

The independent review of compulsory treatment criteria and alignment of decision-making laws

Submission to the Independent Review Panel

2 June 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the independent review of compulsory assessment and treatment criteria and alignment of decision-making laws ('Independent Review').
2. The ALA's submission will primarily address the compulsory assessment criteria and welcomes the opportunity for further consultation in this regard.
3. The *Mental Health and Wellbeing Act 2022* ('The Act') currently allows a person who has mental illness to be compulsorily treated for their mental illness if the compulsory treatment criteria are met, and a temporary treatment order or treatment order has been made.
4. The ALA welcomes the Independent Review following a highly critical report by the Victorian Mental Illness Awareness Council (VMIAC) which has revealed a system that is still secluding and restraining people more frequently and for longer than national averages. Between 2000 and 2001, it was found that the total number of restrictive practices in Victorian hospital mental health services totalled 7461.²
5. The ALA is deeply concerned by what could be described as an epidemic in mental health care facilities as highlighted by VMAIC's report which found 1,039 instances of physical restraint in child and youth units (up 32% from the previous year), as well as a 56% increase in the use of mechanical restraint in adult mental health units between 2020-2021.³ The ALA also highlights the finding that First Nations Victorians were restrained and secluded at higher rates than the general population, making up 3.5% of all inpatients, but 5.3% of all seclusions.⁴
6. The ALA draws attention to comments by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, who called for "an absolute ban" on the use of seclusion and restraint in mental health facilities.

² VMIAC. (2022). How safe is my hospital? The Seclusion Report #3. Version 2.2. Victorian Mental Illness Awareness Council (VMIAC). Available at: www.vmiac.org.au/vmiac-seclusion.

³ Ibid.

⁴ <https://www.theguardian.com/australia-news/2022/jun/15/restraint-of-victorian-children-in-mental-health-facilities-increases-by-32>

Compulsory assessment criteria: A Human Rights Framework

Question 15: Are there any criteria that are particularly problematic?

7. In addition to Australia's international human rights obligations under the *United Nations Convention on the Rights of Persons with Disabilities (2006) (UNCRPD)*, the Victorian Charter of *Human Rights and Responsibilities Act 2006* ('the Charter') and particularly section 38, set out what factors public authorities are required to give proper consideration to and act consistently with human rights.
8. Under the current Act, the treatment criteria for compulsory treatment or temporary treatment are as follows⁵:
 1. *The person appears to have 'mental illness' (defined in the MHW Act as a 'medical condition that is characterised by a significant disturbance of thought, mood, perception of thought').*
 2. *Immediate treatment appears to be needed to prevent serious harm to the person or another, or serious deterioration in the person's mental or physical health.*
 3. *The person can be assessed if made subject to an assessment order.*
 4. *There is no less restrictive way to assess the person.*
9. The ALA is concerned that currently, consumers with decision-making capacity can still be given mental health treatment even if they have the capacity to consent to it, and do not give their consent.
10. Under the Charter, a number of human rights are activated by the above proposed compulsory treatment criteria, including but not limited to recognition and equality before the law (s 8); the right to protection from cruel, inhuman or degrading treatment or punishment (s 10(b)); the right not to be subjected to medical or scientific experimentation or treatment without full, free and informed consent (s 10(c)); freedom of movement (s 12); the right to privacy and protection of reputation (s 13); the right to liberty and security of person (s 21); and the right to humane treatment when deprived of liberty (s 22). to privacy (s 13(a)).
11. The ALA supports use of the Charter to enhance and promote human rights in Australia with a respect for the rule of law in a democratic society. We endorse the following principles

⁵ *Mental Health and Wellbeing Act 2022 (Vic)*, s. 142

which were highlighted by Justice Bell in the *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 ('PBU and NJE case');

