

# Putting human rights at the heart

*Applying human rights*

Prepared for the Mental Health and Wellbeing Division, August 2023



**We acknowledge Victoria's First Peoples and their rich culture.**

As recognised in the preamble of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) 'human rights have special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters'.

We respectfully acknowledge all Aboriginal people in Victoria and pay respects to their elders past and present.

We recognise the lived experiences of colonisation and discrimination, and the strength, leadership and resilience of Aboriginal communities. We also recognise the importance of Aboriginal and Torres Strait Islander people's distinct and culturally grounded approaches to social and emotional wellbeing.

## Disclaimer

This guide was developed for the Mental Health and Wellbeing Division of the Victorian Department of Health. It is provided for information purposes to build awareness of human rights. It should not be taken for, or relied on, as legal advice.

## Transition to new legislation

This guide was written during the transition to new mental health and wellbeing legislation in Victoria. To ensure the guide maintains currency, we have generally referred to the *Mental Health and Wellbeing Act 2022* (Vic) which is due to come into force in September 2023.

Where examples refer to historic situations, references are made to the legislation in force at the relevant time.

## A note on terminology

Language and how we use it can be powerful. The use of language is also developing.

In this guide, we generally use the term 'lived experience' to refer to people with lived experience of mental health issues and psychological distress; and, where relevant, to the distinct lived experience of families, carers and supporters.

We use the term 'consumers' or 'mental health consumers' at times for clarity when talking about people who have been users of, and subject to, the mental health and wellbeing system. We acknowledge that people may also or alternatively identify as being 'patients', 'service users', 'mad', or 'survivors of psychiatry'.

Where terms such a 'disability' and 'mental impairment' are used in legislation, we have

used these terms in this guide to ensure accuracy. However, we note that some of these legal terms are no longer best practice and may not be how people would choose to describe themselves.

'Aboriginal' is used to refer to both Aboriginal and Torres Strait Islander people in accordance with current Victorian Government protocols. 'Aboriginal' is also used in relevant legislation discussed in this guide. We note that 'First Nations' is used by some people to describe themselves.

## Thank you




Thank you to the Mental Health and Wellbeing Division for collaborating on this resource, and Jo Szczepanska for providing excellent information architecture and graphics design advice.

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# Human rights explained

This appendix sets out the 20 human rights protected in Victorian law under the Charter. It provides a brief explanation of each right and gives some context for how these rights may be relevant to work in the mental health and wellbeing system.

Examples and issues identified are illustrative to help you to understand and work with the Charter rights. This guide does not attempt to provide an exhaustive assessment of all circumstances in which human rights issues can arise. You should do your own assessment in the circumstances before you, and seek legal advice on the scope and meaning of rights if required.

At some places in this guide, we have referred to international law. Understanding the international law on which Charter rights are based can help to illustrate the scope and meaning of human rights, particularly where Charter rights have not been considered in detail by Victorian courts. International law is not binding in Victorian courts, but may be considered in interpreting the Charter.<sup>1</sup>

In our experience, the seven human rights that are most commonly engaged in the mental health and wellbeing system are:

- recognition and equality before the law (section 8)
- protection from torture and cruel, inhuman or degrading treatment (section 10)
- privacy and reputation (section 13)
- protection of families and children (section 17)
- cultural rights (section 19)
- right to liberty and security of person (section 21), and
- humane treatment when deprived of liberty (section 22).

You may prioritise learning about these, while noting other rights will likely emerge in your work from time-to-time.<sup>2</sup>

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<sup>1</sup> Charter s 32(2).

<sup>2</sup> You may take note of the right to life (section 9), freedom of movement (section 12), taking part in public life (section 18), property rights, and fair hearing (section 24).



## Recognition and equality before the law (section 8)

### Section 8. Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy their human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

**Once people are ‘tagged’ as having mental health issues they may be treated differently and, in many cases, unfairly in our society. For many people, experiences in the mental health and wellbeing system engage the right to recognition and equality before the law—there are many ways in which the system can both limit and promote this right. The right to equality under the Charter is central to the rights of people with lived experience of mental health issues and using services. It is a ‘large’ right, meaning there are many parts to it. Each of these will be unpacked separately.**

### The right to recognition as a person before the law

Whether someone is a ‘person’ or not in the eyes of the law has been significant to disability and mental health rights.<sup>3</sup> It can often determine whether someone is considered capable of holding and exercising rights. Section 8(1) of the Charter makes clear that every person has the right to recognition before the law.

#### When could this arise in your work?

When developing, reviewing or drafting mental health laws, questions of legal personhood and legal capacity are likely to arise. The Charter is likely to protect an individuals’ lawful rights to commence, defend and participate in legal proceedings<sup>4</sup>, whereas the CRPD provides a more complete picture that ‘persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’.<sup>5</sup>

<sup>3</sup> Anna Arstein-Kerslake et al, ‘Relational Personhood: A Conception of Legal Personhood with Insights from Disability Rights and Environmental Law’ (2021) 30(3) *Griffith Law Review* 530.

<sup>4</sup> The Charter and CRPD provisions protect legal personhood and capacity to different degrees. Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2013) 336 [10.19]; *Lifestyle Communities Ltd (No 3)* (Anti-Discrimination) [2009] VCAT 1869 (22 September 2009) at [278–279].

<sup>5</sup> CRPD art 12(2).

When mechanisms of supported decision-making are being developed and implemented, this supports the exercise of this right. The concept of legal capacity under the CRPD has been argued as meaning the state should not pass laws that take away the right for a person to make decisions about their mental health treatment. Instead, a state should remove any social barriers disabling a person and provide them with the necessary supports so that they can exercise their legal capacity.<sup>6</sup> While mental health laws in Victoria do not fully realise this approach, they do support its exercise to a lesser degree. Opportunities for you to enhance supported decision-making mechanisms, principles and practices within services will promote this right.

## The right to enjoy human rights without discrimination

The right to equality is also about ensuring people enjoy *all of their other rights equally*. Subsections 8(2) and (3) of the Charter set out rights to equality before the law and the equal protection of the law ‘without discrimination’.

This means that you should not be denied enjoyment of your other rights under the Charter for discriminatory reasons, such as your mental health status<sup>7</sup>, disability, sex, sexual orientation or other protected attribute. This extends to carers of people with mental health and other issues. The meaning of discrimination is the same as in the *Equal Opportunity Act 2010* (Vic) (**Equal Opportunity Act**),<sup>8</sup> which also outlines the ‘protected attributes’ which protect people from particular communities.<sup>9</sup>

The Equal Opportunity Act and this right protect against any limitations on your rights based on **direct** or **indirect** discriminatory reasons. Direct discrimination ‘occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute’.<sup>10</sup>

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### Direct discrimination: how can you spot it?

A simple starting point is to ask yourself the question: is someone being treated unfairly? If that person is treated unfairly because of a ‘protected attributed’ such as mental health (see below), there may be direct discrimination.

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Indirect discrimination ‘occurs if a person imposes or proposes to impose, a requirement, condition or practice—(a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and (b) that is not reasonable’.<sup>11</sup>

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<sup>6</sup> Chris Maylea and Asher Hirsch, ‘The Right to Refuse: The Victorian Mental Health Act 2014 and the Convention on the Rights of Persons with Disabilities’ (2017) 42(2) *Alternative Law Journal* 149.

<sup>7</sup> Mental health is included in the definition of disability: *Equal Opportunity Act 2010* (Vic) s 4(1).

<sup>8</sup> Charter s 3.

<sup>9</sup> The protected attributes are age, breastfeeding, employment activity, gender identity, disability, industrial activity, lawful sexual activity, marital status, parental status or carer status, physical features, political belief or activities, pregnancy, profession, trade or occupation, race, religious belief or activity, sex, sex characteristics, sexual orientation, an expunged homosexual conviction, a spent conviction, a personal association with someone with one of these protected attributes: *Equal Opportunity Act 2010* (Vic) s 6.

<sup>10</sup> *Equal Opportunity Act 2010* (Vic) s 8(1).

<sup>11</sup> *Equal Opportunity Act 2010* (Vic) s 9(1).

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### **Indirect discrimination: treated the *same*, but unequal *outcomes***

Sometimes a requirement, condition or practice may be stated in 'neutral' terms but disadvantages someone who is a member of a group protected under law (see below). For example, having one entrance to a ward via stairs may appear equal for everyone, but in fact disadvantages a wheelchair user. It's important to consider whether blanket rules or policies will disadvantage specific groups. When the requirement, condition or practice: (1) disadvantages people of a protected group, and (2) is not reasonable, this is indirect discrimination.

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There are several steps in determining whether a rule, condition or practice is, but broadly they will ask you to assess whether a practice is **reasonable** or not.<sup>12</sup>

### **When could this arise in your work?**

In your work you will often be developing or implementing policy that will determine whether people are able to enjoy their human rights without discrimination.

#### **Meeting individual needs**

Mental health and wellbeing services should be responsive to people's different needs. However, individuals from marginalised or under-represented backgrounds often experience care that isn't responsive to their circumstances, or worse, is racist, ableist, not trans or gender-inclusive. This right should spring to mind when you hear these concerns.

#### **Stigma, discrimination and power imbalances**

In areas where there is historical and contemporary mental health stigma, discrimination and power imbalances, this right becomes relevant. It can become relevant where someone receives a lower standard of care because of a particular attribute they have. It can also be relevant where designated consumer and carer workforces experience poorer workplace conditions because of their mental health experience or carer experience.

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### **Discrimination within the mental health system**

The Royal Commission noted that discrimination occurs in relation to people with a mental health diagnosis both in the community and in the mental health system itself. It noted that:

Many people shared with the Commission their experiences of stigma and discrimination within healthcare settings, including mental health settings. Consumers spoke of being ignored, judged, dismissed, undermined and not believed, particularly in relation to their personal history and treatment needs—and often during periods of crisis.

There are many consequences that arise from this stigma and discrimination. Research indicates that stigma within healthcare settings is a deterrent to seeking care. People described being dehumanised and devalued by health professionals, being excluded from decisions about care, being threatened with coercive treatment, and being spoken to in a

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<sup>12</sup> For the more detailed steps involved, see: *Equal Opportunity Act 2010* (Vic) s 9(3).

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demeaning manner. These experiences often reflect a lower quality of care, breaches of consumer human rights, and poorer health outcomes ...<sup>13</sup>

The Royal Commission also heard about stigma and discriminatory attitudes towards people diagnosed with particular conditions. For example, Dr Chris Groot, Lecturer at the Melbourne School of Psychological Sciences, University of Melbourne told the Royal Commission that:

there is a common perception in mental health workers that people labelled with [borderline personality disorder] are manipulative and may not actually be at risk of suicide when they present as such to crisis services; however, they are 45 times more likely to die by suicide than people in the general population'.<sup>14</sup>

Associate Professor Dan Siskind, Clinical Academic Psychiatrist at the Princess Alexandra Hospital and academic at the University of Queensland, pointed the Royal Commission to discrepancies in diagnosis and treatment for cancer:

people with [a diagnosis of] schizophrenia are no more or less likely to develop cancer, but are much more likely to die of it; they are less likely to be investigated for cancer, and even if they are investigated for cancer, they are less likely to get evidence-based care.<sup>15</sup>

Refusing care, or providing a lower standard of care, to someone because they have a particular diagnosis, such as borderline personality disorder, is treating them unfavourably because of a protected attribute and is likely to be unlawful discrimination.<sup>16</sup> Appropriate clinical care, including assessments about whether someone should be given access to a service, must still operate within constraints of the law. Often, this will require public officials, services and clinicians to work with people with lived experience to design and implement solutions that address clinical and psychosocial needs in a non-discriminatory way.

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## **The right to equality before the law, equal protection from the law without discrimination, and equal and effective protection against discrimination**

There are three parts to section 8(3). The first part addresses the right to equality before the law. This aspect of the right is about the general application, administration and enforcement of the law and the equal treatment of all persons who come before the law.

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<sup>13</sup> State of Victoria, 'Royal Commission into Victoria's Mental Health System, Volume 3: Promoting Inclusion and Addressing Inequities' (n 33) 532 (references omitted).

<sup>14</sup> Ibid 534 (references omitted).

<sup>15</sup> Ibid (references omitted).

<sup>16</sup> This rule does not apply where a service has been established to meet the needs of people with a particular diagnosis and the service refuses to treat people without that diagnosis. The specialist service is likely to be a special measure under which different treatment based on diagnosis is not unlawful discrimination. Refer to Charter s 8(4) and *Equal Opportunity Act 2010* (Vic) s 12.



The other two parts of section 8(3)—the equal protection of the law without discrimination and equal and effective protection against discrimination—require substantive equality, that is, that people may need to be treated differently to ensure equal protection.<sup>17</sup>

### When this may arise in your work

Victorian courts have found this right to impose procedural requirements on courts and tribunals to make reasonable adjustments to ensure that they are accessible.<sup>18</sup> Another example where this applies is regarding the use of interpreters (refer to the example on the following page). Therefore, where you are setting standards for mental health services or tribunals, you may need to consider these duties.

### Lived and living experience workforce stigma, discrimination and power imbalances

The lived and living experience workforce (**LLEW**) is a crucial component of the mental health and wellbeing system. It does, however, face significant cultural barriers in the workplace. The Royal Commission found that people with lived experience and the LLEW are held back by ‘complex power imbalances rooted in professional, historical, social and statutory hierarchies’.<sup>19</sup> This can form stigma and discrimination faced by the LLEW.

Victorian law does not separately protect people with mental health issues from vilification in the way it protects the attributes of race and religion.<sup>20</sup> Tasmania’s laws protect a broader range of attribute groups from public acts inciting hatred, including people with disability.<sup>21</sup> The Victorian Government has committed to carefully considering extending anti-vilification protections to additional groups.<sup>22</sup>

### Special measures

Section 8(4) of the Charter makes clear that measures adopted to assist or advance persons or groups who have been disadvantaged because of prior discrimination do not constitute discrimination. This sub-section recognises that special measures may be required to achieve equality for some groups in the community. It aligns with the provision for special measures in the Equal Opportunity Act.<sup>23</sup>

### When this may arise in your work

This is most likely to arise where you are designating roles within the Division for people with mental health consumer or carer experience or for Aboriginal Victorians. This reaffirms

<sup>17</sup> See for example, Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 10.

<sup>18</sup> *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 at [108] per Bell J. Refer also to *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1 at [249] per Tate JA.

<sup>19</sup> State of Victoria, ‘Royal Commission into Victoria’s Mental Health System, Volume 3: Promoting Inclusion and Addressing Inequities’ (n 32) 16.

<sup>20</sup> Simon Katterl, ‘Words That Hurt: Why Mental Health Stigma Is Often Vilification, and Requires Legal Protection’ (2022) 0(0) *Alternative Law Journal* 1; *Racial and Religious Tolerance Act 2001* (Vic).

<sup>21</sup> *Anti-Discrimination Act 1998* (Tas) s 19.

<sup>22</sup> Department of Justice and Community Safety, ‘Victorian Government response to Anti-Vilification Protections’, <<https://www.vic.gov.au/response-inquiry-anti-vilification-protections>>.

<sup>23</sup> *Equal Opportunity Act 2010* (Vic) s 12.

the Division's capability of taking positive steps to designate roles for particular communities. It may also arise when you are designing or commissioning services specifically tailored to meet the needs of particular groups, such as younger or older people, women, LGBTIQ+ people, people with disability and Aboriginal Victorians.



# EQUALITY AND THE RIGHTS OF PEOPLE WHO USE ALCOHOL AND DRUGS

## PEOPLE WHO IDENTIFY AS HAVING 'SUBSTANCE USE DISORDER' HAVE EQUALITY RIGHTS.

Equality rights are run in tandem with rights against discrimination under the Equal Opportunity Act. The Equal Opportunity Act protects people with a disability, including people with a 'mental or psychological disease or disorder'.<sup>24</sup> This includes individuals diagnosed or who identify as having one of a number of 'substance use disorders'.<sup>25</sup> This means that people who use alcohol or drugs and who identify as having this diagnosis should not get a lower standard of care, or be disadvantaged in their access to care, because of that diagnosis.

There are several ways that people who use drugs may have this right violated. These include:

- being unreasonably excluded from mental health care based on a previous or current drug and alcohol use, even when they require mental health support
- not providing recovery-oriented care that meets the person's personal preferences
- not being given adequate support within a mental health service when they are withdrawing from alcohol or drugs
- not being provided certain medications because of stigma or other unreasonable decisions rather than based on reasonable
- rigid processes, such as drug-dispensing processes that do not work over weekends or public holidays, that may disadvantage some people who use drugs.<sup>26</sup>

For Division staff, they should consider how the decisions they make today (or don't make) can impact on the care of someone that uses alcohol or drugs tomorrow. This may have implications for funding agreements, models of care, prescribing processes or directions on opening times for services.







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<sup>24</sup> *Equal Opportunity Act 2010 (Vic)* s 4.

<sup>25</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 5<sup>th</sup>-TR ed, 2022) 545–560.

