructed to support and represent the person if there is no one to consult among friends, family and carers; and

(f) treatment decisions be determined by a valid and applicable advance directive, or by the consent of an attorney if within the authority given to them by the person, or by a deputy if within the authority granted by the Court of Protection.

8.4 Reviewing Involuntary Treatment

87. Reviewing involuntary treatment and conditions is an important way to certify that people are not being subject to stringent conditions which may deprive them of their liberty. Patients should only have conditions placed upon them and receive treatment when such an order is necessary and proportionate to any deprivation of rights.

88. It is important to note that the Mental Health Review Board of Victoria has no power to order changes to treatment already being provided. Subsequently, if conditions imposed on a community treatment order patient or an involuntary patient are too onerous, they may result in a deprivation of their liberty and privacy.

8.5 Detention without consent

89. This *MHA* power may burden the *Charter* rights to protection against torture, cruel, inhumane or degrading treatment, privacy and reputation, liberty and security of person, protection of inhumane treatment when deprived of liberty and equality before the law.

90. With respect to the right to protection from torture, cruel, inhumane or degrading treatment, recourse to international law when interpreting this right may result in consideration of a broader range of issues than those provided at s8 of the *MHA* in determining if involuntary detention is reasonable and proportionate in accordance with section 7 of the *Charter.* If detention can be characterised as a part of a person's medical treatment, it would be prima facie inconsistent with this *Charter* right which requires full, free and informed consent to medical treatment.

91. Recourse to international law may also result in a finding that a patient being involuntarily detained should be given reasons for that decision being made. This may

turn on the facts of the case, however, including whether a patient's treatment plan provided in accordance with section 19A of the *MHA* includes reasons for detention.

92. The right to humane treatment in detention may be considered to be disproportionately limited if the aggrieved person is able to characterise their detention as an aspect of their treatment and this is found to substantially impact on the dignity of the person detained.

93. In regards to the right to liberty and security of the person (section 21 of the *Charter*), the UK case of *Sunderland City Council v PS and CA,*[68] sets out the minimum requirements must be adhered to when a deprivation of liberty is being authorised including that:

    (a) the detention must be authorised by the court on application made by the local authority and before the detention commences; and

    (b) subject to the exigencies of urgency or emergency, the evidence must establish unsoundness of mind of a kind or degree warranting compulsory confinement.

94. This means that there must be evidence establishing at least a prima facie case that the individual lacks capacity and that confinement of the nature proposed is appropriate. Any order authorising detention must contain provision for an adequate review at reasonable intervals, in particular with a view to ascertaining whether there still persists unsoundness of mind of a kind or degree warranting compulsory confinement.[69]

95. This case codified the House of Lords' view that there should be procedures for depriving a person of their liberty before that person is detained.

96. It was accepted in the United Kingdom that when an individual is detained (in a non-emergency way) on grounds of unsoundness of mind, there must be sufficient evidence of a 'true mental disorder' in order to constitute a lawful detention.[70] This is so the right to liberty as per Article 5(1)(e) of the European Convention of Human Rights (equivalent to Section 21 of the *Charter*) is not infringed. Further, it was said by the House of Lords that

> The mere presence of mental disorders is not enough to justify compulsory confinement; it must be shown that they are of a kind or degree that warrants compulsory confinement.[71]

97. A person who has been detained must have access to and receive adequate medical treatment for any mental disorder present.

8.6 Restraint and seclusion

98. *Charter* rights that may be burdened by restraint and seclusion under the *MHA* include the rights to protection against torture and cruel, inhuman or degrading treatment, privacy and reputation, liberty and security of the person, humane treatment in

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[68] [2007] EWHC 623 (Fam).

[69] House of Lords 15th Report, page 13.

[70] House of Lords 15th Report, page 18.

[71] House of Lords 15th Report, page 21.

detention, freedom of movement and equality before the law. We note that the *MHA* requires cessation of restraint or seclusion as soon as it is no longer necessary and this test should be determined with reference to section 7(2) of the *Charter*. For instance, the use of the power wantonly, or without appropriate justification is likely to be inconsistent with the *Charter* and therefore unlawful. The Court may consider that the use of the power in situations other than utmost gravity can never be considered consistent with the *Charter*.

99. Restraint or seclusion may disproportionately limit the right to protection from torture, cruel, inhumane or degrading treatment if the restraint or seclusion was found to cause mental suffering or physical pain that is not necessary or does not further the medical treatment of the patient.

100. The right to humane treatment when deprived of liberty may be disproportionately limited by the aim of the sections of the *MHA* which include preventing persistent destruction of property. At international law, including Principle 5 of the Principles of Medical Ethics, any procedure for restraining a detainee is a contravention of medical ethics unless such procedure is determined in accordance with purely medical criteria.

101. The right to freedom of movement may also be unreasonably limited if the restraint or seclusion imposed is not the least restrictive method of treating the patient.