

Victorian Aboriginal Legal Service Co-operative Ltd

# *Mental Health Bill 2010*

## *Exposure Draft*

Response to the Victorian Department of Health



Victorian Aboriginal Legal Service Co-operative Ltd  
December 2010

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## About the Victorian Aboriginal Legal Service Co-operative Limited

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973 to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being criminal law, family law and civil law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officer (CSO). CSOs act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

VALS is actively involved in community education, research and advocacy around law reform and policy development. VALS strives to:

- a) Promote social justice for Aboriginal and Torres Strait Islander peoples;
- b) Promote the right of Indigenous Australians to empowerment, identity and culture;
- c) Ensure that Indigenous Australians enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- d) Reduce the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Aboriginal and Torres Strait Islander peoples.

For further information about VALS, please see our website: [www.vals.org.au](http://www.vals.org.au)



## 1. Introduction

VALS made a submission to the Community Consultation Panel for the review of the *Mental Health Act 1986* ('the Act') in March 2009. VALS considered engagement with this process to be critically important in light of linkages that have been found between mental health and contact with the criminal justice system.

Social disadvantage and inadequate treatment of mental health issues in the community inevitably equates to too many people with untreated illness ending up in prison.<sup>1</sup> VALS therefore has acute concerns for the needs of Aboriginal and Torres Strait Islander peoples with mental health issues who have an increased risk of: coming into contact with the criminal justice system; face potential exacerbation of an existing mental illness; and/or experiencing the onset of a mental illness within the justice system. For instance, people with a mental illness are overrepresented in Victorian prisons with 40% of prisoners experiencing serious mental illness and the proportion increases when other types of mental and psychiatric disabilities, such as personality disorders, are also considered.<sup>2</sup>

VALS recognises that the criminal justice system and the health care system have fundamentally different social functions. We argue, however, that these systems share some common interest and purposes.<sup>3</sup> With this bearing, VALS welcomes the opportunity to comment on the *Mental Health Bill 2010 Exposure Draft* ('the Bill').

VALS' 2009 submission on the review of the Act highlighted the unique conception of mental health, mental illness and wellbeing by Aboriginal and Torres Strait Islander communities, and the importance of recognising these conceptualisations in addition to more medical and clinical definitions. VALS considers the call for a broader and more inclusive understanding of mental illness has been ignored and overlooked in the Bill.

As highlighted in our previous submission, there are some common threads that run through different conceptions and definitions of what is considered "mental health", "mental illness" and "mental disability". There is not, however, strong consensus on any one definition of any one of these terms. Definitions of mental illness and wellbeing are influenced by personal experience and as learnings about mental health, mental illness and/or wellbeing evolve with time, place, and culture, so do their respective definitions.

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<sup>1</sup> Smart Justice (2009) *Mental illness is not a crime*

[http://www.amavic.com.au/icms\\_docs/10599\\_Mental\\_illness\\_in\\_prisons\\_-\\_The\\_Facts.pdf](http://www.amavic.com.au/icms_docs/10599_Mental_illness_in_prisons_-_The_Facts.pdf)

<sup>2</sup> Deloitte Consulting (2003) *Victorian Prisoner Health Study* Victoria: Government of Victoria, Department of Justice [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Research+and+Statistics/JUSTICE+-+Victorian+Prisoner+Health+Study+\(PDF\)](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Prisons/Research+and+Statistics/JUSTICE+-+Victorian+Prisoner+Health+Study+(PDF))

<sup>3</sup> For instance, an area where the criminal justice system has recognised its interaction with people experiencing mental illness includes the recently established Assessment and Referral Court List (ARC) at the Melbourne Magistrates' Court.

*The National Mental Health Plan 2003-2008* defines mental illness as a clinically diagnosable disorder that significantly interferes with an individual's cognitive, emotional or social abilities.<sup>4</sup> The *Justice Mental Health Strategy 2010* defines metal illness when a person's thoughts, feelings and behaviour cause them or others distress, and are not in keeping with their cultural background.<sup>5</sup> The adoption of this broader scope of focus for mental illness than what is provided in the *Mental Health Act 1986* is important as it includes intellectual abilities, personality disorders and other impairments that influence and affect people and the aspects of the justice system they come in contact with. This definitional and conceptual broadening of mental health matters represents a positive step towards a more holistic view of the role of mental health and interaction with the justice system.