<sup>26</sup> These are a collection of common problems, but not exhaustive: Interview with Clare Davies, 'Interview with SHARC CEO Clare Davies' (Telephone, 23 March 2023).

# TAKE-HOMES: EQUALITY

 <p><b>Set policies and commission services that promote equal <i>access</i> and <i>standards</i> of care</b></p> <p>When developing policies for or commissioning new or existing services – including funding agreements, program logics, service specifications and design principles, outcomes and processes – be sure to consider how <i>all</i> Victorians can get equal access to, and quality of, care, treatment and support. Also consider the measures and accountabilities you put in place to ensure that your policy and funding approaches are driving equality in practice.</p>	 <p><b>Promote the Equal Opportunity Act</b></p> <p>In your work with services, you should support them to understand their duties under the Equal Opportunity Act. You should ensure that service providers understand direct discrimination and indirect discrimination and their positive duty to take active steps to prevent discrimination. You should ensure that they understand all of the communities and parts of people’s identity that are protected under the Equal Opportunity Act and that they act to ensure that their workplaces and services are safe and accessible for Victoria’s diverse population.</p>
 <p><b>Provide instructions to services on discrimination and equality</b></p> <p>The Division could provide instructions – through law, policy, advice and dialogue – about how service providers must ensure their services and workplaces are free of discrimination. This can include instructions on service eligibility requirements, assessment processes, available treatments, reviews staffing mixes, complaints processes and infrastructure.</p>	 <p><b>Neutrality is not equality</b></p> <p>Don’t assume that because your policy or decision doesn’t have overt or direct discrimination in it, that it can’t be indirectly discriminatory. Policies that appear neutral but disadvantage someone based on their mental health, disability, gender, sexuality, race, religion, carer status or other protected attribute may still be discriminatory. You need to take positive steps to address these inequalities.</p>
 <p><b>Consider staff, consumers and families, carers and supporters</b></p> <p>Ensure that your policies and policies of mental health and wellbeing services enshrine equality for staff, consumers, as well as families, carers and supporters. This shouldn’t prevent policy decisions prioritising the views of consumers where they are closest to the problem being addressed.</p>	 <p><b>Don’t develop policies that unreasonably limit the right to equality</b></p> <p>Don’t develop policies that unreasonably limit people’s right to equality just because they have been diagnosed with a mental health issue. These may be existing or new policies. People’s right to equality includes their right to enjoy their other human rights without discrimination.</p>



## Right to life (section 9)

### Section 9. Right to life

Every person has the right to life and has the right not to be arbitrarily deprived of life.

The United Nations (UN) Human Rights Committee has described the right to life in the International Covenant on Civil and Political Rights (ICCPR) (upon which section 9 of the Charter is based), as ‘the supreme right ... [which] has crucial importance both for individuals and society as a whole’.<sup>27</sup>

### When could this arise in your work?

#### Ensure your policies don’t arbitrarily deprive someone of life

It is crucial that any policies you develop don’t arbitrarily or intentionally deprive someone of life. Whether something is arbitrary or not will depend on the reasonableness, necessity and proportionality of your policy or decision.<sup>28</sup>

#### You may need to take “positive” steps to meet this obligation

Meeting this duty doesn’t just mean avoiding actions that could deprive someone of life. It may mean that you as a policy maker or decision-maker need to take positive steps to protect rights.<sup>29</sup> This duty tends to be enhanced where someone is in the care of the state, such as in prisons, detention centres, medical facilities or mental health facilities.<sup>30</sup> This could require Division staff to ensure they have taken positive steps to ensure that the facilities and services in these settings are adequate to support the life of a person. This can include access to health services and the elimination of things that can pose a life-threatening risk to health and safety (such as dangerous infrastructure).

#### Investigations into deaths: Taking a systemic and preventative view

To give effect to this right, it most likely requires that the state undertake investigations into deaths when someone is in their care.<sup>31</sup> This reaffirms that the Division should expect that coronial inquiries from the Victorian Coroners Court should follow the death of a person

<sup>27</sup> Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)*, 124th sess, UN Doc CCPR/C/GC/36, (3 September 2019) [2].

<sup>28</sup> *Ibid* [12].

<sup>29</sup> *Veness & Medical Board of Australia (Occupational Discipline)* [2011] ACAT 55 at [35] interpreted the equivalent duty in the ACT to mean taking “appropriate steps”. Also, section 7(1)(g) of the *Public Administration Act 2004* (Vic) requires public servants to promote Charter rights by ‘actively implementing, promoting and supporting’ them.

<sup>30</sup> For a case example in the UK, see *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74 (10 December 2008) [68] per Lord Rodger.

<sup>31</sup> This was reflected in the explanatory memorandum for the Charter when introduced: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 10. This was re-affirmed by the Victorian Coroners Court during one of its reports: *Coronial Investigation of 29 Level Crossing Deaths – Ruling on the Interpretation of Clause 7(2) of Schedule 1 of the Coroners Act 2008*, 25 June 2010 [15].

who is in the care of a publicly funded mental health service. However, it is crucial that such processes and the evidence that the Division provides to such processes, include consideration of all relevant human rights.

## **When can you limit the right?**

The right to life right is considered ‘non-derogable’ under international human rights law – meaning it cannot be limited or suspended under any circumstances.<sup>32</sup> The Charter takes a different approach and provides that all rights – including the right to life – are able to be limited subject to section 7(2). However, we note that there are unlikely to be any circumstances where the arbitrary deprivation of life would be a reasonable and proportionate limitation on the right to life when applying the test in section 7(2) in practice.

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<sup>32</sup> ICCPR art 4(2) and 6(1).

# TAKE-HOMES: RIGHT TO LIFE

	<p><b>Ensure that you can assist the Victorian Coroner</b></p> <p>The right to life is engaged where the Coroner’s Court of Victoria must examine someone’s death in state care. You may assist the Coroner to understand the operation of this right as well as the operation of other rights in the mental health context.</p>		<p><b>Don’t take a narrow approach to the right to life</b></p> <p>In your guidance and engagement with services, ensure that you put the right to life within the context of broader rights under the Charter. For example, looking only at the right to life in the absence of other rights can lead to a risk-averse approach.<sup>33</sup> Such an approach can lead to unnecessary admissions into inpatient units and rights breaches. Some researchers have argued that inpatient admissions may do little to prevent suicide in the long-term.<sup>34</sup></p>
	<p><b>Ensure that standards of care are adequate</b></p> <p>In areas of custody, such as within a mental health inpatient unit, prison or police custodial setting, it is important that people are provided with adequate care that should at the least prevent death. You may need to work with other departments and oversight agencies to develop and monitor standards in these contexts. Note: the standards of care should do more than just prevent death.</p>		<p><b>Ensure that people’s right to life is prioritised across government</b></p> <p>The Division has important expertise and responsibilities in relation to people with lived experience of mental health issues and psychological distress. When you are providing comments on draft bills, policies and practices from other areas of government, ensure that you are providing advice on relevant issues that may affect the right of life of people with lived experience and that you work collaboratively to mitigate the risk of human rights breaches.</p>

<sup>33</sup> Anne-Maree Sawyer, ‘Negotiating the Interface between Risk Management and Human Rights-Based Care’ [2017] *Beyond the Risk Paradigm in Mental Health Policy and Practice* 103; Christopher James Ryan, Sascha Callaghan and Matthew Large, ‘The Importance of Least Restrictive Care: The Clinical Implications of a Recent High Court Decision on Negligence’ (2015) 23(4) *Australasian Psychiatry* 415; M Large et al, ‘Suicide Risk Assessment among Psychiatric Inpatients: A Systematic Review and Meta-Analysis of High-Risk Categories’ (2018) 48(7) *Psychological Medicine* 1119.

<sup>34</sup> Matthew Large et al, ‘Nosocomial Suicide’ (2014) 22(2) *Australasian Psychiatry* 118.



## Protection from torture and cruel, inhuman or degrading treatment (section 10)

### Section 10 Protection from torture and cruel, inhuman or degrading treatment

A person must not be —

- (a) Subjected to torture; or
- (b) Treated or punished in a cruel, inhuman or degrading way; or
- (c) Subjected to medical or scientific experiments without that person's full, free and informed consent.

Some of the darkest periods in Europe's modern history were during the experimental medical treatment imposed on people with disability by Nazi Germany, which was informed by guidance from the medical profession, including psychiatry. This led practices such as the sterilisation and murder of people with disability. While this may now seem part of a distant past, more recent practices within mental health may still be considered torture or cruel, inhuman or degrading treatment.<sup>35</sup>

### Defining 'torture' and 'cruel, inhuman and degrading treatment'?

The Charter protects against torture and cruel, inhuman or degrading treatment. This is connected to broader international duties that define these concepts. Article 1 of the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*<sup>36</sup> defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

<sup>35</sup> Penelope Weller, 'OPCAT Monitoring and the Convention on the Rights of Persons with Disabilities' (2019) 25(1) *Australian Journal of Human Rights* 130.

<sup>36</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).



Cruel, inhuman and degrading treatment, by contrast, is lower than the standard of torture, but still carries a minimum level of severity.<sup>37</sup> The line over what constitutes “treatment” can be contested and you should seek legal advice if you are uncertain.<sup>38</sup>

## When could this arise in your work?

There are several issues that can engage and possibly breach this right.

### In services or settings with poor conditions where people are forcibly detained

Wherever there are closed environments where force is used, there is a chance that this right may be limited or breached. As a policy-maker, you should be confident that your policy settings do enough to prevent people from being kept in poor conditions that may amount to degrading treatment. You should also consider whether there are ways someone can get appropriate care outside these closed environments.

### Where there is a use of force

The use of force is permitted in some circumstances under mental health and other laws. However, this right will be more likely to be breached if any use of force is disproportionate.<sup>39</sup> The use of prolonged solitary confinement may violate this right.<sup>40</sup> In promoting this right, you might ask what you have done to ensure that these practices are eliminated or used as a last resort.

### Health and other care in closed environments

In closed environments such as mental health inpatient units or prisons, people still have a right to adequate healthcare. The failure to provide adequate health care in closed environments might also violate this right.<sup>41</sup> Mental health consumers may die up to 30 years younger than the general population.<sup>42</sup> Some of this inequity may relate to the access to, and adequacy of, healthcare in these environments. Therefore, you may need to consider whether your policy settings are enabling people in these settings to have access to adequate healthcare.

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<sup>37</sup> *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; [2017] VSC 251 at [250].

<sup>38</sup> For example the Supreme Court held that smoking bans in services did not amount to ‘treatment’ and therefore didn’t engage this right: *Robert Peter De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111 at [169].

<sup>39</sup> *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; [2017] VSC 251 at [250].

<sup>40</sup> Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th session, UN Doc A/44/40 (10 March 1992) at [6].

<sup>41</sup> For example, where a failure to provide mental health care in prison settings, which ultimately resulted in a person’s suicide, was held to violate article 3 of the European Convention on Human Rights, which matches section 10(b) under the Charter: *Keenan v United Kingdom* (2001) 33 EHHR 38; [2001] ECHR 242 at [108] – [115].

<sup>42</sup> Joanne Suggett et al, ‘Natural Cause Mortality of Mental Health Consumers: A 10-year Retrospective Cohort Study’ (2021) 30(2) *International Journal of Mental Health Nursing* 390.

## What about mental health laws and this right?

Despite their tension and likely incompatibility with international human rights law,<sup>43</sup> mental health laws in Victoria permit the use of compulsory mental health treatment. In Parliament's view, the use of compulsory treatment by qualified mental health practitioners and regulatory oversight make them a proportionate response to risks to health and safety that they state arises from mental illness.<sup>44</sup> Therefore, where a treatment order has corresponded to the criteria set out under mental health laws to authorise that treatment, it will likely be deemed a proportionate limitation on this right under the Charter.<sup>45</sup>

### What can you do about compulsory treatment and human rights?

As a public servant, you don't decide on mental health laws. However, there are things you can do to promote this right to protection from torture and cruel, inhuman or degrading treatment. One way to promote this right is to do everything possible to limit the use of compulsory treatment—to ensure that it is a measure of last resort, and to assist the elimination of restrictive practices. Think of the ways that you can ensure people have access to voluntary non-coercive services and how you can incentivise the use of voluntary measures when someone is in an inpatient unit.

## When can this right be limited?

Under the ICCPR<sup>46</sup> the protection against torture is a 'non-derogable' right, meaning that it cannot be limited under any circumstances. The Charter does not make this distinction between rights. Instead, all rights, including the right of protection against torture, are able to be limited under section 7(2) of the Charter.<sup>47</sup> However, we note that there are unlikely to be any circumstances in which torture would be a reasonable and proportionate limitation on Charter rights when applying the test in section 7(2) in practice.

<sup>43</sup> Chris Maylea and Asher Hirsch, 'The Right to Refuse: The Victorian Mental Health Act 2014 and the Convention on the Rights of Persons with Disabilities' (2017) 42(2) *Alternative Law Journal* 149; Committee on the Rights of Persons with Disabilities, *General Comment No. 1, Article 12: Equal Recognition before the Law*, UN Doc. CRPD/C/GC/1 (19 May 2014).

<sup>44</sup> Victoria, *Parliamentary Debates*, Legislative Assembly (Statement of Compatibility) 23 June 2022, 2654-2655.

<sup>45</sup> *MH6 v Mental Health Review Board* [2008] VCAT 846 at [66] – [72]; *M10 v Mental Health Review Board* [2009] VCAT 1919 [18]–[21].

<sup>46</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

<sup>47</sup> Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006.' (2008) 32(2) *Melbourne University Law Review* 422, 434.

# TAKE-HOMES: PROTECTION FROM TORTURE & DEGRADING TREATMENT



## **Prioritise funding of services that provide less restrictive forms of care**

In the commissioning of services, greater consideration should be given to mental health services and supports that can provide non-coercive options. In further developing commissioning standards with the Regional Mental Health and Wellbeing Boards, you should consider how to prioritise these forms of care as they reduce the likelihood of rights breaches.



## **Utilise departmental levers to incentivise a reduction and elimination of certain practices**

Restrictive practices, search procedures and other involuntary measures such as compulsory treatment can cause serious mental and physical suffering and humiliation. The Department should utilise its levers as a systems steward – including the development of commissioning standards, Chief Mental Health Officer standards, and the publishing of performance data – to reduce and eliminate these practices. No single lever will be sufficient to achieve reductions and elimination, but all will be necessary.



## **Develop standards that monitor conditions in closed environments**

Ensure that the Chief Psychiatrist or Chief Mental Health Officer develops and monitors standards within closed environments. These include both the general living conditions in that environment, as well as the standard of mental health care and general healthcare.



## **Investigate possible breaches and enforce action to address them**

It will be important for the relevant agencies, including the Chief Psychiatrist, the Mental Health and Wellbeing Commission, and, where applicable, the police or the Independent Broad-based Anti-corruption Commission, to investigate possible breaches of this right. Appropriate resolution and enforcement actions are needed where there is a breach of this right.



# COMPULSORY TREATMENT AND HUMAN RIGHTS

## COMPULSORY MENTAL HEALTH TREATMENT ENGAGES INTERNATIONAL HUMAN RIGHTS LAW AND THE CHARTER

As human rights are becoming a more prominent feature of the mental health and wellbeing system, so are debates over the legal status and merits of compulsory mental health treatment. Compulsory mental health treatment should be compared against international human rights standards as well as the Charter.

While there is debate,<sup>48</sup> many prominent authorities argue that compulsory mental health treatment is incompatible with the CRPD.<sup>49</sup> Australia, having ratified the CRPD, must give effect to these standards in domestic legislation. However, it did, in ratifying the convention, make an ‘interpretative declaration’ that argued compulsory mental health treatment was permissible so long as it was subject to safeguards and oversight.<sup>50</sup>

Under the Charter, compulsory mental health treatment engages and limits a range of rights. This includes the right to:

- equality (section 8)
- be free from torture (section 10)
- privacy (section 13)
- culture (19)
- humane treatment when deprived of liberty (section 21)
- liberty and security of person (section 22).

The Victorian Parliament decided that both the *Mental Health Act 2014* (Vic) and the *Mental Health and Wellbeing Act 2022* (Vic) were compatible with the Charter’s human rights.

Funding decisions can also indirectly engage Charter rights when they propose the use of public *clinical* mental health rather than *psychosocial* mental health services. The latter are less likely to use restrictive practices or detain people.

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<sup>48</sup> John Dawson, ‘A Realistic Approach to Assessing Mental Health Laws’ Compliance with the UNCRPD’ (2015) 40 *International Journal of Law and Psychiatry* 70; George Szmukler, ‘Involuntary Detention and Treatment: Are We Edging Toward a “Paradigm Shift”?’ (2020) 46(2) *Schizophrenia Bulletin* 231.

<sup>49</sup> Maylea and Hirsch (n 65); Committee on the Rights of Persons with Disabilities (n 134) 1.

<sup>50</sup> Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia), opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).



# Freedom from forced work (section 11)

## Section 11 Freedom from forced work

- (1) A person must not be held in slavery or servitude.
- (2) A person must not be made to perform forced or compulsory labour.
- (3) For the purposes of subsection (2) **forced or compulsory labour** does not include —
  - (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or
  - (b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or
  - (c) work or service that forms part of normal civil obligations.

