Inquiry into Australia's Human Rights Framework

1st July 2023

Submitted to:

The Parliamentary Joint Committee on Human Rights

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Via: Parliament of Australia Submissions Portal

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework

Email: human.rights@aps.gov.au

Lived Experience Australia Ltd
Contact: Sharon Lawn
Chair & Executive Director
slawn@livedexperienceaustralia.com.au
PO Box 98, Brighton SA 5048
Phone 1300 620 042
ABN: 44 613 210 889

Contents

Introduction 3
Purpose of this Inquiry 3
Our Response 4
Contact 8

Introduction

Lived Experience Australia Ltd (LEA) is a national representative organisation for Australian mental health consumers and carers, families and kin, formed in 2002 with a focus on the private sector. All members of our Board and staff have mental health lived experience as either a consumer, family carer or both. This is core to our advocacy, recognising that the impacts of policy and practice are felt not only by individuals, but also by families and whole communities.

Our core business is to advocate for systemic change to improve mental health care (including psychosocial disability) across the whole Australian health system, including within State and Territory jurisdictions. This includes advocating for empowerment of people with mental health lived experience (people with mental health conditions and their family, carers and kin) in the broad range of issues that impact their mental and physical health, and their lives more broadly. It includes empowering them in their own care and contact with health and social services, promoting their engagement and inclusion within system design, planning and evaluation and most importantly, advocating for systems that promote choice, inclusion, justice and fairness, and address abuse, violence, exploitation, neglect, stigma, discrimination and prejudice.

Our feedback to the Parliamentary Joint Committee on Human Rights comes from the perspectives and experiences of consumers with mental health lived experience, and from the perspectives of their families, carers and supporters. Their resounding feedback is that existing mechanisms to protect human rights at both the federal and state and territory levels through the various Acts and Charters are inconsistent, poorly understood and operationalised into real-world practice, and therefore not adequate to protect human rights. Without a federal Act, there is no consistent guide to build truly accountable systems that promote positive rights or provide sufficient mechanisms to protect people when human rights breaches occur.

In providing our feedback to the inquiry, and also as a member organisation represented on the National Mental Health Consumer Carer Forum (NMHCCF), we also support its submission to this inquiry. We welcome the opportunity to provide this feedback and wish the committee well in its deliberations. We welcome the opportunity to work with the Parliamentary Joint Committee on Human Rights, the federal government, and the sector to ensure the human rights of all people across Australia.

Purpose of this Inquiry

Lived Experience Australia understands that the Parliamentary Joint Committee on Human Rights is tasked with reporting on the following matter to the Attorney-General by 31 March 2024:

- to review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan;
- to consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;
- to consider developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law; and
- to consider any other relevant matters.

The committee has invited submissions in relation to these matters, and in particular:

- whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper);
- whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:
    - to the remit of the Parliamentary Joint Committee on Human Rights;
    - the role of the Australian Human Rights Commission;
    - the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
- the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant caselaw, and relevant work done in other states and territories.

Our Response

1. **Whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper)**

Lived Experience Australia agrees with the proposed recommendations from the Australian Human Rights Commission's (AHRC) position paper for the Australian Parliament to enact a federal Human Rights Act. For consistency with international law and treaties, ensuring Australia meets its human rights obligations domestically and internationally, this Act should align with the Articles laid out in the Universal Declaration of Human Rights (UDHR) and other related International Conventions. The United National Convention on the Rights of People with Disabilities (UNCRPD) and the Declaration on Human Rights of Indigenous Peoples are of particular significance and their elevation within the proposed Human Rights Act are timely.

We urge the Australian Government to take the following actions:

- Re-establish Australia's Human Rights Framework and establish reviews for both the Framework and the National Human Rights Action Plan to update their respective components.
- Implement a National Human Rights Agreement between all Federal, State, and Territory Governments to ensure it is meeting its obligations as a signatory to OPCAT.
- Apply a human rights-based approach to all federal policy and legislative documents, guided by principles laid out with the UNCRPD, providing explicit statements of compatibility with the UNCRPD in each and all of these documents, as proposed by Australia's Human Rights Framework[1].