Definitions of mental illness should therefore be constructed as broadly as practicable to ensure they remain sensitive to individual cases and flexible to ensure inclusivity. VALS argues that the Bill has failed in this regard.

## 2. Responsiveness to specific needs and rights

VALS supports the inclusions in section 8 of the Bill. Section 8(1) states that in making decisions and providing treatment, appropriate regard is to be had to any specific needs of a person with a mental illness, including as a result of the age, gender, disability, sexuality, religion, culture, language, or other communication needs. The strength of this provision relies on where the threshold for "appropriate regard" is set.

### 2.1 Definition of "Aboriginal person"

Section 8(2) provides that in making decisions and providing treatment under this legislation, 'Aboriginal persons hold distinct cultural rights which must be taken into account'. It is encouraging that the word 'must' is used here instead of 'as far as practicable' (or the like). VALS is interested how the intention of this section will be realised through practical implementation. VALS recommends that this section include some form of further explanation about how the interaction between the cultural rights of Aboriginal and Torres Strait Islander peoples, decision making and provision of treatment may present itself.

It is noted that "Aboriginal persons" is not itself defined in the Bill. VALS strongly recommends that this be addressed in the revision of the exposure draft. For example, the *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter') states 'Aboriginal means a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples' (s3(1)).

Furthermore, the *Children, Youth and Families Act 2005* (Vic) articulates an "Aboriginal person" to mean a person who –

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<sup>4</sup> Australian Health Ministers (2003) *National Mental Health Plan 2003-2008 National Mental Health Strategy*, [http://www.health.gov.au/internet/main/publishing.nsf/content/EE630ADE7F40F80FCA2572220002D081/\\$File/pla n03.pdf](http://www.health.gov.au/internet/main/publishing.nsf/content/EE630ADE7F40F80FCA2572220002D081/$File/pla n03.pdf)

<sup>5</sup> Victorian Department of Justice (2010) *Justice Mental Health Strategy* Melbourne: Victorian Department of Justice [http://www.justice.vic.gov.au/wps/wcm/connect/911eb300418928e4ada6bdc23d43cc74/Justice\\_Mental\\_Health\\_S trategy.pdf?MOD=AJPERES](http://www.justice.vic.gov.au/wps/wcm/connect/911eb300418928e4ada6bdc23d43cc74/Justice_Mental_Health_S trategy.pdf?MOD=AJPERES)

- a) is descended from an Aborigine or Torres Strait Islander; and
- b) identifies as an Aborigine or Torres Strait Islander; and
- c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community.<sup>6</sup>

## 2.2 What is considered a “distinct cultural right”?

What is considered a distinct cultural right is not articulated as it may relate to the operation of the Bill. As suggested above, further explanation may be required within the Bill to assist in instructing those who are to comply (provide treatment), and be protected (receive and provide treatment) under this Bill.

Section 19 of the Charter contains cultural rights and includes a specific provision that recognises cultural rights distinct to ‘Aboriginal persons’ as follows:

- (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 his or her culture, to declare and practice his or her religion and to use his or her 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.

The Charter imposes an obligation on all public authorities to act in a way that is compatible with human rights as outlined in the Charter, and has the purpose of protecting and promoting human rights by ensuring all statutory provisions, whenever enacted, are interpreted so far as possible in a way that is compatible with human rights.

Additionally, the *Family Violence Protection Act 2008* (Vic) includes a definition of Aboriginal and Torres Strait Islander *tradition* as being -

- a) the body of traditions, observances, customs and beliefs of Aboriginal and Torres Strait Islander people generally or of a particular community or group of Aboriginal or Torres Strait Islander people; and
- b) any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

Furthermore, article 11 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>7</sup> describes culture to include sacred sites, designs, ceremonies, technologies and performances. Article 12 of UNDRIP also recognises spiritual and religious traditions, customs, ceremonies, sacred sites and ceremonial objects etc.

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<sup>6</sup> s3.

<sup>7</sup> UNDRIP is the most comprehensive international tool to advance the rights of Indigenous peoples. The inclusion of UNDRIP Articles within this submission is an attempt to move beyond its endorsement (endorsed in Australia on 3 April 2009) and work towards the challenging goal of its implementation through local and domestic legislation and policies.

The inclusion of examples within the Bill to indicate how provisions may operate and what may be considered a “cultural right” could provide clarity to a complex concept.