In this section **court order** includes an order made by a court of another jurisdiction.

**Victorians should be free from slavery and servitude. This right is reflected in section 11 of the Charter, which makes it unlawful to hold someone in slavery or servitude or to force someone to perform forced or compulsory labour.**

## What is ‘slavery’?

Early definitions of ‘slavery’ under international law describe it as ‘the status or condition of a person over whom any or all of the powers attaching the right of ownership are exercised.’<sup>51</sup> This definition should be distinguished from relationships such as those based on a harsh or ‘seriously exploitative employment relationship.’<sup>52</sup> Servitude is a lower standard than slavery, but similarly refers to the provision of services as a result of coercion, exploitation or dominance.<sup>53</sup>

## When could this arise in your work?

There is minimal case law on this provision. There are not many foreseeable circumstances where this right will be engaged within the Victorian mental health reform context.

<sup>51</sup> This definition was provided in Article 1 of the *Slavery Convention 1926* from the League of Nations, an international body that preceded the creation of the United Nations.

<sup>52</sup> *R v Tang* (2008) 237 1; [2008] HCA 39 from Gleeson CJ [32] and Kirby J [112].

<sup>53</sup> *Siliadin v France* (2006) 43 EHRR 16; [2005] ECHR 525 at [124].



# Freedom of movement (section 12)

## Section 12 Freedom of movement

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

**The right to move and live where you want has not always been afforded to consumers. The use of twentieth century asylums<sup>54</sup> and twenty-first century secure extended care units, as well as the ongoing use of locked wards present serious limitations on the rights of Victorian consumers.**

## Three parts to this right

The right to freedom of movement has three separate rights. First, the right to move freely *within* Victoria. Second, the right to *enter* and *leave* Victoria freely. Third, the right to *choose where to live*. These rights are qualified to include those ‘lawfully’ within Victoria, meaning those who have entered Victoria in a way incompatible with the *Migration Act 1958* (Cth) may not enjoy this right.<sup>55</sup>

The rights to freedom of movement and the right to liberty and security of person are related. They both refer to the same underlying right, being the restriction of someone’s liberty. Where they differ is the degree to which movement is restricted.<sup>56</sup> Detention is likely to engage liberty and security of person, while restrictions that fall short of detention are likely to engage freedom of movement.<sup>57</sup>

## Community treatment orders and the right to freedom of movement

The right to freedom of movement is engaged and limited by the use of community treatment orders.<sup>58</sup> They do so by specifying that a person must attend a community mental health clinic for mental healthcare. By doing so, it limits a person’s right to move anywhere within Victoria, at any time.<sup>59</sup> This was considered a necessary and proportionate limitation on the right to freedom of movement in a 2009 decision,<sup>60</sup>

<sup>54</sup> For an interesting account of early asylums, see: Giese (n 2).

<sup>55</sup> It is worth noting that this is despite many provisions in the *Migration Act 1958* (Cth) being incompatible with Australia’s obligations under the *Convention Relating to the Status of Refugees*: Jane McAdam, *Australia and Asylum Seekers*, vol 25 (Oxford University Press UK, 2013).

<sup>56</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [583].

<sup>57</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [588]; *Antunovich v Dawson* (2010) 30 VR 355; [2010] VSC 377 at [72]. This right was also engaged where a man was detained on a supervised treatment order under the *Disability Act 2006* (Vic) and had restrictions placed on his movements outside the facility (he had to have staff present because the service said there were behaviours of concern: *AC (Guardianship)* [2009] VCAT 1186 (8 July 2009).

<sup>58</sup> See: *Mental Health Act 2014* (Vic) s 52(2); *Mental Health and Wellbeing Act 2022* (Vic) s 195(2).

<sup>59</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [738].

<sup>60</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [782]–[784].

though this may be questioned after subsequent evidence doubting the clinical efficacy of community treatment orders.<sup>61</sup> However a 2010 decision found that a psychiatrist's direction that a consumer reside at a community care centre (or community care unit) instead of living at home with her mother, was not permitted under the *Mental Health Act 1986* (Vic) and also breached the right to freedom of movement.<sup>62</sup>

## When this could arise in your work

There are other circumstances where the right might be engaged and potentially breached.

### Mental health facilities and their alternatives

Within mental health settings there are routine examples of a restriction on the right to freedom of movement. The requirement to attend compulsory meetings at a clinical mental health service represents a limitation on someone's freedom of movement.<sup>63</sup> It may also be limited in other programs, such as Hospital in the Home (HitH), where individuals are required to stay in their home at the time of their appointment, in the same way that they are required to meet at a venue at a specified time.<sup>64</sup>

### Guardianship and administration orders

These could include the inappropriate use of guardianship or administration orders to sell someone's house, and therefore restrict their right regarding where they choose to live.<sup>65</sup> Mental health services should always be encouraged to explore less restrictive alternatives before applying for this path. The Division may provide information and training on those alternatives to mental health staff and services.

### Police stopping people in distress

The right to freedom of movement is limited by police powers to stop and request information, which can be either a proportionate limitation on the right or an unlawful breach, depending on how police conduct the process and the purpose of it.<sup>66</sup> Measures that regulate the lawful use of these practices by police may be important and you may have an opportunity to provide views or advice on them or to advise your Minister ahead of Cabinet deliberations. Measures to divert individuals away from police when they are in crisis is another way to promote this right.

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<sup>61</sup> Lisa Brophy, *Witness Statement 4 April 2020 to the Royal Commission into Victoria's Mental Health System* (2020) <[http://rcvmhs.archive.royalcommission.vic.gov.au/Brophy\\_Lisa.pdf](http://rcvmhs.archive.royalcommission.vic.gov.au/Brophy_Lisa.pdf)>. Lisa Brophy, Christopher James Ryan and Penelope Weller, 'Community Treatment Orders: The Evidence and the Ethical Implications' in *Critical Perspectives on Coercive Interventions* (Routledge, 2018) 30.

<sup>62</sup> *Antunovich v Dawson* (2010) 30 VR 355; [2010] VSC 377 at [174]–[184].

<sup>63</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [588]; *Antunovich v Dawson* (2010) 30 VR 355; [2010] VSC 377 at [72].

<sup>64</sup> However, this is complicated by the fact that such programs are voluntary, while at the same time, may sit against the backdrop of an existing community treatment order and the potential for an inpatient admission if the person's mental health worsens in the eyes of the mental health service.

<sup>65</sup> *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327.

<sup>66</sup> See the case where police were empowered under other legislation to stop a person if they have a suspicion of wrongdoing, however the use of coercive police questioning was not proportionate and therefore a breach of this right: *DPP v Kaba* (2014) 44 VR 526; [2014] VSC 52 at [458]–[470].

## **Lockdown measures that impact people in distress**

The recent use of lockdown measures during COVID 19, such as curfews and stay-at-home orders, were considered a proportionate limitation on this right.<sup>67</sup> When working with colleagues across the Department and across government, the Division may be asked to advise on the impacts of these kinds of restrictions on the mental health of Victorians.

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<sup>67</sup> *Loiolo v Giles* (2020) 63 VR 1, 10 [21].



# TAKE-HOMES: FREEDOM OF MOVEMENT



## **Consider the use of locked mental health wards**

Consider the utility of the ongoing use of locked wards. As systems steward and manager, the Department and Chief Mental Health Officer should set standards on the use of locked wards and whether they remain a reasonable restriction on this right.



## **Require existing community service models to show flexibility**

The requirement to attend a community clinic restricts a person's freedom of movement. The Department should develop guidelines and service standards that require a mental health service to consider more flexible ways of responding to a person's individual needs, such as use of a mobile support team. This will not be possible in all circumstances, but service design processes and individual clinician decision-making processes must consider this right.



## Privacy and reputation (section 13)

### Section 13 Privacy and reputation

A person has the right —

- (a) not to have that person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have that person’s reputation unlawfully attacked.

Privacy and reputation is of increasing importance to Australians concerned about their digital footprints. So is the ‘privacy’, or integrity, of our physical and psychological selves (our bodies and our minds). However, these have long been the concern of mental health consumers. Incursions on the private lives of consumers have been an almost constant feature of public mental health systems. Describing people in ways that they would not describe themselves has also been standard practice. The questions asked and the treatments given often invade a person’s physical and psychological self. This questioning can be through assessments and diagnoses, as well as through compulsory or coercive treatments.

The right to privacy under the Charter aims to enhance ‘the existence, autonomy, security and wellbeing of every individual in their own private sphere.’<sup>68</sup> The right has two limbs. The first regarding privacy, and the second regarding reputation. Within the first limb there are three distinct fields that are protected, being the person’s ‘privacy’, ‘family’ or ‘correspondence’. It requires that these fields not be ‘unlawfully’ or ‘arbitrarily’<sup>69</sup> interfered with. This is not just an obligation to avoid interfering with a person’s privacy, but may extend an obligation on governments to take active steps to prevent interference (a ‘positive duty’).<sup>70</sup>

### Defining terms in this right

#### What ‘privacy’ means

The concept of ‘privacy’ has no precise definition.<sup>71</sup> But it is broader than what many folk or community understandings of the term are, which commonly only focus on private information. Under the Charter and human rights law, it includes a person’s:

- individual identity (including sexual identity)<sup>72</sup>

<sup>68</sup> *Director of Housing v Sudi* [2010] VCAT 328 at [29] per Bell J.

<sup>69</sup> Therefore an interference with that right might be lawful, but it is still arbitrary. Arbitrary can be understood as an act that is ‘capricious’ or that is unpredictable, unjust or unreasonable relative to the purpose of the interference: *Mongue v Thompson* [2021] VSCA 358, [55].

<sup>70</sup> Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters (Professional) Australia Limited, 2019) 115–116.

<sup>71</sup> *Emerton J in Castles v Department of Justice* (2010) 28 VR 141; [2010] VSC 310 at [79].

<sup>72</sup> Bell J at [619]–[620] in *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646

- physical and psychological integrity<sup>73</sup>
- ‘informational’ privacy<sup>74</sup> as reflected under privacy laws.<sup>75</sup>

## What other terms mean

There are several other terms that have specific meanings under this right. They include:

- ‘Family’ which goes beyond traditional marriage- or cohabitation-based arrangements to include other family structures<sup>76</sup> non-heteronormative relationship structures<sup>77</sup>
- ‘Home’ which is understood on a case-by-case basis as broadly reflecting someone’s connection with a place<sup>78</sup> and doesn’t necessarily mean the person has to have a legal right to the place<sup>79</sup> or reside there<sup>80</sup>
- ‘Correspondence’ which can mean any form of a person’s communication.<sup>81</sup>

## When this could arise in your work

There are a range of examples where the right to privacy is engaged. These include:

- when developing laws and policies about when consumer information can be shared and with whom
- when dealing with the right to *access* private information held about oneself by government authorities,<sup>82</sup> which may be important where decisions are made about someone based on their mental health status
- information obtained during court proceedings,<sup>83</sup> which is relevant to mental health consumers who have their personal information disclosed during treatment and Mental Health Tribunal hearings, with some information and evidence that is used in hearings being criticised as misleading<sup>84</sup>
- information obtained about a person’s private life as part of employment restrictions or assessments,<sup>85</sup> which may affect consumer or carer workers who are asked to disclose information that is both unnecessary and not required to non-lived experience workers
- asking someone to declare a specific mental health diagnosis as a condition of participation in consultations where a specific diagnosis is not relevant to the issues being discussed

<sup>73</sup> Bell J at [619]–[620] in *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646

<sup>74</sup> Pound and Evans (n 161) 116.

<sup>75</sup> Such as the *Privacy and Data Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic).

<sup>76</sup> Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 14.

<sup>77</sup> For a persuasive judgment in a European context, see: *Schalk and Kopf v Austria* (2011) 53 EHRR 20; [2010] ECHR 995.

<sup>78</sup> *Director of Housing v Sudi* (2010) 33 VAR 139; [2010] VCAT 328 at [32]–[34].

<sup>79</sup> *Director of Housing v Sudi* (2010) 33 VAR 139; [2010] VCAT 328 at [32].

<sup>80</sup> *PJB v Melbourne Health (Patrick’s Case)* (2011) 39 VR 373; [2011] VSC 327 at [58].

<sup>81</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [29].

<sup>82</sup> *XYZ v Victoria Police* (2010) 33 VAR 1; [2010] VCAT 255 at [454]–[474].

<sup>83</sup> In ‘*Seachange*’ the court ultimately found the right was not engaged because the information was not ‘of an intensely private or personally embarrassing nature’ which may be distinguishable from some mental health settings: *Seachange Management v Benvol Constructions & Developments Pty Ltd* [2011] VSCA 54 at [31] – [36].

<sup>84</sup> Victoria Legal Aid (n 8) 8, 20.

<sup>85</sup> *ZZ v Secretary, Department of Justice* [2013] VSC 268 at [222], [229], and [234]–[237] per Bell J.

- when service settings permit limitations on correspondence in places of detention through the use of blanket policies<sup>86</sup>
- when laws and policies permit, regulate or fail to regulate the use of surveillance technologies and retention of personal information,<sup>87</sup> noting that similar practices are emerging in Australia and globally.<sup>88</sup>





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<sup>86</sup> *Minogue v Dougherty* [2017] VSC 724.

<sup>87</sup> *Caripis v Victoria Police* [2012] VCAT 1472 ultimately found that the police did not unlawfully limit the right to privacy of a protestor by keeping a photograph of them at a public protest so that police could plan around future protests. Central to the reasoning of the Tribunal was that the person would reasonably expect that protesting in a public place would forego the right to privacy. These facts may be distinguishable from individuals in mental health inpatient units, with any such information being considered private. Moreover, individuals may be in mental health services against their will.

<sup>88</sup> Piers M Gooding and David M Clifford, 'Semi-Automated Care: Video-Algorithmic Patient Monitoring and Surveillance in Care Settings' (2021) 18(4) *Journal of bioethical inquiry* 541.

# TAKE-HOMES: PRIVACY

	<b>Guard against inappropriate surveillance</b> Surveillance technologies are increasing as a response to mental distress and to manage the risk of suicide in mental health inpatient units. <sup>89</sup> The use of these technologies represent a significant limitation on the right to privacy. There may be the need for Charter-informed and co-designed standards for mental health services to adhere to.		<b>Make clear policies on pets</b> The Department may provide guidance to mental health services on how they can support people to keep autonomy over their private affairs when they are in an inpatient unit. For example, policies may be designed to provide guidance to services on strategies to assist people to ensure care for their pets during an admission. <sup>90</sup>
	<b>Develop standards for the implementation of information communication technologies</b> Guidance on the use of ICT in mental health facilities may be needed. This may include when, if ever, ICT devices can be removed from someone. It should also determine the person's rights regarding whether a treatment team wants to access the phone.		<b>Don't leave information dilemmas to services</b> There remain ongoing challenges about when, how and with whom mental health clinicians can share information. Clear guidance and training may be needed to assist mental health services to develop local policies and training. Devolving this to services in the absence of training and guidance risks unequal protection of this right across and within mental health services.

<sup>89</sup> Ibid; Jonah Bossewitch et al, *Digital Futures in Mind: Reflecting on Technological Experiments in Mental Health & Crisis Support* (University of Melbourne, 2022) <<https://automatingmentalhealth.cc/media/pages/digital-futures-in-mind-report/ba660f37e9-1662080126/digital-futures-in-mind-report-aug-2022-final.pdf>>.

<sup>90</sup> Read about how one consumer lost their pet, Cinnamon: Victoria Legal Aid (n 8) 16.



## Freedom of thought, conscience, religion and belief (section 14)

### Section 14 Freedom of thought, conscience, religion and belief

- (1) Every person has the right to freedom of thought, conscience, religion and belief, including —
  - (a) the freedom to have or adopt a religion or belief of that person's choice; and
  - (b) the freedom to demonstrate that person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice, or teaching.

**The ability to hold and share one's beliefs, to the extent that it does not affect other people's enjoyment of human rights, have been a central feature of human rights. However, these rights are often ignored when considering individuals who are subject to compulsory mental health treatment.<sup>91</sup> A person may be compulsorily detained on the basis that they are diagnosed as experiencing unusual beliefs, often termed 'delusions',<sup>92</sup> and because of those beliefs they present a serious risk to self and others.**

#### **'Delusions' and 'hallucinations': words that can (unintentionally) hurt**

Language around mental health and wellbeing is contested (including the terms 'mental health'). Terms like 'delusion' and 'hallucination' are common in clinical and psychiatric literature. For some, these terms are useful in describing their experiences. However, for others, these terms are jarring and do not create space for different ways to understand and respond to their experiences.<sup>93</sup> These terms are more contested amongst individuals who have had to use the public system, as assessments of being 'delusional' or experiencing 'hallucinations' has often attracted forced treatment.<sup>94</sup> This is a reminder to be careful and conscious in the use of these terms. Wherever possible, try to best reflect the language preferences of the people you are talking about.