2. **Whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:**
    - **to the remit of the Parliamentary Joint Committee on Human Rights;**
    - **the role of the Australian Human Rights Commission;**
    - **the process of how federal institutions engage with human rights, including requirements for statements of compatibility**

We stress that existing mechanisms to protect human rights are far from adequate. Breaches of human rights are deeply embedded within mental health services and their practices and the cultures of the mental health workforce. They arise because of the perverse structural focus on risk and create everyday systems that do not delivery recovery-oriented care.

We stress that the ability to breach human rights remains ever-present because of the underlying deeply embedded negative assumptions held by mental health services and their workforces about people in receipt of services and the structures of stigma and discrimination that remain unaddressed. It is too easy to say a biomedical approach is at fault and that a more person-centred, rights-based approach is needed. However, whilst the legislation and the mental health services and workforce continues to fail to engage with core human rights concepts such as capacity, dignity of risk, supported decision-making, and so forth, the person-centredness and the human rights that underpin it remain illusive and rhetorical; they fail to be embedded into everyday practice. The dignity of risk, for example, is a core aspiration of recovery-based practice; however, the means to apply this within routine practice when working with people is extremely unclear for many mental health workers.[2,3]

[1] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework

[2] Lawn, S., Delany, T., Pulvirenti, M., McMillan, J. (2015) A qualitative study using moral framing to understand patients' and mental health workers' experiences of community treatment orders. BMC Psychiatry, 15, 274-290.

[3] Lawn, S., Delany, T., Pulvirenti, M., McMillan, J. (2016) Examining the use of metaphors to understand the experience of community treatment orders for patients and mental health workers. BMC Psychiatry, 16(1), 1-16, doi 10.1186/s12888-016-0791-z.

We also wish to stress the importance of the principles that have guided the Australian Human Rights Commission in designing its model for a Human Rights Act (pp.15-17 of the Position Paper). We particularly stress the importance of the principles of it being 'Preventative' and 'Protective'. As the Position Paper states, human rights breaches may only be apparent after extensive damage has already occurred. We wish to highlight the significant impact of trauma for mental health consumers and their family carers, over decades and which continues even now, as part of their contact with systems of care where human rights have been breached.

3. The effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant caselaw, and relevant work done in other states and territories.

Lived Experience Australia wish to stress that state and territory Human Rights Acts/Charters currently offer no explicit guidance on how to operationalise and implement the very protections that they espouse. They are largely rhetorical documents. Every day, people with mental illness experience human rights breaches as part of their contact with services and systems that are meant to serve, support and protect them. Refugee, Indigenous, Culturally and Linguistically Diverse, Homeless and LGBTIQ communities are particularly impacted.

The problem of minimal safeguarding of human rights may be in part due to the limited powers and resources of the State and Territory human rights bodies to investigate complaints and hold services and individuals accountable for breaches. However, this does not fully explain why Australia does not adhere to its obligations under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

Lived Experience Australia is currently partnering on an Australian Research Council (ARC) funded project led by Prof Lisa Brophy to investigate the variation in the use of Community Treatment Orders (CTOs) across States and Territories. This work is important because CTOs represent a prominent area of mental health treatment where coercion and human rights breaches are arguably most visible. This work will have a particular focus on the culture of mental health services to examine whether and how it might account for these variations which are significant despite rates of mental ill-health being equivocal across jurisdictions.[4]

Further research undertaken by Lived Experience Australia's Executive Director and colleagues has highlighted significant system failure to provided supported decision-making largely driven by paternalistic and coercive cultural issues within mental health services.[5,6] Many people experience compulsory assessment and then the resultant compulsory treatment within an extremely limited frame in which enforced medication is the primary or only treatment provided. People are often placed on compulsory treatment regimes devoid of any efforts to work constructively with them so that they no longer need compulsory treatment. It can lead to some individuals experiencing repeated CTOs over many years. This is a prime example of failure to consider the person's human rights in the sort and longer term.

We recommend that the Parliamentary Joint Committee and the National Human Rights Commission engage closely with the Australian and international evidence being gathered on the use of CTOs to inform its work.

