

# **Mental Health Legal Centre Inc**

## **Submission to the Independent Review of the Victorian *Equal Opportunity Act***

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The Mental Health Legal Centre provides a free and confidential legal service to anyone who has experienced mental illness in Victoria where their legal problem relates to their mental illness.

All centre activities aim to promote the rights of people who experience mental illness. The Centre is a non-profit organisation run by an independent Committee of Management.

We receive the majority of our funding from the Victorian Department of Human Services and Victoria Legal Aid.

MHLC provides telephone advice and referral, direct advocacy - in some cases, education and general inquiries about mental health and the law for consumers in Victoria.

### **Attitudes**

The Mental Health Legal Centre (MHLC) would like to begin by saying that it is pleased that the present government is continuing with its avowed policy to improve the political status of *all* citizens in the state of Victoria. The Centre hopes that this current review will contribute to the potential for persons with a psychiatric disability to participate in society to the fullest of their ability.

People with psychiatric disability experience discrimination everyday in all areas of life. Equal opportunity legislation is highly important to our client group not only because it sets a standard but also

because it enables people with psychiatric disability to redress inappropriate action by some members of the community in everyday life.

For more than 20 years our Centre has provided legal services to people with psychiatric disability, and we have a keen sense of the extensive discrimination and prejudice to which they are subject. We are very much aware that a great deal of discrimination is legislatively based. It is of particular concern to the Centre that the piece of legislation devised to confront discrimination in society, namely the *Equal Opportunity Act* (the Act), instead appears to too readily defer to other legislation that tends to discriminate.

However, as the issue of exceptions and exemptions will be reviewed at a different time by a different body, this is not the forum to raise on-going concerns that the Centre has about this matter. We will however discuss three areas of concern: Health, Employment and Families (Child protection).

## **Health**

### **Specialist Services for Women**

One key area of concern for the clients of MHLC is the lack of specialist services for women in psychiatric wards. Section 8 (1) of the *Equal Opportunity Act* states that Direct discrimination occurs if a person treats, or proposes to treat someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances. The non-provision of women only wards – in contrast to the general health system – is a clear example of someone being treated differently because of an attribute (namely ‘impairment’, which includes mental impairment defined as a mental or psychological disease or disorder).

The Mental Health Act discriminates in this manner by not making provision for appropriate and specialist women only services. The Act provides that services will take into account, amongst other things, gender related needs (section 5(a)(ii)), but such specialist services do not exist.

There is a growing awareness that treatment of women in mixed gender wards can be counter therapeutic in terms of exposure to risk of assault and harassment, the fear some women may have of male patients, and the impact on the many women with experience of sexual abuse or assault of mixed environments<sup>1</sup>. Women’s inability to receive treatment in women only wards may arguably amount to indirect discrimination in the sense that the condition on female use of inpatient services is that they do it in the presence of males, and for those for whom this is counter therapeutic they can not obtain effective treatment in that context. The issue to which most debate would relate is reasonableness – this would come down to resource and service

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<sup>1</sup> Plowman R, “Resegregating psychiatric wards may protect women” [2002] *CrossCurrents – The Journal of Addiction and Mental Health* 8 August 2003.

provision practicalities. It is certainly arguable that it would not be unreasonable for mental health services to at least provide some access to women only services for those women most in need. In the context of reasonableness it should be noted that there are a number of other specialist mental health services in Victoria such as those for forensic patients, young people, people with eating disorders, people with personality disorders, people in need of more secure care and people with dual diagnosis (mental illness and substance abuse issues).

### **Child Protection**

Existing research into parents with a disability suggests that there is both a disproportionate representation of parents with a disability appearing before the Children's Court in Melbourne and an over-representation within the Victorian Child Protection system. Research also indicates that parents with a disability may be unfairly targeted by the child protection system.<sup>2</sup> Given this, we are concerned about the new child protection regime and the likelihood that parents with a disability will be further discriminated against. The Children, Youth and Families Act 2005 (CY&F) has new powers that impact unfairly on people with psychiatric disability. Some of our concerns are as follows:

Fast tracked permanent care - 6 months is often an unrealistic time frame for a parent to recover from an acute episode of illness and return to full time parenting

Disclosures under s 39 of CY&F Act are deemed not a breach of section 120 A of the Mental Health Act and available for the purpose of determining an appropriate service and seeking advice on risk to a child.