### 2.3 Definition of “family member”

VALS notes that the Bill does not include a definition of ‘family’. VALS recommends that the Bill include a definition of what relationships are included when the term ‘family’ is used as it may affect the understanding and operation of numerous parts of the legislation. For instance:

- section 7(5) of the Bill states that treatment services should –
  - (g) wherever possible, be provided in a manner that preserves the existing supportive relationships of a person with a mental illness, and recognises and supports the important and positive role of carers and supportive **family** relationships in the life of a person with a mental illness;
  - (h) have regard to the needs of children with a mental illness and preserve and promote relationships between the child, their **family** and other persons who are significant in the life of the child with a mental illness;
- Section 9(2b) of the Bill states that if a provision of this Act provides that a copy of any advice, notice, order or other information must be provided in accordance with this subsection, the copy of any advice, notice, order or other information must be provided as soon as is reasonably practicable—
  - (a) to the nominated person;
  - (b) if there is no nominated person or the nominated person cannot be found or located, to a **family member**, guardian, carer, advocate or other person to which the person with a mental illness has consented should be provided a copy of any advice, notice, order or other information;
- Section 20(5)(d) of the Bill states that if a patient does not consent or is incapable of giving consent, the Chief Psychiatrist may give directions in relation to the provision of cessation of treatment and must have regard to the views of any **family member**, guardian or carer (with the consent of the patient).<sup>8</sup>

VALS therefore strongly suggests that the Bill include a broad definition of family that recognises the diverse nature of family structures, including Aboriginal and Torres Strait Islander peoples’ kinship systems and networks. An example of this can be found in the *Family Violence Protection Act 2008* (Vic) which defines and gives examples of ‘family member’ as follows:

8(1) For the purposes of this Act, a *family member*, in relation to a person (a *relevant person*), means—

- a) a person who is, or has been, the relevant person's spouse or domestic partner; or
  - b) a person who has, or has had, an intimate personal relationship with the relevant person;
- or

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<sup>8</sup> Other sections of the Bill that would be engaged by the definition of ‘family’, ‘family member’ and/ or ‘immediate family member’ include: 73(3)(b); 74(3)(b); 79(6)(b); 80(7)(b); 81(3)(b); 90(f); 94(3)(d); 95(7)(d); 103(3)(d); 114(3)(d); 117(6)(b); 125(3)(d); 126(4)(c); 131(c); 134(1)(b); 142(8)(c); 147(7)(c); 151(2)(d); 179(2); 185(2); 241(a,b,d); 253(7)(d); and 354(50H).

- c) a person who is, or has been, a relative of the relevant person; or
- d) a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or
- e) a child of a person who has, or has had, an intimate personal relationship with the relevant person.

(2) For the purposes of subsections (1)(b) and (1)(e), a relationship may be an intimate personal relationship whether or not it is sexual in nature.

(3) For the purposes of this Act, a *family member* of a person (the *relevant person*) also includes any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member having regard to the circumstances of the relationship, including the following—

- a) the nature of the social and emotional ties between the relevant person and the other person;
- b) whether the relevant person and the other person live together or relate together in a home environment;
- c) the reputation of the relationship as being like family in the relevant person's and the other person's community;
- d) the cultural recognition of the relationship as being like family in the relevant person's or other person's community;
- e) the duration of the relationship between the relevant person and the other person and the frequency of contact;
- f) any financial dependence or interdependence between the relevant person or other person;
- g) any other form of dependence or interdependence between the relevant person and the other person;
- h) the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person;
- i) the provision of sustenance or support between the relevant person and the other person.

#### Example

A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members.

(4) For the purposes of subsection (3), in deciding whether a person is a family member of a relevant person the relationship between the persons must be considered in its entirety.

The *Family Violence Protection Act 2008* (Vic) demonstrates the usefulness of examples within legislation to help signal potential situations that will engage that section of the act (see Appendix A).

### 3. Statement of Rights

VALS looks forward to future discussions on the nature and content of the Statement of Rights that is to be articulated in the Mental Health Regulations following the passing of the Bill in parliament. What *must* be contained in the Statement of Rights is, however, already provided for in section 156 of the Bill as follows:

- (1) The mental health service provider must ensure that a patient is given a statement of rights as soon as practicable –
  - a) after being made subject to an Assessment Order;
  - b) before any of the following treatments are administered –
    - i. electroconvulsive therapy;
    - ii. psychosurgery;
    - iii. any treatment which is prescribed for the purposes of this section.