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[4] Brophy, L., Edan, V., Kisely, S., Lawn, S., Light, E., Maylea, C., Newton-Howes, G., Ryan, C.J., Weller, P.J., Zirnsak, T. (2022) The urgent need to review the use of CTOs and compliance with the UNCRPD across Australian jurisdictions. International Journal of Mental Health and Capacity Law, 28(2021), 1-75. DOI: https://doi.org/10.19164/ijmhcl.28.1232

[5] Dawson, S., Muir-Cochrane, E., Lawn, S., Simpson, A. (2021) Community Treatment Orders and care planning: how is engagement and decision-making enacted? Health Expectations, 24(5), 1859-1867. https://doi.org/10.1111/hex.13329

[6] Dawson, S., Muir-Cochrane, E., Simpson, A., Lawn, S. (2021) Risk versus recovery: care planning with individuals on community treatment orders. International Journal of Mental Health Nursing, 30(5), 1248-1262. https://onlinelibrary.wiley.com/doi/10.1111/inm.12877

We do not seem to be learning from the past

Again, we stress that the ability to breach human rights remains ever-present because the underlying structures of stigma and discrimination remain unaddressed. History teaches us that when individuals are not respected or seen as having the capacity for autonomous decision-making or supported decision-making, then it becomes 'easy' to deny them basic human rights, either through paternalistic responses, or simply viewing them as 'non-human' or 'less then', and in some cases not worthy of humane care. However, it is unclear what has been learned.

We fully support the work of the Parliamentary Joint Committee and urge it to strengthen existing mechanisms, including the role and powers of the Australian Human Rights Commission.

We offer the below particular examples to demonstrate these points:

I. The COVID-19 pandemic created unprecedented concern by governments in countries around the world for the mental health and wellbeing of their citizens. The internet was replete with messages of 'We are in this together'. However, in their haste to safeguard the community, it became apparent that not all citizens were to be treated with equal regard for their mental health and wellbeing.

The response within Residential Aged Care Facilities, and Supported Residential Facilities (SRFs) in particular, was one largely of containment, with little attention to the mental health and wellbeing impacts for residents and staff. These facilities arguably are home for some of the most marginalised people in our community; however, there was virtually no direct support for their mental health and wellbeing needs during COVID, or increased resourcing to support the care needs arising from COVID within these settings.

Many individuals residing in SRFs would otherwise be homeless or reside in long-term inpatient psychiatric care settings. They include adults of all ages. They commonly already experience a range of impacts of the SRF environment on their overall health and wellbeing, including significantly reduced autonomy, lack of privacy, increased dependence on staff and other support providers, and community withdrawal and exclusion. In effect, they were the least likely members of the community to leave their residence during the pandemic, and least likely to be in contact with others outside of the SRF environment.

The SA COVID Emergency Response Act (enacted in April 2020 to 'manage the SRF and similar institutional environments during COVID) is an example of a response that has been predominantly one of 'containment' first. The Act was in response to concerns about COVID-19 and compliance with social distancing by residents of SRFs. It was enacted with no apparent consultation with residents, the disability sector or mental health sector, or consumer and carer advocates, despite many people with significant disability and psychosocial disability being residents in SRFs. It put in place measures to restrict an individual's movements where there was a clear risk that they may contract or contribute to the spread of COVID-19. In discussion with the Public Advocate and lead disability advocates, Lived Experience Australia's Executive Director, who was SA Mental Health Commissioner during that time, established that there was virtually no actual evidence of this risk to prompt the development of the Act other than brief concern raised by one SRF manager and a family carer. The Act was conceived as a prevention measure and the main reason given by the Public Advocate for the Act was concern that some SRF managers were detaining people unlawfully, so an Act offered greater protections.

Equally, there had been only one instance of the Act needing to be enacted during this time. An increase in support, resources, and organised training and education to this sector was not offered. Concern for the residents' mental health and wellbeing and the potential trauma caused by being locked in their rooms appears to have not been an explicit component of the deliberations that led to this Act. The Act did not align with the United Nations Convention on the Rights of People with Disabilities (UNCRPD); nor was it clear how it aligns with SRF regulations and policies regarding use of restraint, or National Disability Insurance Scheme (NDIS) policies regarding the provision of care by registered service providers and use of restraint. There was also no alignment with the state's Mental Health Act. Effectively, completely untrained

people were given the power to 'detain' and 'seclude' residents, by any means they chose, for any period of time and with limited oversight.