<sup>91</sup> Mari Stenlund, 'The Freedom of Belief and Opinion of People with Psychosis: The Viewpoint of the Capabilities Approach' (2017) 46(1) *International Journal of Mental Health* 18.

<sup>92</sup> Terms like 'hallucinations' and 'delusions' can be experienced as harmful for individuals who hear voices and have unusual beliefs and who do not understand their experiences through a biomedical frame: Dirk Corstens et al, 'Emerging Perspectives from the Hearing Voices Movement: Implications for Research and Practice' (2014) 40 (Suppl\_4) *Schizophrenia bulletin* S285.

<sup>93</sup> Ibid.

<sup>94</sup> For brief information on how VMIAC members - who are more representative of people using public mental health services - understand their language preferences, see: Victorian Mental Illness Awareness Council, *Response to Royal Commission: Issues Affecting Consumers Labelled with "serious and Persistent Mental Illness"* (2020) 6-7 <<https://www.vmiac.org.au/wp-content/uploads/Response-to-Royal-Commission-request-.pdf>>.

## What different terms mean under this right

Many of the terms in this right have specific meaning. Though you don't need to know this in detail, some terms to know are:

- 'Religion' is defined as being, first, a belief in a supernatural being, thing or principle, and second, accepted conduct or rules that comport with those beliefs<sup>95</sup>
- 'Belief' is broader and can include academic and other beliefs that are seriously or genuinely held<sup>96</sup>
- 'Holding' a belief or religion is *internal*, and under international law shouldn't be limited in any form<sup>97</sup>
- 'Demonstrating' a belief is more *external* than holding a belief, and therefore can be limited in some circumstances to account for competing rights and needs.<sup>98</sup>

## When could this arise in your work?

These rights have been regularly engaged in Victoria and elsewhere.

### Where someone holds genuine beliefs about non-pharmacological interventions

Consumers may hold views about the efficacy of pharmacological interventions in assisting them, based on evidence and on their personal lived experience. Decisions that override the ability to hold that belief by requiring the use of these interventions may limit this right.<sup>99</sup>

### Where someone cannot hold or display their religious beliefs in a mental health service

Sometimes restrictions placed in mental health services mean that someone cannot practice their religious beliefs.<sup>100</sup> For example, this may be around clothing restrictions<sup>101</sup> (such as on headscarfs) or access to a phone to read prayers. One of the author's of this guide saw several instances, in their advocacy and regulatory roles, of mental health consumers being prevented from practicing their religious beliefs on the basis of a clinical assessment or about concerns with suicide risk. In many of these cases less restrictive alternatives to address these risks were not explored.

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<sup>95</sup> *Church of New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 136. It should be noted that this definition emerges from within the context of questions about whether certain belief systems should be considered religions for tax purposes.

<sup>96</sup> *R v District Court; Ex parte White* (1966) 116 CLR 644 at 661; *R v District Court (Queensland Northern District); Ex parte Thompson* (1968) 118 CLR 488 at 492.

<sup>97</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services* (2014) 50 VR 256; [2014] VSCA 75 at [537].

<sup>98</sup> See for example laws to outlaw displaying the Nazi sign publicly: Victoria, *Parliamentary Debates*, Legislative Assembly (Statement of Compatibility) 12 May 2022, 1717-1718.

<sup>99</sup> In *McAdam v Victoria University* [2010] VCAT 1429 the Tribunal found that these beliefs could constitute non-religious beliefs under section 14 of the Charter.

<sup>100</sup> *Haigh v Ryan* [2018] VSC 474 at [57].

<sup>101</sup> In *R v Chaarani (Ruling No 1)* [2018] VSC 387, the Court held that refusing permission for a woman to wear a niqab while sitting in the public gallery was a legitimate restriction on that right for security purposes (as it was deemed necessary to see a person's face). Though the Court did allow other arrangements for the woman to watch a live stream. In *Arora v Melton Christian College (Human Rights)* [2017] VCAT 1507 the Tribunal found that a seemingly neutral policy that required students to have short hair and not wear head coverings disadvantaged people from non-Christian faiths.

The division plays an important role in setting expectations of how human rights will be considered and upheld in services and pathways for people to make a complaint if their rights have been unreasonably restricted.

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**Reminder: avoid pathologising religious or other beliefs as ‘mental illness’**

People should not have their beliefs pathologised as a ‘mental illness’. Section 4 of the Mental Health and Wellbeing Act states that a person cannot be considered to have a ‘mental illness by reason only of any one or more of’ several factors, including political beliefs, philosophies, religious beliefs or sexual preferences.

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# TAKE-HOMES: FREE THOUGHT, CONSCIENCE, RELIGION AND BELIEF



## **Ensure clinical practice and service guidelines, and training, address cultural and religious beliefs**

You may need to provide clinical practice and service guidelines on how mental health practitioners should engage with people from a range of cultural and religious beliefs. This may include how they are assessed, how this could influence individual clinician decisions as well as decisions that impact a whole ward.



## **Provide service models that offer someone the opportunity to get care in the community or in their home (where they can more easily observe and practice their religion)**

Being moved to an inpatient unit might mean a person's right to practice their religion and connect with their community is unnecessarily restricted. The Department should provide a range of service options, such as community services and hospital in the home, that allow a person to continue to engage in their faith in community with others should they want this.



## **Don't permit unjustified limitations on religious and other rights**

Ongoing communications with mental health services should make clear their duties to ensure that consumers are able to practice their religious and other cultural beliefs.



# Freedom of expression (section 15)

## Section 15 Freedom of expression

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether —
  - (a) orally; or
  - (b) in writing; or
  - (c) in print; or
  - (d) by way of art; or
  - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
  - (a) to respect the rights and reputation of other persons; or
  - (b) for the protection of national security, public order, public health or public morality.

**The right to freedom of expression is considered by many to be a foundational right to liberal democracies.<sup>102</sup> What is less understood is that this right not only protects ‘free speech’. It also generates rights to information *from* governments.**

## Different elements of this right

### The right to hold an opinion

The right to hold an opinion without interference is similar to section 14 in that it is considered absolute under international law.<sup>103</sup> However, it is worth noting that all rights under the Charter can be limited under section 7(2) in certain circumstances.

### Imparting ideas and information (‘free speech’)

Freedom of expression, including ‘free speech’, is crucial to the discovery of truth, individual self-fulfilment and democratic governance.<sup>104</sup> This right is limited by the need to respect the

<sup>102</sup> For a perspective that favours and privileges this right, see: Eric Heinze, *The Most Human Right: Why Free Speech Is Everything* (MIT Press, 2022).

<sup>103</sup> Human Rights Committee, *General Comment No. 34, Article 19 Freedom of Opinion and Expression*, 102nd session, UN Doc CCPR/C/GC/34 (12 September 2011) at [9].

<sup>104</sup> *Eatock v Bolt* (2011) 197 FCR 261; [2011] FCA 1103 at [228] per Bromberg J. See also *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 at [22].

rights of others and of the need to maintain national security, public order, public health or public morality.<sup>105</sup>

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### **Did you know that we have no Victorian laws against mental health vilification?**

One of the limitations on freedom of expression is to protect against the rights and reputation of others. The Royal Commission found several examples mental health stigma in the community and in media and the negative impact this had on people's lives.<sup>106</sup> Examples include regular use of terms 'psycho' or 'schizo' as insults or the use of mental health diagnoses to discredit the believability of individuals.<sup>107</sup> Despite these examples, only the ACT and Tasmania have anti-vilification laws for people with a disability (which includes people diagnosed with mental health issues).<sup>108</sup>

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### **The right to seek and receive information**

Freedom of expression under the Charter includes the right to 'seek' and 'receive' information. This can create a duty on government to provide information, when sought, that is in the public interest or where the person seeking the information has a legitimate interest in the information.<sup>109</sup> In practice, this right will often operate separately to, but concurrently with, an application under freedom of information laws.<sup>110</sup> However, one example outside freedom of information laws occurred where corrections staff failed to give proper consideration to right to seek and receive information when they withheld books and correspondence to a prisoner.<sup>111</sup>

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### **Are our settings right for transparent information sharing?**

Consistent with this right, Victorian freedom of information law aims to make government information and operations as transparent as possible.<sup>112</sup> Information sharing can drive better performance across the sector. You may ask how you can influence information sharing processes in your work to drive better performance and promote the freedom of expression.

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### **When could this arise in your work?**

There are a range of examples where the right to freedom of expression is engaged. These include:

- ensuring that current and new mental health and wellbeing services make information sharing processes with consumers timely and accessible

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<sup>105</sup> In *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407 at [89]–[98] the Court reaffirmed that the right to free expression did not mean individuals could choose to express themselves in whatever form they wanted, such as through criminal conduct.

<sup>106</sup> State of Victoria, 'Royal Commission into Victoria's Mental Health System, Volume 3: Promoting Inclusion and Addressing Inequities' (n 32) 521–544.

<sup>107</sup> Simon Katterl, 'Words That Hurt: Why Mental Health Stigma Is Often Vilification, and Requires Legal Protection' (2023) 0(0) *Alternative Law Journal* 1.

<sup>108</sup> *Ibid.*

<sup>109</sup> *XYZ v Victoria Police* (2010) 33 VAR 1; [2010] VCAT 255 at [515]–[559].

<sup>110</sup> *Freedom of Information Act 1982* (Vic).

<sup>111</sup> *Minogue v Dougherty* [2017] VSC 724.

<sup>112</sup> *Freedom of Information Act 1982* (Vic) s 3.

- considering what policies and laws could limit stigmatising and vilifying statements against people with lived experience
- prioritising the sharing of performance data of mental health services and other bodies
- considering what policies, laws and actions could limit any instances of victimisation should a consumer or family, carer or supporter speak out about adverse treatment.

# TAKE-HOMES: FREEDOM OF EXPRESSION



## Ensure that services enable easy and timely access to a person's healthcare information

All consumers should have access to information about their mental health care. However, the process of accessing this information can be difficult and slow, meaning information is not given in a timely fashion that informs treatment. Work with services may be needed to ensure that consumers have this right adequately observed.



## Don't allow victimisation of mental health consumers for speaking up

One of the authors of this guide is aware of numerous examples of victimisation when mental health consumers raise concerns about their treatment – either formally through regulators or publicly through social media. Notwithstanding other legal issues such as defamation, consumers should not fear victimisation or any negative consequences arising from raising concerns about their treatment. Clear expectations should be provided, either from the Division or from the Mental Health and Wellbeing Commission, about victimisation that may unjustifiably limit someone's right to freedom of expression.



## Ensure that timely mental health performance data is released

Transparent release of service performance data was part of the Royal Commission's recommendations for an improved mental health and wellbeing system. It also promotes the right to receive information under the Charter. Wherever possible, performance data on mental health services should be released.



# Peaceful assembly and freedom of association (section 16)

## Section 16 Peaceful assembly and freedom of association

- (1) Every person has the right of peaceful assembly.
- (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

**Democracies rely on more than just elections. They are animated by civic engagement in political discourse, which itself relies on the right to peaceful assembly and freedom of association. This right was severely violated within Soviet psychiatry, which as an instrument of the state, transformed political dissidents into mental health patients for the purposes of social control.<sup>113</sup>**

### The right to peaceful assembly

To engage with, and communicate about, political, and other civic matters, people often come together in one place. Sometimes this forms a protest. The right to freedom of assembly protects this right to protest,<sup>114</sup> but it is subject to several conditions and limitations. Peaceful assemblies should be just that: peaceful. Therefore protest-limiting actions by police may be protected if they were necessary to protect against a breach of the peace, and there were no less restrictive options to do so.<sup>115</sup> However, this right may generate a positive duty on police or the relevant authorities to *protect protestors*, such as from violence from their opponents, during protests.<sup>116</sup> It can also be limited by surveillance activities by authorities on protestors, with mixed Australian and international case law.<sup>117</sup>

### The right to freedom of association

Being able to freely associate with other groups is equally important to a thriving civil society and democracy. Section 16(2) protects this right, including the right *not* to join particular groups.<sup>118</sup> Examples of the right being engaged are laws that restricted workers from joining

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<sup>113</sup> For example, see: Stephen Faraone, 'Psychiatry and Political Repression in the Soviet Union.' (1982) 37(10) *American Psychologist* 1105.

<sup>114</sup> *Carpis v Victoria Police* [2012] VCAT 1472 at [69].

<sup>115</sup> *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105; [2006] UOUP 55 regarding Art 11 of the European Convention on Human Rights.

<sup>116</sup> *Plattform "Ärzte für das Leben" (Doctors for the Right to Life) v Austria* (1988 13 EHRR 204; [1988] ECHR 15, regarding Art 13 of the European Convention on Human Rights.

<sup>117</sup> *Sergerstedt-Wiberg v Sweden* (2007) 44 EHRR 2; [2006] ECHR 597 found that the storage of personal information on a police register would be an unjustified limitation on this right, while *Carpis v Victoria Police* [2012] VCAT 1472 at [76] stated that the equivalent right in the Charter would not be unjustifiably limited by photos being taken by police, because other photos were being published by other members of the community online.

<sup>118</sup> *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38; [1981] ECHR 4 at [32]. Note, the *Equal Opportunity Act 2010* (Vic) protects against discrimination on the basis of industrial activity, which under section 4(1), includes both joining and not joining unions.

unions or where collective bargaining was held to be an interference with this right and unconstitutional (in Canada).<sup>119</sup>

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<sup>119</sup> *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016; [2001] SCC 94, where the Court found that the laws that restricted agricultural workers from joining a statutory labour relations scheme were a substantial interference with the right to freedom of association and rendered the laws unconstitutional.

# TAKE-HOMES: PEACEFUL ASSEMBLY AND FREEDOM OF ASSOCIATION



## **Provide guidance on worker membership rights**

Worker's rights to peaceful assembly and freedom of association may be exercised through membership with some organisations. For example, they may be exercised through membership with a union or a consumer or carer peak body. There may be value in advising mental health services on the appropriateness of any limitations on these rights should issues arise.





## Protection of families and children (section 17)

### Section 17 Protection of families and children

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the state.
- (2) Every child has the right, without discrimination, to such protection as is in the child's best interests and is needed by the child by reason of being a child.

Families and children are often deeply connected to mental health issues and psychological distress. Families can be a supporter of someone in distress or crisis, and can help them navigate the system and speak up for their rights.<sup>120</sup> Alternatively, family can also be a site of harm or a cause of distress, with instances of family violence and child sexual abuse.<sup>121</sup> Families can feel they are excluded from decisions regarding the care of a family member,<sup>122</sup> while consumers can express concerns that the involvement of family undermines their autonomy, safety and human rights.<sup>123</sup> The impacts of mental health care on children are often lost too, rendered invisible by a fast-moving and at times impersonal system.<sup>124</sup>

These spaces are deeply complex and contested. They are bound up in shared and separate identities, goals, and traumas. There are few universal truths or 'silver bullets' to resolve these tensions. The Charter does, however, provide an organising framework to *think through* how to balance the human rights and interests of different people. The Royal Commission expressly recognised that human rights belong to all people and that a range of rights need to be considered in the mental health and wellbeing system, including rights to privacy and personal autonomy, and rights to family and social connection.<sup>125</sup>

### When this could arise in your work

There are a range of circumstances where this right may be engaged or limited.

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<sup>120</sup> Caroline Lambert, 'From Time Slips to Visceral Disquiet: The Experience of Mental Health Caring – Croakey Health Media', *Croakey Health Media* (online, 12 October 2022) <<https://www.croakey.org/from-time-slips-to-visceral-disquiet-the-experience-of-mental-health-caring/>>; Kerry Hawkins, 'Let's Talk about Psychosis, and the Families Mental Health Reform Forgot – Croakey Health Media', *Croakey Health Media* (online, 10 November 2022) <<https://www.croakey.org/lets-talk-about-psychosis-and-the-families-mental-health-reform-forgot/>>.

<sup>121</sup> Indigo Daya, *Witness Statement 12 May 2020 to the Royal Commission into Victoria's Mental Health System* (2020) 24–25 <[http://rcvmhs.archive.royalcommission.vic.gov.au/Daya\\_Indigo.pdf](http://rcvmhs.archive.royalcommission.vic.gov.au/Daya_Indigo.pdf)>.

<sup>122</sup> Tandem (n 36).

<sup>123</sup> For a systematic review of the positive and negative experiences of family involvement from service user (consumer) perspectives, see: Sarah LA Cameron, Phillip Tchernegovski and Darryl Maybery, 'Mental Health Service Users' Experiences and Perspectives of Family Involvement in Their Care: A Systematic Literature Review' [2022] *Journal of Mental Health* 1.

<sup>124</sup> To hear directly from children and young people, read and follow work from Y-Change: Y-Change, *Curing the Sickness of the System: Y-Change's Submission to the Royal Commission into Victoria's Mental Health System* (Berry Street, 2019) <[http://rcvmhs.archive.royalcommission.vic.gov.au/Organisational\\_-updated\\_version\\_Y-Change.pdf](http://rcvmhs.archive.royalcommission.vic.gov.au/Organisational_-updated_version_Y-Change.pdf)>.