Section 156(2) also states that a statement of rights must, amongst other things: provide information about the right to make a complaint to the Mental Health Commissioner (s165(2)(f)); provide information about the ability to make an advance statement and to nominate a nominated person (s165(2)(h)); include the mental health principles (s165(2)(b)); and specify the confidentiality and information disclosure provisions of the Act (s165(2)(d)).

VALS believes the content required in a statement of rights - as instructed by section 165 of the Bill - is lacking elements to ensuring the highest level of protection and promotion of the rights of people experiencing mental illness. There should be, at minimum, mention of the Charter.<sup>9</sup>

VALS also strongly advocates that the statement of rights given to the patient by the mental health service provider *must* include information about their right to legal assistance and advice. This is crucially important in light of the evidence presented to the Community Consultation Panel in the review of the Act in 2009 such as the numerous barriers to accessing legal assistance experienced by people with a mental illness face a, one of them being a lack of awareness of their legal rights.<sup>10</sup>

## 4. Capacity to consent, decision-making & Involuntary Orders

### 4.1 Capacity

In VALS' 2009 submission to the Community Consultation Panel for the review of the Act, it was noted that one of the five grounds that must be met before a person can be placed on an involuntary order included the refusal or inability to consent. Problematically, there was no definition within the Act of what constitutes capacity to consent.

Our submission noted the *Adults with Incapacity Act 2000* from Scotland as an example of a departure from an "all or nothing" idea of capacity, and instead acknowledges that capacity is decision specific<sup>11</sup> and that a person's capacity may remain stable, improve, fluctuate or deteriorate. This example is evidence of legislation that reflects a sophisticated understanding of the nature of mental illness, notably that legislation requires flexibility in some respects to operate effectively.

For example, this Scottish Act defines mental capacity in more than one way as it can apply in everyday life. Mental capacity is defined as the ability to make decisions or take actions affecting daily. And, in a

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<sup>9</sup> as it engages protection from torture and cruel, inhuman or degrading treatment (s10); freedom of movement (s12); privacy and reputation (s13); protection of families and children (s17); cultural rights (s19); right to liberty and security of person (s21??); Humane treatment when deprived of liberty (s22); and rights in criminal proceedings (s25).

<sup>10</sup> i.e. individuals do not realise that their problem has a legal element and a potential remedy. Per Karras M, McCarron E, Gray A and Ardasinski S (2006) *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW, Volume 4* Sydney: Law and Justice Foundation of New South Wales.

<sup>11</sup> For example, someone may be capable of making certain types of decisions but not others, and this may depend on the complexity of the decision to be made.

legal context refers to a person’s ability to do something, including making a decision which may have legal consequences for the person themselves and for other people.

The Bill fails to achieve the same level of erudition in light of section 3(2) which provides a comparatively narrow requirement that a person has capacity to make a decision (for the purposes of the Act) if the person is capable of—

- (a) understanding the nature and effect of the decision; and
- (b) making the decision freely and voluntarily; and
- (c) communicating the decision in a manner such that another person can understand what the decision is.

VALS argues that this issue is moderately improved by the Bill’s general principle<sup>12</sup> that a person with a mental illness is *presumed to have capacity* to make decisions about matters relating to their mental illness if the person appears to be capable of doing the things specified in section 3(2) (above). An example of more explanatory provision for capacity for decision making is contained in the criteria for an Inpatient Treatment Order, which states that because of the person's mental illness, the ability of the person to make decisions about the provision of treatment is significantly impaired as the person is unable to: understand the information relevant to the decision; or retain that information; or, use, weigh or appreciate that information as part of the process of making the decision; or communicate the decision in a manner such that another person can understand what the decision is.<sup>13</sup>

#### 4.2 Involuntary Orders

In our submission to the review of the Act, VALS expressed concern over the provision of involuntary treatment for the “protection” of members of the public. What was meant by “protection” of the public was vague at best. We are pleased to see our recommendation that a requirement of a likelihood of *serious* or *immanent* risk to others is realised in section 70(d) in dealing with criteria for an Inpatient Treatment Order as follows:

- If the person is not detained and treated in an approved mental health service there is—
- (i) an imminent and significant risk that the person may cause serious harm to himself or herself or to another person; or
  - (ii) a significant risk that the person will suffer serious physical or mental deterioration;

## 5. Restraint and seclusion

In our 2009 submission, VALS argued for legislation to cater beyond mechanical restraints and seclusion to include provisions for physical restraint.<sup>14</sup> VALS is pleased to see the Bill include regulation of physical and mechanical restraint (and seclusion) and reduce and eliminate, where possible, their use. VALS looks forward to seeing how the new Mental Health Act Regulations will attempt to achieve this aim.