Several components of the Act therefore remained wide open to abuse of people's basic human rights, including lack of proper oversight and accountability, appeal processes that were flawed, and mismatch with the physical environment of SRFs in which physical distancing was virtually impossible other than to lock the person in their room.

We note that concerns about the use of restrictive practices and ineffective supervision and oversight for vulnerable persons were key themes emerging from the Oakden inquiry and Royal Commission into Aged Care Quality and Safety. These concerns were further echoed in the failures and a lack of independent oversight that culminated in the death of Ms Ann Marie Smith deceased. A lack of oversight of the carer tending to her needs, coupled with prolonged, unsupervised access enabled severe neglect and abuse to take place.

Acknowledging that poor oversight is a recurring theme that underscores well-known instances of abuse and neglect of vulnerable persons, we urge the Parliamentary Joint Committee to consider how to strengthen oversight of all legislation impacting people with mental ill-health and/or psychosocial disability, to preventing improper exercises of the power and breaches of their basic human rights.

II. There continue to be many failures in the addressing physical health and mental health comorbidity, with people with mental ill-health continuing to die up to 20 years earlier than they should. This is fundamentally a human rights issue. There have been significant efforts to improve this situation, but health systems continue to fail to deliver a coordinated response. We believe that this is fundamentally due to stigma and discrimination within these systems, the negative assumptions they hold about people's capacity to change, and then the consequent failure to provide sufficient support, or that they have simply lost hope.

Lived Experience Australia's recent research in collaboration with Equally Well, or mental health consumers' and carers' experiences of contact with GPs, psychiatrists and other mental health professionals about their physical health concerns, found that many health professionals are failing to screen, ask and then act on addressing people's physical health concerns.[7]

We also wish to highlight the findings of a very recent study investigates mortality rates and causes of death during inpatient psychiatric care in New South Wales (NSW), Australia. Risk factors for inpatient death were also explored using linked administrative datasets with complete capture of psychiatric admissions in NSW from 2002 to 2012 (n=421,580). Suicide accounted for 17% of inpatient deaths, while physical health causes accounted for 75% of all deaths. Thirty percent of these deaths were considered potentially avoidable.[8] We also offer an example of an 'avoidable' inpatient death, for which there was ultimately a finding of 'everyone and no-one' being held accountable, that highlights how basic human rights continue to be ignored, because they continue to be underpinned by stigma and discrimination by mental health service providers and structural failures to consider, understand, and then enact basic human rights within their policies, guidelines and systems of care.[9]

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[7] Kaine, C., Lawn, S., Roberts, R., Cobb, L., & Erskine, V. (2022) Review of Physical and Mental Health Care in Australia, Lived Experience Australia Ltd: Marden, South Australia, Australia. https://www.livedexperienceaustralia.com.au/research

[8] Gunaratne P, Srasuebkul P, Trollor J, Mortality and cause of death during inpatient psychiatric care in New South Wales, Australia: A retrospective linked data study, *Journal of Psychiatric Research* (2023), doi: https://doi.org/10.1016/j.jpsychires.2023.05.043.

[9] https://www.courts.sa.gov.au/download/2020-findings/ (Ricky Dale Noonan)
https://indaily.com.au/news/notes-on-adelaide/2019/02/05/eyes-forward-keep-walking-sa-healths-tips-for-avoiding-the-media/
https://anmj.org.au/policy-the-need-for-them-to-be-understood-enforced-and-practiced/
https://thewest.com.au/news/crime/mentally-ill-man-was-left-to-choke-to-death-in-seclusion-at-flinders-medical-centre-nurses-later-falsified-notes-inquest-hears-ng-55d7dee485a0dba0f46a5b5064154bb2

Contact

We thank the Parliamentary Joint Committee on Human Rights for the work it is doing. We wish you every success with the next steps and would be keen to be involved in any future discussions about this important topic.

Your sincerely

Sharon Lawn

Professor Sharon Lawn
Lived Experience Australia Ltd
Board Chair and Executive Director
Email: slawn@livedexperienceaustralia.com.au
Mobile: 0459 098 772