<sup>125</sup> State of Victoria, 'Royal Commission into Victoria's Mental Health System, Volume 3: Promoting Inclusion and Addressing Inequities' (n 32) 74–75.

### **When mental health services interact with the child protection or family violence system**

One example is where children are taken from their parents because of ill-treatment or neglect.<sup>126</sup> The scale of childhood abuse and neglect is enormous.<sup>127</sup> The impact on mental health and wellbeing of a child later in life is also significant.<sup>128</sup> This can create difficult policy-level and service provider-level decisions.

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#### **Where families' and children's rights are in tension**

At times, the protection of the family unit may come into tension with the rights of the child to protection. This tension is most likely to occur in child protection matters. In those cases, the court has favoured the best interests of the child over protection of the family.<sup>129</sup>

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Children and carers of family members in distress can try to avoid various systems, including mental health systems, because they fear the prospect of removals by child protection services.<sup>130</sup> These risks are often felt strongly within Aboriginal families.<sup>131</sup> Because of this connection, the reviewing of perinatal mental health screening methods<sup>132</sup> is an example of where family rights should be foregrounded, as well children's rights, cultural rights and other rights affected by mental health treatment.

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<sup>126</sup> See *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221; [2011] VSC 42.

<sup>127</sup> A recent study found that 62.2% of surveyed participants had experienced some form of maltreatment during their childhood: Daryl J Higgins et al, 'The Prevalence and Nature of Multi-type Child Maltreatment in Australia' (2023) 218 *Medical Journal of Australia* S19.

<sup>128</sup> James G Scott et al, 'The Association between Child Maltreatment and Mental Disorders in the Australian Child Maltreatment Study' (2023) 218 *Medical Journal of Australia* S26.

<sup>129</sup> *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221; [2011] VSC 42 at [145].

<sup>130</sup> State of Victoria, 'Royal Commission into Victoria's Mental Health System, Volume 3: Promoting Inclusion and Addressing Inequities' (n 32) 128.

<sup>131</sup> Graham Gee, *Witness Statement 10 July 2019 to the Royal Commission into Victoria's Mental Health System* (2019) 11.

<sup>132</sup> Recommendation 18.2: State of Victoria, 'Royal Commission into Victoria's Mental Health System, Final Report, Summary and Recommendations' (n 1).

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### **Balancing rights and interests between families, carers, supporters, and consumers**

The Charter's strength lay in its ability to support thinking about difficult policy issues. That was its purpose when introduced to Parliament in 2006.<sup>133</sup> Where there are competing tensions between the needs of families, carers and supporters, and the needs of consumers, section 7(2) of the Charter enables a series of questions to guide better decision-making:

- *Whose* human right(s) are being engaged by this decision?
- *What* rights are being engaged, what is the *nature* of the right and the *effect* of the engagement?<sup>134</sup>
- If the decision is impacting a group's rights, how *important* is the purpose (or goal) behind that limitation?
- If there is a proposed limitation on someone or a group's rights, is that limitation *actually effective* in achieving the purpose (or goal) behind it?
- If there is a proposed limitation on someone or a group's rights, are there *less restrictive ways* to achieve the purpose or goal, than the limitation being proposed?

While many stakeholders have an interest in mental health care, you should scale your level of engagement towards consumers and families, carers and supporters based on whose human rights are engaged in a proposal, policy, decision or service.

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### **When developing mental health and wellbeing services for children and young people**

Human rights must be front of mind for the development of youth mental health and wellbeing services, including Youth Mental Health and Wellbeing Victoria.<sup>135</sup> The rights of children and young people – referring to people under 18 years of age – are set out under the *Convention on the Rights of the Child*<sup>136</sup> (CROC). A central principle and right for children in both the CROC and the Charter is that decisions are made in the child's 'best interests'. Therefore, mental health and wellbeing services should develop their policies and procedures in ways that maximise the child's best interests in their decision-making, while also adhering to other duties under the Mental Health and Wellbeing Act. In doing so, children and young people should be 'active partners' in the development of the mental health and wellbeing system.

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<sup>133</sup> *Parliamentary debates, Legislative Assembly, 4 May (Victoria, 2006) 1293.*

<sup>134</sup> Although all rights can be limited under the Charter, you will notice some human rights are considered absolute under international law. This means you have to consider them more carefully. For example, treating the right to protection of the family with care, but not of the same importance, as the right to be free from torture.

<sup>135</sup> Victoria Government, 'A New Mental Health and Wellbeing Act for Victoria: Youth Mental Health and Wellbeing Victoria' (June 2022) <<https://nla.gov.au/nla.obj-3125294297/view>>.

<sup>136</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (CROC).

### **When considering the impact of decisions on young carers and family members and opportunities to connect them to supports**

Additionally, children and young people who are carers or have a parent, guardian or sibling who has mental health needs can be significantly affected by decisions in the mental health and wellbeing system. The broader family context should be considered when making decisions. Opportunities to connect children and young people to appropriate supports should be identified and acted on.<sup>137</sup>

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<sup>137</sup> *Mental Health and Wellbeing Act 2022 (Vic) s 24.*

# TAKE-HOMES: PROTECTION OF FAMILY AND CHILDREN



## Balancing family-inclusive care with privacy and other rights

The protection of family and children is important and is often expressed through concepts of family-inclusive care. This is important and valuable for many individuals and families. However, this needs to be balanced against other rights, including privacy. Guidance on how to balance these interests in line with Charter rights may be important.



## Provide supports to families, carers and supporters rather than take away rights from consumers

Often the needs of consumers and families, carers and supporters can appear in tension. This can result in decisions that balance a consumer's autonomy with a family, carer or supporter's needs. Such decisions may result in unnecessary limitations on consumer rights. It is important that greater supports are put in place to meet the needs of families, carers and supporters. This will meet their needs, while also avoiding unnecessary restrictions on consumer human rights.



## Take extra care for the rights of children

Take proactive steps to think about how certain policies or practices could impact on children and young people. Their voices are rarely heard and their rights more vulnerable to limitation.



## Consider how mental health policies could impact rights in other settings

Perinatal mental health is an important area of concern for policymakers, with some advocates calling for 'universal screening'. Such policies screen all mothers for mental health and other issues during their pregnancy. These approaches may bring more parents to the attention of child protection.<sup>138</sup> Sometimes this is because of stigma and assumptions made about mental health rather than specific risks to children. Such processes can result in a limitation on the rights to equality and the protection of the family, and may disproportionately impact Aboriginal women.<sup>139</sup> It is important to carefully, with the affected communities, consider how mental health policy decisions could negatively impact human rights in non-mental health settings.

<sup>138</sup> Emma Tseris, 'The Psychiatric Surveillance of Pregnancy and Early Parenting' [2022] *Troubled Persons Industries: The Expansion of Psychiatric Categories beyond Psychiatry* 171, 180.

<sup>139</sup> Valerie Braithwaite, 'Institutional Oppression That Silences Child Protection Reform' [2021] *International Journal on Child Maltreatment: Research, Policy and Practice* 1.



# BALANCING RIGHTS AND INTERESTS IN FAMILIES

**ENSURING THAT DIVISION STAFF UTILISE A CHARTER-BASED APPROACH TO BALANCE THE RIGHTS AND NEEDS OF CONSUMERS AND FAMILIES, CARERS AND SUPPORTERS.**

Human rights sometimes need balancing between consumers and families, carers and supporters. An example of this is on policies and decisions that relate to a designated mental health service disclosing a consumer's health information without their consent. Doing so engages the right to equal protection from the law (section 8) and the right to privacy (section 13) among others. For carers, family members and supporters, the right to information under freedom of expression (section 15) and the right to family (section 17) may be engaged. Specific laws about the disclosure of consumer information are outlined under sections 729 to 734 of the Mental Health and Wellbeing Act. However, there may be need for the Division to provide guidance about how to give effect to these duties. The Charter applies concurrently with mental health laws and can help the Division develop guidance.

## ***Forecast the impacts of today's decision***

If you were beginning a process to consider policies and guidance about the sharing of consumer information, you would ask yourself '**who is the person(s) at the end of this decision?**' In this scenario, it is predominantly the consumer, as a range of their human rights are engaged and limited by a designated mental health system. Second to this would be their family member, carer, or supporter. You may **reach out to lived experience workforce expertise** internally to identify what is happening 'on the ground' when such decisions are made? How does this impact individuals, positively or negatively?

## ***Assess the human rights situation***

You may examine the **human rights context and history**. Consumers have historically been excluded from most aspects of their own care and had limited control over how their health information has been communicated. These institutionalising features mean that past and possibly **current practices limit human rights** such as the right to equality (section 8) and the right to privacy (section 13). This is within the context of several other rights limitations. For families, carers and supporters, there has been evidence that they have been given no information to support them in their role which has left them feeling lost. Sometimes this

has meant families, carers and supporters have been denied general information and education as well as personal information about the person they care for.

## ***Decide on how to proceed***

Simply by grounding any advice from the Division in the context of the Charter, there will be opportunities to **promote** human rights. **Complying** with human rights will require the Division's advice to **balance** competing rights and interests and choose the least restrictive option possible.

The most likely outcome of this would be a policy that maximises mental health consumer autonomy and privacy, given the significance of the rights limitations posed by non-consensually disclosing health information. The Division may choose to consider exceptions for this scenario where there are no less restrictive options to address a particular issue. In balancing these rights, the advice may also indicate that services should still provide general information and support to family members, carers and supporters. General information may relate to questions family members, carers and supporters may have about medications or specific diagnoses, without disclosing any aspects of a person's care. Support may come in the form of carer peer support services within the service or external referrals to carer support agencies. Doing so enables some expression of these rights while balancing them against more severe restrictions on consumer rights.

**Documenting** and communicating these decision-making processes will be crucial, and would easily be achieved by reflecting the reasoning in the policy. In the case of a practitioner, it would be briefly documented in clinical notes.



## Taking part in public life (section 18)

### Section 18 Taking part in public life

- (1) Every person in Victoria has the right, and is to have the opportunity without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination —
  - (a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and
  - (b) to have access, on general terms of equality, to the Victorian public service and public office.

**All people, including people with mental health issues or psychological distress as well as their families, carers and supporters, have the right to be part of public life. This hasn't always been the case. Hidden within asylums during the nineteenth and twentieth centuries, and historically given limited voice on the issues that affect them throughout mental health policy development,<sup>140</sup> mental health consumers have often been governed by public laws and policies, but not participated in their development.<sup>141</sup>**

Efforts to further embed the protection to take part in public life may address, in part, these issues. These right to participation in public life may be further reinforced by Australia's duties under articles 4(3) and 33(1) of the CRPD, which requires the active involvement of people with a disability on public issues that impact them.<sup>142</sup>

### The right to participate in public affairs

Under section 18(1), all people in Victoria have the right to participate in public affairs directly or through representatives such as parliamentarians. 'Public affairs' is broadly understood, referring to the development of laws and policies as well as any exercise of public power.<sup>143</sup> There are several ways that this could impact on your work.

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<sup>140</sup> For important historical accounts of these processes, including of deinstitutionalisation, see: Gooding, 'From Deinstitutionalisation to Consumer Empowerment: Mental Health Policy, Neoliberal Restructuring and the Closure of the "Big Bins" in Victoria' (n 2); Gooding, "'The Government Is the Cause of the Disease and We Are Stuck with the Symptoms": Deinstitutionalisation, Mental Health Advocacy and Police Shootings in 1990s Victoria' (n 2).

<sup>141</sup> The Royal Commission discussed this in detail, see: State of Victoria, 'Royal Commission into Victoria's Mental Health System, Volume 3: Promoting Inclusion and Addressing Inequities' (n 32) 18–25.

<sup>142</sup> CRPD arts 4(3) & 33(1).

<sup>143</sup> Human Rights Committee, *General Comment No 25 (Right to Participate in Public Affairs)*, 57th session, UN Doc CCPR/C/21/Rev.1/Add.7, (12 July 1996) at [5].



## **In ensuring people with lived experience can participate in reform processes**

Previous decisions have clarified that participation in public affairs can include participation in local council meetings<sup>144</sup> or attendance at public court hearings.<sup>145</sup> The right can be limited, but only in accordance with section 7(2) of the Charter.<sup>146</sup>

There will be circumstances where reform processes hear from people with lived experience. It is important that reform processes hear from a range of people with lived experience, including those who have both positive and negative experiences.<sup>147</sup> At times people may report significant trauma or have strong views that can make it difficult for others to also present their views in the same forum. Default processes may be to remove that person(s) from future reform processes. However, section 7(2) asks the Division or private contractors fulfilling its public function to ensure they explore all other less restrictive ways to address any issues. This could mean ensuring there are two facilitators present to assist individuals during these consultations, that there are agreed to processes for open forums that may be developed with lived experience experts, or that there are other ways for individuals to participate where it is too difficult to balance the rights and wellbeing of all involved in a single session.

This aspect of the right can create a duty on government to tailor approaches to engagement to ensure that people whose rights may be affected can have a say and participate in public affairs, and not be drowned out by more powerful or institutional actors.<sup>148</sup>

Within the context of mental health policy and debates, it highlights the importance that people with lived experience of mental health issues and psychological distress should be able to participate in public affairs on an equal basis as others.

Under international law, both the ICCPR and the CRPD emphasise the participation of people in the development of laws and public policy that affect them. This is summed up in the principle of ‘nothing about us, without us’.

In guidance for article 25 of the ICCPR (which section 18 of the Charter was modelled on), the Office of the High Commissioner for Human Rights recommended that States ensure processes for people to participate in ‘laws, policies and institutional arrangements’ that affect them, with a particular focus on the voices and groups most marginalised and discriminated against.<sup>149</sup> This guidance can be read within the context of articles 4(3) and 33(1) of the CRPD which requires State parties to involve people in the public policy issues

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<sup>144</sup> *Slattery v Manningham City Council* [2013] VCAT 1869.

<sup>145</sup> *R v Chaarani (Ruling No 1)* [2018] VSC 387.

<sup>146</sup> For an example, see page in this guide that illustrates where a local council failed to justify limitations on this right: *Slattery v Manningham City Council* [2013] VCAT 1869.

<sup>147</sup> Indigo Daya, Bridget Hamilton and Cath Roper, ‘Authentic Engagement: A Conceptual Model for Welcoming Diverse and Challenging Consumer and Survivor Views in Mental Health Research, Policy, and Practice’ (2020) 29(2) *International journal of mental health nursing* 299.

<sup>148</sup> Human Rights Committee, *General Comment No 25 (Right to Participate in Public Affairs)* (n 228) at [19]. French CJ as well as Kiefel, Bell and Keane JJ shared similar views in *McCloy v New South Wales* (2015) 257 CLR 178.

<sup>149</sup> Office of the High Commissioner, *Guidelines for State on the Effective Implementation of the Right to Participate in Public Affairs* (United Nations, 2018) 6–7.

that affect them.<sup>150</sup> The Committee on the CRPD provided guidance that explicitly connects article 25 of the ICCPR with both articles 4(3) and 33(1).<sup>151</sup>

Read together, these provisions encourage government processes that enable people's participation. Special attention should be given to those affected by the policy, proposal, decision or service, in particular those who are most marginalised and disadvantaged within this context. Such groups may include people subject to compulsory mental health treatment, people from culturally and linguistically diverse backgrounds, Aboriginal people living in Victoria, or older or younger Victorians. Lessons on how to do so effectively, including how to structure policy engagements based on 'who is closest to the problem', can be found in co-production literature written by consumers.<sup>152</sup>

## The right to vote

Under section 18(2)(a) all eligible<sup>153</sup> Victorians have the right to vote for public office (at state or local levels) and to run for office themselves. Who is deemed 'eligible' to exercise this right is undefined in the Charter, but guidance can be drawn from the *Constitution Act 1975* (Vic) and the *Electoral Act 2002* (Vic) which put conditions around age (18 years of age), being registered, and having a fixed address (with exceptions). You also can't commit treason and vote either.<sup>154</sup> Some criminal offences may invalidate the right to vote, while others will not.<sup>155</sup>

The right to vote can also entail 'positive duties' on relevant authorities to support individuals to exercise that right. International human rights law provides extensive guidance on the kinds of positive measures that would assist people from disadvantaged backgrounds to exercise that right on an equal basis. These include the use of information materials, photographs, symbols and other measures to address the needs of people with reading difficulties.<sup>156</sup> In Victoria, legislation includes requirements for additional assistance for those who need it.<sup>157</sup>

In mental health settings, individuals can experience a range of barriers to exercising this right. Individuals with reading or cognitive processing difficulties may not have access to meaningful information. Those who are detained within mental health inpatient units may not be able to attend a voting booth and may require assistance to vote via alternative means. It should be noted that decisions to grant a leave of absence in this context,<sup>158</sup> where

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<sup>150</sup> CRPD arts 4(3) and 33(1).

<sup>151</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 7 on the Participation of Persons with Disabilities, Including Children with Disabilities, through Their Respective Organizations, in the Implementation of the Convention*, UN Doc CRPD/C/GC/7 (9 November 2018) at [3].