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<sup>12</sup> Section 7(2).

<sup>13</sup> Section 70(c)(i)-(iv).

<sup>14</sup> Tasmania and the Australian Capital Territory were the only jurisdictions to do so at the time at the time of writing.

VALS' 2009 submission also noted that chemical restraint was not adequately dealt with in the Act. We do not see evidence that the Bill does either.

## 6. Review and appeals

VALS has previously argued that external board/tribunal reviews of involuntary orders, appeals and the like should include a true community representative rather than simply an 'objective third party'. The Koori community is unique, and therefore a person representing opinions of the Koori community in hearings should be, where possible, a member of the Koori community when an Aboriginal and Torres Strait Islander patient is concerned. This could, for example, take the form of a Koori Mental Health Liaison Officer. The standing of such a community member may be similar to that of Elders in the Koori Court or those who appear before the Parole Board.

VALS reiterates this point, and refers to Schedule 1 of the Bill which states that in recommending a person to be appointed as an ordinary member of the Mental Health Tribunal, the Minister must have regard to the need for the Mental Health Tribunal to, as far as possible, reflect the social and cultural diversity of the community.<sup>15</sup>

A Koori Mental Health Liaison Officer role at the Tribunal could act as a middle person who is capable of understanding the perspective of Aboriginal and Torres Strait Islanders and that of the mental health system.<sup>16</sup>

This notion is provided for in the Northern Territory through their *Mental Health and Related Services Act 2010* (section 118) as follows:

- (3) For subsection (2), one or more of each of the following persons must be appointed:
- a) a person who is:
    - (i) a magistrate; or
    - (ii) a person appointed to be a Judicial Registrar under section 9(1) of the *Local Court Act*; or
    - (iii) a lawyer with at least 5 years' experience as a legal practitioner;
  - b) a medical practitioner;
  - c) a person who has a special interest or expertise in mental illness or mental disturbance.
- (4) As far as is practicable, the Tribunal is to consist of persons of both sexes and from diverse backgrounds (including Aboriginal and Torres Strait Islander background).

As hearings are currently held at Mental Health Services throughout Victoria, VALS also argues that in order to provide for culturally appropriate and accessible mental health care, it should be considered a possibility to have hearings made readily available at Aboriginal Health Services.

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<sup>15</sup> 4(2)(b).

<sup>16</sup> It would be useful to refer to the utilisation of Elders and Respected persons and community members in the Koori Courts.

## 7. Complaints

As there is currently no centralised process to address mental health service related complaints, VALS is pleased that the Bill establishes a process through the Mental Health Commissioner who has the power to take on an individual complaints and may issue a compliance notice to a treatment provider.

VALS is interested in whether the Mental Health Commissioner's powers are limited to investigating individual complaints, or if the Commissioner is able to proactively investigate group complaints or investigate around systemic issues.

## 8. Review Officers and Community Visitors

VALS supports the role and function of the Review Officer role so far as it is ensured that the Officer informs a person subject to an Order their rights in a manner that the person is most likely to understand. VALS suggests that training of Review Officers should include cultural awareness training including specifics around verbal and non-verbal communication as they have been found to exist for some members of the Aboriginal and Torres Strait Islander community.<sup>17</sup> This should also be provided for Community Visitors and the Community Visitors Mental Health Board.

These two positions, designed to provide further protection of rights of persons with a mental illness, should operate to ensure that treatment services not only support a person with a mental illness to realise their individual physical, social and emotional potential and to maximise their self-reliance, including so far as is possible, participation in community life (as stipulated in s7(5)(i)) but do these things in recognition of the importance of family, community, and culture.<sup>18</sup>

## 9. Conclusion

### 9.1 Summary of response to the Bill

VALS is pleased to see the Bill move towards a human rights-centred approach and that the distinct cultural rights of "Aboriginal persons"<sup>19</sup> must be taken into account when treatment decisions are being made. VALS is also pleased to see the requirement of a likelihood of *serious* or *immanent* risk to others in section 70(d) when "protecting the public" in order to issue an Inpatient Treatment Order.

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<sup>17</sup> For example, see the Victorian Aboriginal Legal Service & Roberts F (2007) *A Report on Aboriginal English in the Courts* Melbourne: Victorian Aboriginal Legal Service.