People are unaware when seeking support as parents that their private information can be shared. In the case of many people with a psychiatric disability the only support available to them is from paid workers. We know of one case where a mother reported to her doctor that she wasn't coping and feared that she might self harm, the doctor reported this to child protection services (as is a doctors mandatory reporting obligation under the CY&F Act). As a result the child was removed from her care. It took many months and court appearances to even secure supervised contact, eventually the child was returned to his mother. Similar disclosures result in voluntary agreements that the child be placed in care.

Parents are pressured to enter voluntary agreements. Parents with a psychiatric disability are vulnerable to being talked into making decisions at the threat of losing their children and in our experience are not properly informed. We propose that an advocate must be present to assist the person at the time of the first contact with child protection services.

Contact arrangements particularly with permanent care placements are far too infrequent to allow a parent to maintain a meaningful role in their child's life (often only 2-6 x per year, supervised contact). The person is expected to initiate these arrangements as a test of their motivation and commitment; people with psychiatric disabilities need more support and guidance. It is not surprising in many cases that DHS observe poor interaction between the child and parent which

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<sup>2</sup> Swain, S. et al, "Pride and Prejudice: A Snapshot of Parents with Disabilities Experience of the Child Protection System in Victoria", 2002, p37.

allows them to conclude that there is no meaningful parenting and to recommend further reducing contact.

The Victorian Children Youth and Families Act 2005 makes no provision for the specialist needs of parents with a mental illness. In accordance with the abovementioned research, the Department of Human Services notes a marked increase in people with disabilities coming into the child protection system and highlights that 70% of parents affected by the system have a disability or drug or alcohol issue, but provides no assistance. In accordance with the Disability Discrimination Act 1992 and the Equal Opportunity Act 1995 reasonable adjustments must be made to ensure that specialist services are available to assist these parents.

However, DHS's subjective views on 'parental capacity' time and time again discriminate against parents with disabilities. Many are concerned that these changes, providing for fast-tracked permanent care and changing the key test for intervention in a way likely to discriminate, will only deepen the injustice.

An example of the kind of discrimination that clients of the Centre encounter involves a recent case that involved Child Protective Services (CPS) where a child was placed under a Guardianship Order. The mother of the child has a psychiatric disability that means she has great difficulty remembering times and dates as well as coordinating activities. As a consequence of this she will sometimes be unable to meet her child for visitation at the time and place arranged by the CPS. This is deemed by CPS to be illustrative of the mother's inability and unwillingness to properly engage with her child.

This situation could easily have been avoided by something as simple as CPS booking a taxi to drive the mother to the pre-arranged location.

This is clearly an example of indirect discrimination as defined in s 9 (1) of the Equal Opportunity Act. The consequences of which, namely loss of contact with a child, when compared to the costs of alternative arrangements – a number of taxi fares – clearly means that the requirements of CPS are 'unreasonable' for the purposes of s 9 (2).

## **Employment**

### **Section 13 Equal Opportunity Act – Discrimination against Job Applicants**

MHLC is particularly concerned about the now standard practice of employers requesting from potential employees information about their mental health status and history. This practice is sometimes a dubious one for a number of reasons. For what purpose is this information requested – is it to better understand the candidate's talents and abilities? Is it requested so as to better accommodate the person into the structure of the workplace, should their abilities prove to be best suited for the vacancy? Or is it simply requested as a blanket exclusionary measure?

Lawyers at MHLC have encountered a number of examples where discrimination has been experienced by clients. A number of clients have experienced discrimination on the part of

employers when unsuccessfully applying for a position that was well within their ability to attain. One client believed that declaring a mental illness on her application proved a determining factor when not receiving a promotion. This meant that when later applying for another vacancy she felt as though she was placed in a situation of having to deny her personal history to receive a promotion.

Many clients of the Centre are subsequently fearful of being 'found out'. This worry, that some time in the future the decision not to disclose will become a problem has the potential to exacerbate the symptoms of their illness.