<sup>152</sup> Cath Roper, Flick Grey and Emma Cadogan, 'Co-Production: Putting Principles into Practice in Mental Health Contexts' [2018] *Melbourne: University of Melbourne* 27.

<sup>153</sup> The meaning of 'eligible' is unclear as it is undefined in the Charter, but there are various requirements under the *Constitution Act 1975* (Vic) and *Electoral Act 2002* (Vic). It is beyond the scope of this guide to explore this. Pound and Evans (n 161) 173–174.

<sup>154</sup> *Ibid* 174–175.

<sup>155</sup> See *Roach v Electoral Commissioner* (2007) 233 CLR 162; [2007] HCA 43.

<sup>156</sup> Human Rights Committee, *General Comment No 25 (Right to Participate in Public Affairs)* (n 268) at [12].

<sup>157</sup> *Electoral Act 2002* (Vic) s 94.

<sup>158</sup> Decisions regarding leave of absence are made under s 64 of the *Mental Health Act 2014* (Vic), and will be made under ss 212–221 of the *Mental Health and Wellbeing Act 2022* (Vic) from 1 July 2023.

other means of voting are not available, should take special effort to consider the limitations on these rights caused by a failure to grant a leave of absence.<sup>159</sup>

### **The right of access to public service and public office**

People with mental health issues and psychological distress should, and do, serve in the public service and public office (politics). The opportunity to do this, on an equal basis with others without mental health issues or psychological distress, is protected under section 18(2)(b) of the Charter.

The meaning of ‘public service’ is undefined in the Charter, but likely reflects the different agencies reflected under Part 3 of the Public Administration Act. The meaning of eligible is the same as that discussed under section 18(2)(a) above. Though the right does not affirm someone’s right *to the job*, but rather the equal opportunity to be assessed on fair criteria, it may require positive steps to ensure that different communities do get equal access to the process.<sup>160</sup> There may be limitations on this right, such as requirements to disclose political activities where this is directly relevant and may give rise to a conflict of interest.<sup>161</sup>

Within a mental health and wellbeing context, there may be several instances where this right arises. Positive measures to hire individuals with lived experience of mental health issues or psychological distress, or carers, can promote this right while also limiting the right to privacy. Whether a disclosure of these experiences is justified or not may turn on whether, for example, the roles are designated *only for* people with that lived experience. Advertising such roles may also require positive steps to ensure that people with those lived experience have equal opportunity to apply for the roles in a fair process.

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<sup>159</sup> Existing non-enforceable guidance to mental health services does not address this issue: Office of the Chief Psychiatrist, *Leave of Absence from a Mental Health Inpatient Unit: Chief Psychiatrist’s Guideline* (2018) <<https://www2.health.vic.gov.au/Api/downloadmedia/%7B9A485568-6EAO-4EB1-A2F1-6F6E21DB287E%7D>>.

<sup>160</sup> Human Rights Committee, *General Comment No 25 (Right to Participate in Public Affairs)* (n 268) at [23].

<sup>161</sup> The Victorian Electoral Commission successfully applied for an exemption from section 83 of the *Equal Opportunity Act 2010* (Vic) to require applicants to disclose political activities, so that it could assess applicants within the context of its duties to impartiality: *Victorian Electoral Commission (Anti-Discrimination Exemption)* [2009] VCAT 2191.

# TAKE-HOMES: RIGHT TO PARTICIPATION IN PUBLIC AFFAIRS



## **Clarify voting rights for mental health inpatients**

Even if someone is detained within mental health inpatient units, they should not lose their right to participate in public affairs, such as voting in elections. Advice to mental health services on how to facilitate the exercise of these rights may be needed in advance of elections.



## **Providing accessible information and support for people in distress**

Someone who is experiencing cognitive or other emotional challenges may benefit from assistance to understand information to enable them to vote. This guidance may be provided to mental health services.



## **Encourage people with lived experience to apply for public sector jobs**

You may consider what more you can do to encourage people with lived experience as consumers or as family members, carers or supporters, to apply for public sector roles.



## Cultural rights (section 19)

### Section 19 Cultural rights

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practice their religion and to use their language.
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community —
  - (a) to enjoy their identity and culture; and
  - (b) to maintain and use their language; and
  - (c) to maintain their kinship ties; and
  - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

**All Victorians should be free to be and express themselves, including their culture, equally. However, some communities, such as culturally and linguistically diverse communities and Aboriginal Victorians continue to experience racism and discrimination.<sup>162</sup> Aboriginal Victorians experience this against the backdrop of ongoing processes of colonisation and intergenerational trauma. Such experiences can have profound effects on people’s mental health and wellbeing.<sup>163</sup> These experiences occur despite legal protections against discrimination<sup>164</sup> and vilification,<sup>165</sup> as well as the right to culture under section 19 of the Charter. The gap between the law and the lived experience of the law invites reflection on where human rights can be better embedded in our existing systems and institutions, including in mental health care.**

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<sup>162</sup> For experiences in Victoria, see: Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (Parliament of Victoria, 2021) 25–38 <[https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry\\_into\\_Homelessness\\_in\\_Victoria/Report/LCLSIC\\_59-06\\_Homelessness\\_in\\_Vic\\_Final\\_report.pdf](https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf)>.

<sup>163</sup> State of Victoria, ‘Royal Commission into Victoria’s Mental Health System, Volume 3: Promoting Inclusion and Addressing Inequities’ (n 32) 149; Legal and Social Issues Committee (n 287) 39–44.

<sup>164</sup> The *Equal Opportunity Act 2010* (Vic) protects people against direct and indirect discrimination on the grounds of race.

<sup>165</sup> The *Racial and Religious Tolerance Act 2001* (Vic) protects people against vilification on the grounds of race and religion. It does not protect people against vilification on the grounds of mental health: Katterl, ‘Words That Hurt: Why Mental Health Stigma Is Often Vilification, and Requires Legal Protection’ (n 223).

## Defining terms in this right

There are shared elements underpinning the rights in section 19(1) and 19(2). First, the rights do not just apply to individuals, they apply to people in community with other.<sup>166</sup> Second, culture remains undefined within the Charter, but international evidence indicates that culture should be understood broadly to not just include belief systems and practices, but also social and economic activities where they are part a group's tradition.<sup>167</sup> Importantly for a mental health policy design context, cultural rights may also involve a right to participate in decision-making that affects the particular cultural group.<sup>168</sup>

## Cultural, religious, racial and linguistic rights

There are several instances where cultural, religious, racial and linguistic rights may be at issue. For example, the right was protected, in effect, in Bendigo, when planning for an Islamic Mosque proceeded despite small resistance from some groups in the community.<sup>169</sup> Similarly, limitations, such as bans on the use of particular languages, may be unlawful.<sup>170</sup>

### How could culture, mental health and human rights intersect?

Culture, mental health and human rights intersect regularly in the mental health and wellbeing system. Sometimes those connections are positive. Other times those connections can be negative. Often, these intersections will have implications for someone's human rights, including their cultural rights under the Charter. It is important to understand these connections to ensure equitable outcomes for all Victorians and to avoid unintended consequences.

Some of the way that mental health and culture can intersect include:

- in how mental health frameworks can impose a Western conception of disorder over culturally layered experience of people from particular communities, proving ineffective or harmful<sup>171</sup>

<sup>166</sup> Human Rights Committee, *General Comment No 23 (Rights of minorities)*, 50<sup>th</sup> session, UN Doc CCPR/C/21 (8 April 1994) at [3.1]; *Clark-Uggle v Clark* [2016] VSCA 44 at [140]-[149].

<sup>167</sup> *Kitok v Sweden* (Communication No 197/1985) UN Doc CCPR/C/33/D/197/1985, IHRL 2484 (UNHRC 1988); Joseph and Castan (n 63) 846–847.

<sup>168</sup> Two UN Human Rights Committee assessments make this case: *Poma Poma v Peru* (Communication No 1457/2006); *Mahuika v New Zealand* (Communication No 547/1993).

<sup>169</sup> *Hoskin v Greater Bendigo City Council* (2015) 48 VR 715; [2015] VSCA 350, where the court rejected an argument that building the mosque would lead to 'significant [negative] social effects' in the neighbourhood by changing the religious and cultural practices in the area. The court utilised section 19(1) of the Charter to find that the relevant planning laws, properly interpreted, could not find normal religious practice as having significant social effects. To read more about the case, see: Madeleine Morris, 'Nationalist Group behind Bendigo's Anti-Mosque Protest', *ABC News* (online, 12 October 2015) <<https://www.abc.net.au/news/2015-10-12/who-was-behind-bendigos-anti-mosque-protests/6848468>>.

<sup>170</sup> In *Ford v Quebec (Attorney General)* [1988] 2 SCR 712, the Supreme Court in Canada struck down legislation that banned the use of signs in any other language than French.

<sup>171</sup> Australian Psychological Society, 'Australian Psychological Society Apologises to Aboriginal and Torres Strait Islander People', *Australian Psychological Society* (15 September 2016) <[https://psychology.org.au/news/media\\_releases/15september2016](https://psychology.org.au/news/media_releases/15september2016)>; Djirra spoke about how the mental health system misunderstood culturally-grounded experiences of hearing one's ancestors, and that the system was more of a 'diagnostic system' than a 'therapeutic system': Djirra, *Submission to the Royal Commission into Victoria's Mental Health System* (July 2019) 44 <<http://rcvmhs.archive.royalcommission.vic.gov.au/Djirra.pdf>>. For a critical review of the Global Mental Health movement and its impacts on different cultures, particularly in the 'Global South', see: Ethan Watters, *Crazy like Us: The Globalization of the American Psyche* (Simon and Schuster, 2010); Nikolas Rose, *Our Psychiatric Future* (John Wiley & Sons, 2018) 134–149.

- in the use of psychological assessments or instruments that may support and recognise, or hinder and undermine, a person or group's culture<sup>172</sup>
- in the place and nature of mental health treatments<sup>173</sup>
- in the stigma and discrimination faced by people from some culturally and linguistically diverse communities<sup>174</sup>
- in the participation and integration of mental health systems and practitioners with other systems that may give rise to negative experiences from culturally and linguistically diverse communities or Aboriginal Victorians, such as the criminal justice system or the child protection system.<sup>175</sup>

Culture is so deeply embedded in conceptions of mental health and wellbeing that great caution should be given when applying neutral-appearing policies to diverse populations.

## Aboriginal cultural rights

The Charter makes specific mention of Aboriginal Victorians and their rights. It does so in the preamble of the Charter and more substantively in section 19(2).

### Where this may be relevant to your work

There are a range of scenarios where this may be relevant to your work. These include when:

- advising mental health services about ways to treat people less restrictively in the community to better protect Aboriginal cultural rights<sup>176</sup>
- ensuring that the Mental Health Tribunal has sufficient capability to provide culturally safe hearings
- staffing of services and institutions like the Mental Health Tribunal to effectively respond to the needs of Aboriginal Victorians<sup>177</sup>

<sup>172</sup> The Australian Psychological Society has apologised to Aboriginal and Torres Strait Islander people for the use of assessments that provided 'misleading and inaccurate' messages about the abilities and capacities of Aboriginal and Torres Strait Islander people: Australian Psychological Society (n 296).

<sup>173</sup> As noted in *AQH* [2017] VMHT 24 (5 April 2017), the Mental Health Tribunal reflected on the importance of providing an Aboriginal woman with mental health care in the community where she could remain at home and get access to care from a culturally-safe service.

<sup>174</sup> Chris Groot, *Witness Statement 4 September 2019 to the Royal Commission into Victoria's Mental Health System* (2019) 15 <<http://rcvmhs.archive.royalcommission.vic.gov.au/WIT.0001.0069.0001.pdf>>.

<sup>175</sup> Sharynne L Hamilton et al, "'We Don't Want You to Come in and Make a Decision for Us": Traversing Cultural Authority and Responsive Regulation in Australian Child Protection Systems' [2021] *Australian Journal of Social Issues*; Daryl Higgins et al, 'Experiences of People with Mental Ill-Health Involved in Family Court or Child Protection Processes: A Rapid Evidence Review'; Royal Australian and New Zealand College of Psychiatry, 'Apology for the Role Played by Psychiatrists in the Stolen Generations', *Royal Australian and New Zealand College of Psychiatry* <<https://www.ranzcp.org/news-policy/policy-and-advocacy/position-statements/apology-by-psychiatrists-stolen-generations>>.

<sup>176</sup> Similar decisions about restrictions on liberty are made in relation to bail, see: *Re Chafer-Smith; An application for Bail* [2014] VSC 51; *Re Application for Bail by Hume* p2015] VSC 695.

<sup>177</sup> In *Cemino* the Supreme Court held that a Magistrate acted unlawfully in refusing an Aboriginal man's request to be heard by a Koori Court: *Cemino v Cannan* [2018] VSC 535. It could be argued that similar considerations might be relevant for requests for Aboriginal members on Mental Health Tribunal hearings where this is practicable.

- considering how to meet the mental health and wellbeing needs of Aboriginal Victorians while also supporting self-determination,<sup>178</sup> such as when to fund community-controlled services.<sup>179</sup>

It is important that Division staff are aware of the history and present of racism and colonisation in Australian mental health care.<sup>180</sup> This awareness may enable better policy that prevents and responds to these experiences.

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<sup>178</sup> ICCPR article 1 holds that ‘all peoples have the right of self-determination’, while article 23 of UNDRIP reaffirms the right of Indigenous peoples to participate in the decisions and policies that affect them, including healthcare: United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, A/RES/47/1 (2007).

<sup>179</sup> Odette Mazel, ‘Self-Determination and the Right to Health: Australian Aboriginal Community Controlled Health Services’ (2016) 16(2) *Human Rights Law Review* 323.

<sup>180</sup> Australian Psychological Society (n 296); Royal Australian and New Zealand College of Psychiatry (n 300).



# TAKE-HOMES: CULTURAL RIGHTS



## Don't be 'neutral' on culture

Assuming everyone has the same needs and preferences may mean that people from different cultural or religious groups are worse off. To build an inclusive mental health and wellbeing system, the Division will need to take proactive steps to ensure that all people can practice their culture equally. This should influence all parts of the system's management and stewardship.



## Enable different services and models of care

Different service offerings and models of care will enable better compliance with cultural rights. For example, hospital in the home may enable an Aboriginal person to have care in their home, on country, and closer to their community. Other models of care may enable anonymous forms of mental health support where stigma is stronger within some cultures.



## Require cultural safety training for practitioners, managers and service designers

In the absence of training and ongoing professional development, many staff members will not be able to provide culturally safe care. Service designers or managers may not be able to set up services and policies that enable staff to provide this care, and they may not hire individuals with the appropriate experience and skills. Build in requirements for cultural safety and other forms of training that allow people to continue exercising their cultural rights when accessing mental health services.



## Provide translated information and interpreters

It is important that people can make decisions about their assessment, treatment, care and support that accords with their culture. For many people, this will require translated information or the use of interpreters. Some of this translated information may be provided by the Division. The Division can also require services and oversight bodies to use interpreters.



# ABORIGINAL CULTURAL RIGHTS

## TAKING CULTURAL RIGHTS INTO ACCOUNT TO INFORM A COMMUNITY TREATMENT ORDER DECISION

An Aboriginal woman in her early twenties, known in the matter before the Mental Health Tribunal as AQH,\* was subject to compulsory mental health treatment in hospital. She had a strong connection with her Aboriginal identity and wanted to return home to receive treatment through her GP and with a community psychiatric service that had a good understanding of Aboriginal culture.

AQH's consultant psychiatrist was firmly of the view that AQH needed to remain in hospital. The Mental Health Tribunal made an order for compulsory treatment. However, it considered AQH's Aboriginal cultural rights under the Charter and decided that a community, rather than an inpatient treatment order, was less restrictive of her human rights and was appropriate in the circumstances.

The Tribunal acknowledged that discharge from hospital may risk some deterioration in AQH's mental health, but it decided that the risks were not sufficiently serious or imminent to justify the restriction that would be imposed by an inpatient treatment order. The Tribunal had regard to the high rate of Aboriginal imprisonment, AQH's preferences for treatment in the community and it decided that community treatment was also consistent with the 'dignity of risk' principle in the Mental Health Act.

\* AQH [2017] VMHT 24 (5 April 2017)



## Property rights (section 20)

### Section 20 Property rights

A person must not be deprived of that person's property other than in accordance with law.

**Property rights are important for safety, social and cultural connection and economic participation. In many cases people with lived experience have been denied this right.**

Under section 20 of the Charter a person cannot be deprived of their property except where such a deprivation is allowed by the law.

### Defining terms in this right

The right covers real property such as land and personal possessions, and other forms of property that people can own such as shares, licences, leases and patents.<sup>181</sup> A 'deprivation' of property has been taken to include not only the complete removal of a person's property but also any substantial restriction of the person's ability to use, enjoy, dispose of or transfer their property.<sup>182</sup>

### Where this may be relevant to your work

Property rights are most likely to be engaged in the mental health and wellbeing system if a service removes a person's personal possessions or limits access to them. As the case example below illustrates, property rights are also relevant if guardianship arrangements are put in place to control the transfer or disposition of land and personal property.