<sup>18</sup> For example, see (a) Kelly K, Dudgeon P, Gee G and Glaskin G (2009) *Living on the Edge: Social and Emotional Wellbeing and Risk and Protective Factors for Serious Psychological Distress among Aboriginal and Torres Strait Islander People* (Discussion Paper Series No. 10) Casurina, Northern Territory: Australian Indigenous Psychologists Association and the Cooperative Research Centre for Aboriginal Health, at <http://www.craah.org.au/publications/downloads/DP10-Living-on-the-Edge-Kelly-et-al-AIPA.pdf>; and (b) Mental Health First Aid *Cultural Consideration & Communication Techniques: Guidelines for providing mental health first aid to an Aboriginal and Torres Strait Islander person* and other guidelines at <http://www.mhfa.com.au/Guidelines.shtml>

<sup>19</sup> we argue that 'Aboriginal and Torres Strait Islander persons' is a more appropriate term.

While many sections show maturation of the Bill, there are however some areas that require adjustment in the final drafting. These changes are in some cases minor on paper, but have potential for widespread affect and can be seen in our recommendations below.

### *9.2 Recommendations*

1. The definition of mental illness within the Bill be constructed as broadly as practicable to ensure it remains sensitive to individual cases and flexible to ensure inclusivity (see section 1).
2. Section 8(2) of the Bill include further explanation about how the interaction between the cultural rights of Aboriginal and Torres Strait Islander peoples, decision making and treatment may operate (see section 2.1 and Appendix A).
3. The Bill define “Aboriginal persons” (section 2.1).
4. The Bill articulate what is considered a “distinct cultural right” (see section 2.2).
5. The Bill define “family” and “family member”. A definition of the two should be broad, and recognise the diverse nature of family structures seen in some Aboriginal and Torres Strait Islander kinship systems (see section 2.3).
6. Section 156(2) must include, for the purposes of a patient’s statement of rights, mention of the Charter and rights to legal assistance and advice.
7. The Bill further depart from and “all or nothing” idea of capacity and instead acknowledge that capacity is decision-specific and that a person’s capacity may improve, deteriorate and/or fluctuate (see section 4.1).
8. The Mental Health Tribunal, where possible, have a Koori representative sitting where an Aboriginal and Torres Strait Islander patient is concerned. This could take the form of a Koori Mental Health Liaison Officer (see section 6).
9. Mental Health Tribunal hearings be available at Aboriginal Health Services (see section 6).
10. Cultural awareness training be provided to Review Officers, members of the Mental Health Tribunal, Community Visitors and the Community Visitors Mental Health Board. This should include specifics around verbal and non-verbal communications as they have been found to apply to some members of the Aboriginal and Torres Strait Islander community (see section 8).

### *9.3 Questions*

1. Does the Mental Health Commissioner have the power to investigate beyond individual complaints, i.e. proactive investigation involving systemic issues?

## Appendix A

Examples in the *Family Violence Protection Act 2008* (Vic) when definitions of family violence and economic abuse are given shown below in sections 5 and 6 respectively.

(1) For the purposes of this Act, *family violence* is—

(a) behaviour by a person towards a family member of that person if that behaviour—

- (i) is physically or sexually abusive; or
  - (ii) is emotionally or psychologically abusive; or
  - (iii) is economically abusive; or
  - (iv) is threatening; or
  - (v) is coercive; or
  - (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person;
- or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Examples -

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a)—

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member's property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

(2) Without limiting subsection (1), *family violence* includes the following behaviour—

- a) assaulting or causing personal injury to a family member or threatening to do so;
- b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
- c) intentionally damaging a family member's property, or threatening to do so;
- d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;
- e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.

(3) To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

For the purposes of this Act, *economic abuse* is behaviour by a person (the *first person*) that is coercive, deceptive or unreasonably controls another person (the *second person*), without the second person's consent—

- a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
- b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

Examples—

- coercing a person to relinquish control over assets and income;
- removing or keeping a family member's property without permission, or threatening to do so;
- disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;
- without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;
- preventing a person from seeking or keeping employment;
- coercing a person to claim social security payments;
- coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;
- coercing a person to sign a contract for the purchase of goods or services;
- coercing a person to sign a contract for the provision of finance, a loan or credit;
- coercing a person to sign a contract of guarantee;
- coercing a person to sign any legal document for the establishment or operation of a business.