### **The impact of Criminal records upon employment prospects**

#### **Police Records Information Release Policy**

The possession of a criminal record has a serious impact upon a person's future employment prospects. It is therefore most important that policy regarding the release of criminal records is both consistent and is not a detriment to a person's ability to participate in, and contribute to society. The MHLC agrees with Fitzroy Legal Service (FLS) when it states that 'there are numerous deficiencies in the current approach to the use of criminal record information in Victoria. These deficiencies are highly significant when set in the context of upward spiraling rates of police record checks for employment, volunteering and licensing.'<sup>3</sup> FLS goes on to recommend (with regard to the need for a spent conviction scheme) that 'a finding of guilt without a criminal conviction being recorded . . . should not be included within the definition of conviction for the purposes of a spent conviction scheme, and accordingly should not be made available on a person's official criminal record.'<sup>4</sup>

It is nothing less than discriminatory practice on the part of Victoria Police when it includes in its Information Release Policy that Serious Offences where the result was 'Acquitted by reason of insanity / mental impairment' or 'Not guilty by reason of insanity / mental impairment' is an exception to the non-release of a record that is over ten years old. Other exceptions in this Victoria Police Policy either pertain to specific categories of work or to issues of public safety. There is no practical reason why persons acquitted or found not guilty for reasons of mental impairment cannot be covered by the other exception category of 'in the interest of crime prevention or the administration of justice' should the specific example warrant it. Including mental impairment in the exceptions category is to suggest that all persons found not guilty or acquitted in this way are an ongoing threat to the community regardless of how long ago the incident occurred or what has happened during the intervening years. It in no way takes into account the character of the person or the circumstances of the event that brought them to court, or for that matter the work they are presently seeking to attain.

As an example of the effects that this policy has, this Centre is aware of a case where a person resigned from his job because the police were insisting on disclosing the fact that he was found

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<sup>3</sup> Fitzroy Legal Service Inc, *Criminal Records in Victoria: Proposals for Reform*, 2005, p 4.

<sup>4</sup> Ibid.

not guilty of murder even though the Privacy Commissioner was concerned about this and the man had overwhelmingly supportive evidence from his treating team that he posed no risk.

## Human Rights in Victoria – Management Model

The Government is to be commended for its recent review of the Equal Opportunity Commission and the opportunity to move into 2008 with a revamped and rigorous approach to human rights in Victoria.

MHLC would now like to take this opportunity to express some of the concerns that it has about the present structure of the EO Commission.

In our dealings with the Commission (since the restructuring that took place in 1995) we have difficulty identifying the lines of communication and allocation of responsibility within the office. For example, do we write to the chair of the commission or the CEO or a commissioner in charge of the relevant portfolio?

We propose a model that is clear in its lines of accountability, is practical and affordable - modeled somewhat on the Victorian Law Reform Commission.

Below can be found a list of our concerns and possible solutions to existing structural problems:

The Current governance model lacks authority – the position of CEO can override the decisions of the Commission when internal management priorities emerge.

**Solution – The Equal Opportunity Commission should have a Commissioner and separate full time CEO.**

**The role of the CEO:**

**accountable to the Chairperson  
to support the Commission and manage the internal running of the organisation, the budget and the staff.**

**The Governance roles and responsibilities of the Commission need to be redefined – the allocation of project funding and financial management to be addressed within the structure.**

The current model lacks high profile identities - it is essential that the community hears the voice of a champion of human rights, who is able to react quickly to issues of discrimination, particularly in the media. However the community sector must have open and timely access to this person (or persons if need be) to ensure that they consider the needs of those experiencing discrimination and that they are not captive to the media.

**Solution - a Commission comprising a full time chair person and part time Commissioners who are appointed to a portfolio which encompasses a specific attribute or attributes (as defined in the Act). Each financial year a determined number of systemic issues ought to be nominated and addressed. The Commissioner will be responsible to nominate an advisory group, chair the group and ensure that each issue is dealt with in an expedient fashion and that the results are widely disseminated. Commissioners to meet on an as needs basis, defined by the chair (rather than regular meetings of the Commissioners which can become largely administrative meetings). The Chair is to take responsibility for determining areas of priority but is to remain accountable to the Commissioners thus protecting the chair and thus the Commission from external lobbying which may demand attention at the expense of quieter minority groups.**

Current model lacks sufficient determinative powers

**Solution - a commission with increased powers, including a range of remedial options such as undertakings, legally enforceable directions and penalties.**

Current model fails in its duty to inquire publicly into systemic issues.