#### **Case example: No justification to appoint an administrator**

*PJB v Melbourne Health (Patrick's Case)* concerned a 58-year-old man diagnosed with a mental illness. He had been an involuntary patient in a hospital for over ten years. He owned a house and wanted to live independently in the community. The hospital recommended that Patrick move into supported accommodation and through that 'the move would be more likely to succeed if Patrick did not continue to own his home'.<sup>183</sup> They applied to the Victorian Civil and Administrative Tribunal (VCAT) for an administrator to be appointed over his estate who could sell his house. VCAT appointed the administrator, but that decision was overturned by the Supreme Court of Victoria. The

<sup>181</sup> *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [90].

<sup>182</sup> *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 at [63]; *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [89].

<sup>183</sup> *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [3].

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Court found that the appointment of the administrator was a 'de facto deprivation of property' and engaged the property rights in section 20 of the Charter.<sup>184</sup> Whether the deprivation was in accordance with the law was a key question in the case. In his judgement, Justice Bell stated that:

The rights which are at stake are very important to Patrick, for they protect his interest in being able to choose where to live and to live in the home which he owns. He holds those rights, and they deserve protection and respect, on equal terms with everybody else even though he is an involuntary patient in a mental hospital. The appointment infringes his human rights very seriously, as the administrator will take complete management and control of his money and other property, and probably sell his home. No sufficient purpose has been shown to justify such a serious infringement of his human rights, as he is not in a crisis (or anything like it) in terms of his health, accommodation or otherwise. He has not been found to be mismanaging his money or his home. ... [A]ppointing an unlimited administrator was virtually the most rather than the least restrictive option which was reasonable available.<sup>185</sup>

In addition to this, some compulsory payments such as fees for time spent in Secure Extended Care Units may engage this right, particularly if the person is there compulsorily.<sup>186</sup>

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<sup>184</sup> *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [92].

<sup>185</sup> *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [373].

<sup>186</sup> Monash Health, *Secure Extended Care Unit (SECU) Unit 4* (Monash Health, 2019) 3 <[https://monashhealth.org/wp-content/uploads/2021/02/Secure-Extended-Care-Unit-SECU-Unit-4\\_v1-Jan-19.pdf](https://monashhealth.org/wp-content/uploads/2021/02/Secure-Extended-Care-Unit-SECU-Unit-4_v1-Jan-19.pdf)>.

# TAKE-HOMES: PROPERTY RIGHTS



## **Make policies on property clear**

The removal of property occurs regularly within mental health inpatient units. There should be greater guidance provided to mental health services about if and how property can be handled in a way compliant with this right. This should include compulsory fees, such as those in some Secure Extended Care Units.



## Right to liberty and security of person (section 21)

### Section 21 Right to liberty and security of person

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of that person's liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against that person.
- (5) A person who is arrested or detained on a criminal charge—
  - (a) must be promptly brought before a court; and
  - (b) has the right to be brought to trial without unreasonable delay; and
  - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but that person's release may be subject to guarantees to attend—
  - (a) for trial; and
  - (b) at any other stage of the judicial proceeding; and
  - (c) if appropriate, for execution of judgment.
- (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of that person's detention, and the court must—
  - (a) make a decision without delay; and
  - (b) order the release of the person if it finds that the detention is unlawful.
- (8) A person must not be imprisoned only because of that person's inability to perform a contractual obligation.

**The mental health and wellbeing system, as well as other systems, place significant restrictions on mental health consumers' rights. Advocates and people with lived experience advocate against these restrictions.<sup>187</sup> It is important, at a minimum, that any**

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<sup>187</sup> Indigo Daya, 'Russian Dolls and Epistemic Crypts: A Lived Experience Reflection on Epistemic Injustice and Psychiatric Confinement' (2022) 3(2) *Incarceration* 26326663221103444; Maylea and Hirsch (n 65).

**restrictions that are placed on someone’s rights are done in the least restrictive way possible and in accordance with the law. This is a feature of the right to liberty and security of person.**

Section 21 of the Charter protects people against the unlawful or arbitrary deprivation of liberty. The first four subsections of this right apply to any deprivation of liberty, including deprivations of liberty in the mental health and wellbeing system.<sup>188</sup>

This right can be relevant any time a person is detained (which means that the person is not free to leave a place by their own choice). The right is not limited to circumstances where a person is being held under a legal order.

In subsection (1), the right to ‘security’ requires public authorities to protect a person’s security. The concept of security can cover both physical and mental wellbeing.

Subsection (2) states that a person must not be subject to arbitrary arrest or detention. Even when a deprivation of liberty is lawful, the section 21(2) right can be limited if the deprivation of liberty is arbitrary. ‘Arbitrary’ can involve circumstances that are capricious, unpredictable, unjust or unreasonable ‘in the sense of not being proportionate to a legitimate aim sought’.<sup>189</sup> In *Kracke*, VCAT discussed how the failure of safeguards may affect the question of whether detention is ‘arbitrary’.<sup>190</sup>

Subsection (3) provides that a person may only be detained in accordance with the law. This means that relevant statutory criteria must be satisfied as a prerequisite to the exercise of a power to detain a person (or as a condition of the exercise of any ongoing authority to detain a person).<sup>191</sup>

Subsections (5)–(8) of section 21 provide further detail about the minimum rights a person has when detained in the criminal justice system.

## **Where this may be relevant to your work**

Regarding subsection (3), this means that if:

- (a) the *Mental Health Act 2014* (Vic)/Mental Health and Wellbeing Act sets out a requirement that must be met before a person is detained, or a requirement that must be met when a person is being detained, and
- (b) the requirement under the relevant mental health legislation is not complied with,

then the person is being deprived of their liberty outside of the procedures established by law and the right to liberty in section 21 of the Charter is being limited. This has significant

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<sup>188</sup> *Kracke v Mental Health Review Board (General)* 2009 VCAT 646 [664]–[665]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [110].

<sup>189</sup> *PJB v Melbourne Health* (2011) 39 VR 373; [2011] VSC 327 [82]–[85]; *Taha (Vic Police Toll Enforcement v Taha)* (2013) 49 VR 1; [2013] VSCA 37 [199].

<sup>190</sup> *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [761], [767], [769], [781].

<sup>191</sup> *Antunovic v Dawson* (2010) 30 VR 355; [2010] VSC 377 [135].





implications for how you design policies that restrict or are part of restrictions on mental health consumers' liberty.

### **Ensuring compliance with rights**

It is crucial that in developing policies, a 'set and forget' approach is avoided. The mental health and wellbeing system has significant issues regarding compliance with mental health and human rights laws. Therefore, it is unlikely that merely articulating the rights that mental health consumers and families, carers and supporters enjoy will be sufficient. Rights are not self-enforcing. Instead, Division staff will need to consider what tools they have and could create to encourage, support and enforce compliance with laws and procedures, particularly as they relate to rights.



# TAKE-HOMES: LIBERTY AND SECURITY OF PERSON

	<p><b>Use your levers and influence for compliance</b></p> <p>There are significant compliance issues with mental health laws and policies in Victoria.<sup>192</sup> Many of these breaches ‘on the ground’ need to be addressed ‘upstream’.<sup>193</sup> The Division has many formal levers (commissioning standards, monitoring and outcomes frameworks, publication of performance data) and informal mechanisms (meetings and communications with services) to address this. Use them.</p>		<p><b>Communicate your expectations publicly and privately</b></p> <p>It is important to remind mental health and wellbeing services that the standards under the Charter and under mental health laws are not voluntary. They are requirements to operate lawfully and in line with community standards. It is important as a system steward and manager that this message is reiterated.</p>
	<p><b>Promote enforcement from enforcement bodies</b></p> <p>Rights protection requires rights enforcement. These powers and duties are currently held by a range of bodies, including the Mental Health Tribunal, the Office of the Chief Psychiatrist and the Mental Health Complaints Commission (to become the Mental Health and Wellbeing Commission). These bodies have been criticised for under-enforcement of rights.<sup>194</sup> Clear messaging to, appropriate funding for, and accountability of these bodies for the performance of their functions from the system steward may be helpful.</p>		<p><b>Develop data capability on compliance</b></p> <p>Despite a range of formal duties under mental health laws and the Charter (such as informed consent provisions or the lawful use of restrictive practices), there is limited data that helps people to assess compliance with these laws. As system steward, the Department should consider how information communication technologies can be developed to gather routine data on compliance with these duties.</p>

<sup>192</sup> Victoria Legal Aid (n 8); Maylea et al (n 33).

<sup>193</sup> Simon Katterl and Chris Maylea, ‘Keeping Human Rights in Mind: Embedding the Victorian Charter of Human Rights into the Public Mental Health System’ (2021) 27(1) *Australian Journal of Human Rights* 58.

<sup>194</sup> Simon Katterl, ‘Regulatory Oversight, Mental Health and Human Rights’ (2021) 46(2) *Alternative Law Journal* 149; Simon Katterl and Sharon Friel, ‘Regulating Rights: Developing a Human Rights and Mental Health Regulatory Framework’ in Kay Wilson, Yvette Maker and Piers Gooding (eds), *The Future of Mental Health, Disability and Criminal Law* (Routledge, 2023); Simon Katterl, ‘Preventing and Responding to Harm: Restorative and Responsive Regulation in Victoria, Australia’ (2022) *Early View Journal of Social Issues*; Adeshola Ore and Melissa Davey, ‘No Action Taken against Victorian Mental Health Services despite More than 12,000 Complaints’, *The Guardian* (online, 25 May 2022) <<https://www.theguardian.com/society/2022/may/26/no-action-taken-against-victorian-mental-health-services-despite-more-than-12000-complaints>>; Christopher Maylea and Christopher James Ryan, ‘Decision-Making Capacity and the Victorian Mental Health Tribunal’ [2017] (23) *International Journal of Mental Health and Capacity Law* 87; Castan Centre for Human Rights Law, *Analysis of Mental Health Tribunal Engagement with Human Rights* (Castan Centre for Human Rights Law, November 2021) <<https://static1.squarespace.com/static/6004b9776f0b7e66aaa48c0a/t/638d2b08061ba10438906325/1670195979299/VMIAC+Team+CP4+-+Final+Report.pdf>>.



# ENSURING COMPLIANCE WITH HUMAN RIGHTS

## ON THE IMPORTANCE OF ENSURING ANY RESTRICTIONS ON LIBERTY ARE LAWFUL.

Parliament has assessed that both the *Mental Health Act 2014 (Vic)*<sup>195</sup> and the *Mental Health and Wellbeing Act 2022 (Vic)*<sup>196</sup> are compatible with human rights set out under the Charter. Section 21(3) of the Charter requires that any restrictions on liberty can only be done ‘on grounds, and in accordance with procedures, established by law’. This means, for example, that compulsory mental health treatment decisions must be done in accordance with mental health laws.

Both 2014 and the 2022 Victorian mental health laws contain provisions that the authorised psychiatrist must:

- Presume that a person has capacity to give informed consent and undertake a capacity assessment if the clinician is in doubt.
- Follow procedures to provide the person with adequate information to make an informed decision, a reasonable opportunity to consider their decision about informed consent, and to do so free of undue pressure or coercion.
- Only override a refusal of informed consent if that particular treatment is the least restrictive treatment possible to treat the person.<sup>197</sup>

There are many other provisions relating to the use of restrictive practices and how they must be performed to be lawful under either piece of legislation.<sup>198</sup>

Unfortunately, there are significant compliance issues. For example, evidence suggests:

- Regular breaches of informed consent provisions,<sup>199</sup> including reflections from the Royal Commission that authorised psychiatrists may not consider these duties when making treatment decisions.<sup>200</sup>

<sup>195</sup> Victoria, *Parliamentary Debates*, Legislative Assembly (Statement of Compatibility) 18 February 2014, 461–462.

<sup>196</sup> Victoria, *Parliamentary Debates*, Legislative Assembly (Statement of Compatibility) 23 June 2022, 2644, 2650.

<sup>197</sup> *Mental Health Act 2014 (Vic)* ss 68-71; *Mental Health and Wellbeing Act 2022 (Vic)* ss 85-89.

<sup>198</sup> *Mental Health Act 2014 (Vic)* Pt 6; *Mental Health and Wellbeing Act 2022 (Vic)* Pt 3.6.

<sup>199</sup> Maylea et al (n 33); see also: Victoria Legal Aid, *Roads to Recovery: Building a Better System for People Experiencing Mental Health Issues in Victoria* (2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-roads-to-recovery-july-2019.docx>>; Victoria Legal Aid (n 8).

<sup>200</sup> State of Victoria, ‘Royal Commission into Victoria’s Mental Health System, Volume 4: The Fundamentals for Enduring Reform’ (n 4) 402.

- A significant proportion of restrictive practices performed outside the regulations of the *Mental Health Act 2014 (Vic)*.<sup>201</sup>
- Evidence of misconceptions about the law,<sup>202</sup> particularly relating to how mental health clinicians misunderstand the application of their ‘duty of care’, possibly rendering their actions unlawful.<sup>203</sup>
- There are also mixed perceptions amongst clinicians about the value of rights-based protections within mental health laws.<sup>204</sup>

These circumstances should prompt the Division to consider in their forecast whether there will be compliance issues with laws and procedures in existing and new services within the reform agenda. Some ways to address the risks of non-compliance with the law (and therefore human rights breaches) are:

- Trying to understand the distinct postures – some positive, some negative, some neutral – that public mental health services have regarding their duties, and employ tailored responses that best match those postures.<sup>205</sup>
- Ensuring training and development accompanies new service models, particularly training on human rights, supported decision-making and other standards such as those surrounding cultural safety.
- Embedding reporting requirements on compliance with laws in new and existing processes, such as will be done regarding new commissioning processes.<sup>206</sup>
- Ensuring regulators have clear objectives to protect human rights, are responsive to the distinct posture and behaviour of each mental health and wellbeing service, apply a risk-based approach, commit to credible enforcement, enable third-party participation in regulation, and explicitly balance power relations between parties to the regulatory process.<sup>207</sup>
- Be clear on messaging, such as the intention of laws, the requirement to comply with them, and the capability supports you are providing to enable that compliance.

<sup>201</sup> Jonathan Knott et al, ‘Restrictive Interventions in Victorian Emergency Departments: A Study of Current Clinical Practice’ (2020) 32(3) *Emergency Medicine Australasia* 393.

<sup>202</sup> Simon Katterl, ‘The Importance of Motivational Postures to Mental Health Regulators: Lessons for Victoria’s Mental Health System in Reducing the Use of Force’ [2021] *Australasian Psychiatry* 10398562211038912.

<sup>203</sup> Scott Lamont, Cameron Stewart and Mary Chiarella, ‘The Misuse of “Duty of Care” as Justification for Non-Consensual Coercive Treatment’ (2020) 71 *International journal of law and psychiatry* 101598.

<sup>204</sup> Katterl, ‘The Importance of Motivational Postures to Mental Health Regulators: Lessons for Victoria’s Mental Health System in Reducing the Use of Force’ (n 328).

<sup>205</sup> Ibid.

<sup>206</sup> State of Victoria, ‘Royal Commission into Victoria’s Mental Health System, Volume 4: The Fundamentals for Enduring Reform’ (n 4) 128–129.

<sup>207</sup> Katterl and Friel (n 320).



## Humane treatment when deprived of liberty (section 22)

### Section 22 Humane treatment when deprived of liberty

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

**There are some circumstances where the state will deem it necessary to restrict the liberty of its citizens. For example, it occurs when people are in custody in the justice system or when they are held in inpatient units under mental health legislation. It is important, however, that citizens are treated as humanely as possible when they are deprived of liberty. The initial failure to uphold this right during the 2020 COVID 19 housing tower lockdowns was rectified in 2021 lockdowns.**

### Defining the right

Section 22 requires that everyone must be treated decently when deprived of their liberty. The right to humane treatment applies in all circumstances where a person is being detained, including when a person is detained in a mental health service. This right is complementary to the right to be free from torture and cruel, inhuman and degrading treatment (section 10).

### Where this may be relevant to your work

The right requires, for example, adequate standards of accommodation, food, and personal hygiene, opportunity to exercise, and access to appropriate medical services. In *Castles*, the Supreme Court of Victoria found that access to health care is a fundamental aspect of the right in section 22(1) so that ‘prisoners are entitled to have access to health services available to the wider community without discrimination on the grounds of their legal situation’<sup>208</sup> This reasoning could be applied to a person accessing physical health services and relevant medications when detained in a mental health service.

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<sup>208</sup> *Castles v Secretary to the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 [108], [113].

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### **Case example: Smoke Free Policy found not to be inhumane treatment**

The right in section 22(1) was found not to be engaged by a 'Smoke Free Policy' implemented at Thomas Embling Hospital. The plaintiff was an involuntary inpatient who argued that being forced to quit smoking would cause a deterioration of his mental state and physical side effects. The Court acknowledged that 'what may not be inhumane or an affront to the dignity of a person, who is free to return to his home, may be one or both of those things to an involuntary patient'.<sup>209</sup> It also acknowledged the addictive nature of nicotine and the effects of an imposed withdrawal.<sup>210</sup> The Court also found that the policy was intended for the 'ultimate benefit of all of the Hospital's patients ... and staff' and was introduced with 'careful consideration' and supportive treatments being made available to patients.<sup>211</sup> The Court concluded that the policy did not 'impact on the dignity of the Hospital patients' and was not 'inhumane'.<sup>212</sup>

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Subsections (2) and (3) of the right to humane treatment when deprived of liberty set out additional rights in the criminal justice system.