- a. the Charter should be interpreted generously to give individuals the 'full measure of the fundamental rights and freedoms referred to'; and
 - b. the Charter should be interpreted as a 'living instrument', capable of growth and expansion, and applied in the context and in the light of present day conditions.⁶
12. The ALA draws particular attention to Justice Bell's commentary on the application of the Charter specifically on the assessment of a person's capacity to consent to compulsory mental health treatment and the assessment of whether there is a less restrictive treatment option.
 13. The ALA echoes observations that people 'with mental illness are highly vulnerable to interference with the exercise of their human rights, especially their right to self-determination, to be free from non-consensual medical treatment and to personal inviolability'.⁷
 14. The ALA, therefore, supports including capacity and consent criterion which involves an assessment of the patient's capacity for decision-making. We believe this would a) address discrimination on the basis of mental ability and b) provide an additional guard against unnecessary imposition of compulsory assessment and treatment on the basis of a diagnosis of mental illness.
 15. In terms of section 142(2) of the proposed criteria, the question is whether the limitation on human rights under the Charter are proportionate. This assessment of proportionality is defined under section 7(2) of the Charter to include two requirements: legality and proportionality. For a limitation to be proportionate it must be 'reasonable and demonstrably justified in a free and democratic society', which is to be determined with reference to the specified criteria set out in s 7(2).
 16. We emphasise the need for clarity and evidence in determining whether a right warrants restriction. In this respect, the ALA encourages the panel to consider specific circumstances

⁶ *PBU & NJE v Mental Health Tribunal* [2018] VSC 564.

⁷ *PBU & NJE v Mental Health Tribunal* [2018] VSC 564.

under which compulsory treatment would be warranted and specifically, what type of treatment would be warranted in the circumstances.

17. The ALA notes the additional test prescribed by Justice Bell; that a limitation imposed must be rationally and reasonably connected to its purpose.⁸ If the imposition of compulsory treatment is not rationally connected, it is not justified however important the purpose may be. The ALA places particular emphasis on this factor for determining whether compulsory treatment is warranted in particular circumstances.
18. For example, the finding in the PBU v NJE case was that the purpose of the limitation was to ensure that necessary medical treatment was given to people who are mentally ill. This purpose was not reduced by the fact of the claimants disputing the necessity of the treatment. Nevertheless, the ALA strongly supports outlining the circumstances that would warrant intervention via compulsory treatment.

Capacity

Question 17: Should the compulsory assessment and treatment criteria include a decision-making capacity criterion? What are the considerations?

19. The ALA agrees that the compulsory assessment and treatment criteria should include a decision-making capacity criterion. This differentiating factor will ensure that individuals are not unnecessarily subject to compulsory treatment on the basis of their mental health diagnosis, and can therefore act as an additional safeguard.
20. In determining whether someone has capacity for decision-making, we reference comments from the 'PBU & NJE case' where Justice Bell stated that it is enough that 'the person ... is able to make and communicate a decision in broad terms as to the general nature, purpose and effect of the treatment'.
21. The ALA notes that such a test requires a non-discriminatory approach and an objective assessment of whether the person has the capacity to use and weigh the relevant information, not whether they actually do use and weigh the relevant information.⁹ Notably, Justice Bell states that, '[t]o impose upon persons having a mental illness a higher threshold

⁸ PBU & NJE v Mental Health Tribunal [2018] VSC 564.

⁹ PBU & NJE v Mental Health Tribunal [2018] VSC 564.

of capacity, and to afford them less respect for personal autonomy and individual dignity, than people not having mental illness would be discriminatory’.

22. In all the circumstances, the ALA supports a human rights-oriented framework for determining whether individuals can be subject to the state’s compulsory mental health treatment. With reference to existing international human rights norms as well as Victoria’s own Charter, these protections can ensure that individual liberties are curtailed by appropriate limitations.

Conclusion

23. The Australian Lawyers Alliance (ALA) welcomes the opportunity to assist the Independent Review.



Lachlan Fitch

President, Victorian Branch Committee

Australian Lawyers Alliance