**Solution - A Commission with responsibility and power to regularly research and inquire into systemic issues. A Commission to identify areas for systemic advocacy in response to issues raised by the community, particularly those experiencing discrimination.**

Current model is dated and uninviting, it lacks appeal. We propose a renamed and 'rebadged' Office or Commission which will attract the confidence of young people, people from culturally diverse backgrounds and people with disabilities. We suggest removing 'Opportunity' from the current title, there are few opportunities for people with a mental illness, who generally feel too disempowered to avail themselves of them. Opportunities are generally available to well resourced, articulate individuals. It is possible that the title itself is a deterrent to complainants.

We prefer the Northern Ireland title: 'Equality Commission' (where equality is used as a verb) or 'Equal Rights' Commission. A 'Fair go' Commission is a captive title, unfortunately already used, however, a similar catchy name that resonates as addressing human rights and addresses inequity would be great.

**Solution - The current Commission to speak with people who experience discrimination, to establish their views (especially people who experience daily discrimination and young people). As a result of this process develop a new title, a new image and appropriate promotional material.**

It is our experience that clients have limited contact with the EOC, although ongoing discrimination is generally experienced by all people known to have a mental illness, however few clients pursue remedies via the Act for reasons previously discussed.

**Solution - the Commissioner(s) must take a role as a significant public and media figure to attract the community's confidence and promote equal rights and the work of the office.**

Current system lacks focus and expertise in many areas, conciliations are privately resolved and the quantum of awards remains confidential. However, without disclosing personal details of complainants/ respondents resolutions could be disclosed and published on a regular basis. It is our view that there ought to be disclosure of the details of repeat offenders consistent with the practice of the building industry, medical practice board etc. Frequent offenders to be subject to audit

**Solution – a Commission that is comprised of a full time chairperson and part time members appointed with specific portfolios and for limited period of time, defined by action within their portfolio area. Advisory groups to be established for each law reform project. The powers of the Commission extended to investigate the employment practices of private and public employers at any time.**

Current system too reactive and complaints driven.

**Solution – Commission to have powers, resources and obligations to perform proactive audit function, analyse and collate complaints data and recommend systemic reform.**

Insufficient involvement of consumers (people with psychiatric disability) in complaints processes.

**Solution – a Commission to include consumers at Commission level and on advisory groups, to remunerate all consumers for time including preparation.**

Failure of existing mechanisms to adequately understand consumer experience or accord sufficient dignity respect and credibility to consumer complainants.

**Solution – Commission to employ consumers as advisers and educators. Consumer advisers to be involved in the handling of complaints and audits. Consumer Educators to train Commission staff on the consumer perspective of psychiatric disability ( youth, age etc)**

Inconsistent/inadequate standards of internal complaints processes within psychiatric disability services.

**Solution – Commission to establish minimum standards for complaint resolution, to publicise these standards and complaint processes.**

Inadequate advocacy support for complainants.

**Solution - Increase resources of specialist psychiatric disability advocates such as Mental Health Legal Centre, Victorian Mental Illness Awareness Council and Victoria Legal Aid to represent complainants.**

Failure of present system to provide seamless open complaints system that links all complaints bodies to ensure that they compliment each other and that complaints are heard and addressed. Clients are quickly disillusioned by endless referral to other agencies and no one taking them seriously.

**Solution – A Commission to provide referral to other bodies such as the HSC, Ombudsman, Police Integrity Unity, Office of the Chief Psychiatrist and to monitor the progress of complaints. A Commission with the power to develop a tracking system - to follow the progress of complaints both within the Commission and between complaints bodies. The Commission to work with other complaint bodies towards developing a universal referral system to ensure that complaints do not fall between the gaps.**