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<sup>209</sup> *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 [127].

<sup>210</sup> *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 [128].

<sup>211</sup> *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 [129].

<sup>212</sup> *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 [131].

# TAKE-HOMES: HUMANE TREATMENT WHEN DEPRIVED OF LIBERTY

	<p><b>Develop standards and monitor conditions in closed environments</b></p> <p>Ensure that the Chief Psychiatrist or Chief Mental Health Officer develops and monitors standards within closed environments. These include both the general living conditions in that environment, as well as the standard of mental health care and general healthcare.</p>		<p><b>Ensure compliance with laws</b></p> <p>Even if someone is detained under mental health laws, they have rights. Unfortunately, these minimum rights are often breached.<sup>213</sup> It is crucial that in their engagements with mental health and wellbeing services, that the Division communicate its expectations on compliance with the Charter and mental health laws and has in place mechanisms to get feedback on and more formally review and evaluate compliance. Assessment for future contracts should consider past performance in acting lawfully under the Charter and mental health laws.</p>
	<p><b>Ensure consumers develop minimum standards for services</b></p> <p>If someone is detained within a mental health service, it is crucial that this environment is as safe, clean and accessible as possible. Statewide standards and local implementation processes should be done in partnership with consumers. This should include consumers from a range of backgrounds.</p>		

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<sup>213</sup> Maylea et al (n 33).



## Children in the criminal process (section 23)

### Section 23 Children in the criminal process

- (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- (2) An accused child must be brought to trial as quickly as possible.
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for that child's age.

**Given the greater opportunities for harm and exploitation to children and young people, they enjoy specific rights in the criminal justice process.**

Section 23 sets out the special rights of children in the criminal process.

If children are detained, whether they have been charged or not, they must be kept apart from adults. Facilities designed specifically for children better cater for the developmental needs of children.

There is one exception to the separation of children from adults—where it is not in the child's best interests. For example, a judge may decide that it is in a child's best interest to be detained with a parent or close to home, even if that means being detained in a facility shared with adults.

Every child arrested and charged must be brought before a court as quickly as possible.

A child who has been convicted of an offence must be treated in a way that is appropriate to his or her age.

### Where this may be relevant to your work

Circumstances where this may arise include when working with the Department of Justice and Community Safety on:

- policy settings, commissioning, funding and evaluation of psychological or psychiatric assessments of children for criminal justice matters
- policy settings, commissioning, funding and evaluation of mental health and wellbeing services in youth justice settings
- policies and procedures that impact on the mental health and wellbeing of children and young people in youth justice settings.



## Fair hearing (section 24)

### Section 24 Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

**Mental health consumers may participate in civil and criminal justice court proceedings. It is crucial that they enjoy a fair hearing that takes full account of their rights. This right is protected under the Charter.**

The right to a fair hearing applies to civil proceedings, including those before the Mental Health Tribunal.<sup>214</sup>

The following factors have been identified as relevant to determining whether a court or tribunal is ‘competent, independent and impartial’:

- It is established by law.
- It is independent of the executive and legislative branches of government, or has, in specific cases, judicial independence in deciding legal matters in judicial proceedings.
- It is free to decide the factual and legal issues in a matter without interference.
- It has the function of deciding matters within its competence on the basis of rules of law, following prescribed proceedings.
- It presents the appearance of independence.
- Its officers have security of tenure.<sup>215</sup>

The right is about procedural fairness, not debates about the fairness of a decision or outcome. The Supreme Court has said that ‘[w]hat fairness requires will depend on all the circumstances of the case. Broadly, it ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to

<sup>214</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [413]–[418], [437]–[439], [489].

<sup>215</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [440]–[446].



their opponent'.<sup>216</sup> A fair hearing includes an opportunity to be informed of the opposing party's case and to have an opportunity to respond.<sup>217</sup> In giving a 'reasonable opportunity' the court will consider:

- the nature of the decision to be made
- the nature and complexity of the issues in dispute
- the nature and complexity of the submissions which the party wishes to advance
- the significance to that party of an adverse decision ('what is at stake'), and
- the competing demands on the time and resources of the court or tribunal.<sup>218</sup>

The right to a fair hearing also includes access to relevant documents.<sup>219</sup> Subsection 2 of section 24 allows for courts and tribunals to exclude media or other people from a hearing if it is in the public interest or the interest of justice.

Subsection 3 states that judgments and decisions must be public, however, other laws may permit all or part of a judgement to be suppressed

## Where this may be relevant to your work

This right may be relevant where the Division establishes policy settings and drafts laws that direct the Mental Health Tribunal, or where it works with others across government to provide advice about the funding and scope of the legal services that support consumers when presenting before the Mental Health Tribunal. It also applies to Mental Health Tribunal members and staff in making decisions and setting rules<sup>220</sup> or setting practice guidelines and procedures. Examples include:

- funding decisions by the Victorian Government on legal services to support people at Mental Health Tribunal matters and matters under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
- developing and enforcing processes to ensure that evidence being relied upon by a treating team is provided to a mental health consumer before the 48-hour timeframe
- developing and enforcing processes to ensure that urgent electroconvulsive treatment hearing are used appropriately and do not undermine the right to a fair hearing by limiting access to evidence and a lawyer
- developing indicators on Mental Health Tribunal performance as they relate to a fair hearing and other duties such as to properly consider and comply with Charter rights.

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<sup>216</sup> *Knight v Wise* [2014] VSC 76 [36].




<sup>217</sup> *Roberts v Harkness* [2018] VSCA 215 [48].

<sup>218</sup> *Roberts v Harkness* [2018] VSCA 215 [49].

<sup>219</sup> *Ambridge Investments Pty Ltd (in liq) (recvr app'td) v Baker (No 3)* [2010] VSC 545 [35].

<sup>220</sup> *Mental Health Tribunal Rules 2014*

# TAKE-HOMES: RIGHT TO A FAIR HEARING

	<p><b>Communicate information and disclosure obligations to services and the Tribunal</b></p> <p>Concerns have been raised about the timeliness of Tribunal reports being provided to mental health consumers and lawyers.<sup>221</sup> You can reiterate that these duties may assist with compliance and a fair hearing.</p>		<p><b>Communicate expectations on urgent hearings</b></p> <p>Concerns have also been raised about the inappropriate use of urgent electroconvulsive treatment hearings to by-pass other legal protections.<sup>222</sup> This impacts on the ability of consumers to get access to the evidence being used by mental health services and accessing a lawyer. Reiterating these duties to mental health services and the Tribunal may assist compliance and ensure a fair hearing.</p>
	<p><b>Ensure adequate funding for legal services</b></p> <p>Ensuring individuals who are subject to treatment orders have access to timely legal advice and representation will assist with the right to a fair hearing.</p>		

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<sup>221</sup> Victoria Legal Aid (n 325).

<sup>222</sup> Ibid.



## Rights in criminal proceedings (section 25)

### Section 25 Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that that person speaks or understands; and

(b) to have adequate time and facilities to prepare their defence and to communicate with a lawyer or advisor chosen by that person; and

(c) to be tried without unreasonable delay; and

(d) to be tried in person, and to defend themselves personally or through legal assistance chosen by that person or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; and

(e) to be told, if that person does not have legal assistance, about the right, if eligible, to legal aid under the Legal Aid Act 1978; and

(f) to have legal aid provided if the interests of justice require it, without any costs payable by that person if the person meets the eligibility criteria set out in the Legal Aid Act 1978; and

(g) to examine, or have examined, witnesses against that person, unless otherwise provided for by law; and

(h) to obtain the attendance and examination of witnesses on that person's behalf under the same conditions as witnesses for the prosecution; and

(i) to have the free assistance of an interpreter if that person cannot understand or speak English; and

(j) to have the free assistance of assistants and specialised communication tools and technology if that person has communication or speech difficulties that require such assistance; and

(k) not to be compelled to testify against themselves or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of that child's age and the desirability of promoting the child's rehabilitation.

(4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

Rights in criminal proceedings are primarily the responsibility of the justice system and are unlikely to be engaged in the administration and delivery of the mental health and wellbeing system. However, we note that several protections in section 25 of the Charter may have particular relevance to people whose mental health (or other disability) affects their communication or comprehension of information. These protections are:

- The right to be informed of the nature and reason for the charge in a language and a type of communication that the person understands (section 25(2)(a)). When considering a similar right, the European Court of Human Rights has found that when a charge is serious and the person charged has a mental impairment making it difficult to understand the charge, authorities must do more than simply inform the person of the charge.<sup>223</sup> Additional processes and information may need to be provided in a way that the person can understand.
- The right to have adequate time to prepare their defence (section 25(2)(b)). What is 'adequate time' is considered in the circumstances of the case. It is arguable that a person's communication needs, and the time associated with these needs, could be a relevant consideration in determining whether the time to prepare a defence is adequate.
- The right to have the free assistance of assistants and specialised communication tools and technology if that person has communication difficulties that require such assistance (section 25(2)(j)).

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<sup>223</sup> *Vaudelle v France* (2001) ECHR 76 at [65].



## Right not to be tried or punished more than once (section 26)

### Section 26 Right not to be tried or punished more than once

A person must not be tried or punished more than once for an offence in respect of which that person has already been finally convicted or acquitted in accordance with law.

Under the Charter, if a person has already been convicted or acquitted of a criminal offence, they cannot be tried or punished for the same offence again. This right may be limited in certain circumstances, for example, if there is new evidence or the original trial was not conducted fairly.

When considering professional disciplinary proceedings, VCAT found that the purpose of the action was to protect the public, not to punish the practitioner, and therefore did not amount to a double punishment for the purposes of section 26.<sup>224</sup> So, to be an unlawful double punishment, the purpose and consequences of the action must be to punish a person for a criminal offence.

Section 26 is not engaged where a person accused of a crime is found unfit to stand trial or not guilty by reason of mental impairment and is placed on a supervision order which includes receiving compulsory mental health treatment. In such cases the person has not been punished under the criminal justice system for the criminal offence and, unless there is some abuse of process, the purpose of compulsory treatment is likely to be found by a court to be mental health treatment.<sup>225</sup>

You will need to take the right not to be tried or punished more than once into account if the proposal, policy, or decision:

- relates to policies, procedures and oversight mechanisms designed to ensure that compulsory treatment is used in accordance with the law (and is not undertaken to a purpose other than healthcare).

<sup>224</sup> *Psychology Board of Australia v Ildiri (Occupational and Business Regulation)* [2011] VCAT 1036 at [33]–[35].

<sup>225</sup> However, other human rights are relevant to this situation, such as whether deprivation of liberty is in accordance with the law, whether the person is receiving humane treatment when deprived of liberty, and whether the person is able to enjoy their human rights without discrimination.



## Retrospective criminal laws (section 27)

### Section 27 [Right to protection from] Retrospective criminal laws

(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

(4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

The protections against retrospective criminal laws are primarily the responsibility of the justice system and are unlikely to be engaged in the administration and delivery of the mental health and wellbeing system.

## Resources

Staff have ongoing access to the Charter of Human Rights in Victoria online education program. The online education program is open to VPS employees and local government staff members. In addition, we recommend the following resources:

### Charter Resources

- Victorian Equal Opportunity and Human Rights Commission, [\*The Charter of Human Rights and Responsibilities – A guide for Victorian Public Sector Workers\*](#), July 2019. The guide is designed as a practical tool to help public sector employees to build their human rights knowledge and capability.
- Judicial College of Victoria, [\*Charter of Human Rights Bench Book\*](#), March 2022. The Bench Book outlines the rights and operative provisions of the *Charter*, drawing on relevant Victorian case law to discuss the operation and effects of the various provisions.
- Judicial College of Victoria, [\*Charter case collection\*](#), November 2022. This resource provides brief summaries of decisions from the Victorian Court of Appeal and the Supreme Court of Victoria which have discussed the Charter.
- Victorian Ombudsman, [\*Good Practice Guide: Managing Complaints Involving Human Rights\*](#), May 2017. This guide is designed to help public organisations deal effectively with complaints involving human rights.
- Simon Katterl and Chris Maylea, 'Keeping Human Rights in Mind: Embedding the Victorian Charter of Human Rights into the Public Mental Health System' (2021) 27(1) *Australian Journal of Human Rights* 58.

### Broader human rights and mental health resources

- Indigo Daya, 'Russian Dolls and Epistemic Crypts: A Lived Experience Reflection on Epistemic Injustice and Psychiatric Confinement' (2022) 3(2) *Incarceration* 26326663221103444.
- Anne Wand and Timothy Wand, "'Admit Voluntary, Schedule If Tries to Leave": Placing Mental Health Acts in the Context of Mental Health Law and Human Rights' (2013) 21(2) *Australasian Psychiatry* 137.
- Laura Davidson, 'A Key, Not a Straitjacket: The Case for Interim Mental Health Legislation Pending Complete Prohibition of Psychiatric Coercion in Accordance with the Convention on the Rights of Persons with Disabilities' (2020) 22(1) *Health and Human Rights* 163.

- Sebastian Von Peter et al, 'Open Dialogue as a Human Rights-Aligned Approach' (2019) 10 *Frontiers in Psychiatry* 387.
- Dainius Puras and Piers Gooding, 'Mental Health and Human Rights in the 21st Century' (2019) 18(1) *World Psychiatry* 42.
- Vrinda Edan and Chris Maylea, 'A Model for Mental Health Advance Directives in the New Victorian Mental Health and Wellbeing Act' [2021] *Psychiatry, Psychology and Law* 1
- Juliet Watson et al, *Preventing Gender-Based Violence in Mental Health Inpatient Units* (Australia's National Research Organisation for Women's Safety, 2020)
- Chris Maylea and Asher Hirsch, 'The Right to Refuse: The Victorian Mental Health Act 2014 and the Convention on the Rights of Persons with Disabilities' (2017) 42(2) *Alternative Law Journal* 149.

### Co-production and co-design resources

- Vrinda Edan et al, 'Employed but Not Included: The Case of Consumer-Workers in Mental Health Care Services' [2021] *The International Journal of Human Resource Management* 1
- Susan Ainsworth et al, *Leading the Change: Co-Producing Safe, Inclusive Workplaces for Consumer Mental Health Workers* (VMIAC & University of Melbourne, 2020) <[https://socialequity.unimelb.edu.au/data/assets/pdf\\_file/0005/3532820/Leading-the-Change-Report-2020.pdf](https://socialequity.unimelb.edu.au/data/assets/pdf_file/0005/3532820/Leading-the-Change-Report-2020.pdf)>
- Indigo Daya, Bridget Hamilton and Cath Roper, 'Authentic Engagement: A Conceptual Model for Welcoming Diverse and Challenging Consumer and Survivor Views in Mental Health Research, Policy, and Practice' (2020) 29(2) *International journal of mental health nursing* 299.
- Kelly Ann McKercher, 'Beyond Sticky Notes' [2020] *Doing co-design for Real: Mindsets, Methods, and Movements*, 1st Edn. Sydney, NSW: Beyond Sticky Notes.



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## **Simon Katterl**

Simon Katterl is the owner of Simon Katterl Consulting. He is a consultant to government, mental health, the Royal Commission into Victoria's Mental Health System, and legal services on issues of mental health law, human rights, co-design and consumer leadership.

Prior to consulting, Simon worked in consumer and non-consumer designated roles at Victorian Mental Illness Awareness Council, Victoria Legal Aid, Independent Mental Health Advocacy, the Mental Health Complaints Commissioner, and the Victorian Equal Opportunity and Human Rights Commission. Prior to working in mental health Simon worked in aid and development in East Timor.

Simon has lived experience of mental health issues and using both private and public (community) mental health services. He holds a Bachelor of Arts (International Relations) and a Bachelor of Laws (Hons) from Griffith University, a Graduate Diploma in Psychology from the University of Melbourne, and is completing a Masters of Regulation and Governance at the Australian National University.

## **Kerin Leonard**

Kerin Leonard is the Director of Lionheart Consulting Australia.

Prior to becoming an independent consultant, Kerin was the senior executive responsible for community engagement at the Royal Commission into Victoria's Mental Health System.

During her public service career, Kerin was the head of legal at the Victorian Equal Opportunity and Human Rights Commission for five years and led the secretariat supporting the statutory eight-year review of the Charter. Kerin was also previously a Principal Legal Officer in the International Human Rights and Security Law Branch of the Australian Government Attorney-General's Department.

Kerin holds a Bachelor of Arts and a Bachelor of Laws (Hons 1) from the Australian National University and a Master of Law (International Law) from the University of Edinburgh.

In 2015 Kerin was awarded the Paul Baker Award by the Law Institute of Victoria for significant and outstanding contribution in human rights.

