

CoMHWA



Consumers of Mental Health WA (Inc)

**Feedback to the
Inquiry into Australia's Human Rights Framework**

01 July 2023

Consumers of Mental Health WA

Street Address: 12/275 Belmont Ave, Cloverdale 6104

P: (08) 9258 8911 W: www.comhwa.org.au E: admin@comhwa.org.au

1. Preliminaries

About the Respondents

Consumers of Mental Health WA (CoMHWA) is Western Australia's peak body for and by mental health consumers (people with a past or present lived experience of mental health issues, psychological or emotional distress). We are a not-for-profit, systemic advocacy group independent from mental health services that exists to listen to, understand and act upon the voices of consumers. We work collaboratively with other user-led organisations and a diversity of stakeholders to advance our rights, equality, recovery and wellbeing.

Request for Feedback

CoMHWA works to uphold the dignity and human rights of consumers, through providing advocacy in leading change with and for consumers. We appreciate notification of the outcomes of our submission to this consultation in order to understand and communicate the difference made through our work.

Please provide feedback via the contact details on this submission's cover page.

Language

CoMHWA uses the term mental health consumer throughout this submission. Mental health consumers to refer to people who identify as having a past or present lived experience of psychological or emotional distress, irrespective of whether they have received a diagnosis of mental illness or accessed services. Other ways people may choose to describe themselves include "peer", "survivor", "person with a lived experience" and "expert by experience".

This definition is based on consumers' call for respect, dignity and choice in how we choose to individually identify. As individuals we choose different ways to name and describe our experiences that may confirm or trouble ideas about 'mental illness'.

About the Consultation: ‘Inquiry into Australia’s Human Rights Framework’

On 15 March 2023, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General [referred](#) to the Parliamentary Joint Committee on Human Rights the following matters for inquiry and report 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 invites submissions by **1 July 2023** 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.

Close Date: 01/07/23

Submissions to:

Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823

human.rights@aph.gov.au

2. Introduction

CoMHWA welcomes the opportunity to make a submission to the Inquiry to give feedback on Australia's Human Rights Framework. Consumers of mental health frequently experience transgressions, abuses and erosion of their human rights as a matter of course in health treatment, often without knowing what their rights are and what constitutes an abuse of these rights. CoMHWA plays a significant role in providing education to consumers of mental health about their rights in a variety of settings and contexts, including involuntary and voluntary hospital stays, community treatment orders in community mental health environments, guardianship orders, employment, housing and legal services.

Several provisions under legislation relevant to mental health consumers, such as *Mental Health Act 2014 (W.A.)*, *Guardianship and Administration Act 1990 (W.A.)* and others directly contravene national and international commitments made for the Human Rights for people with disability, such as the United Nations Convention for the Rights of People with Disability (UNCRPD) or the Optional Protocol to the Convention Against Torture (OPCAT). While these conventions are widely recognised, there is no legal framework for ensuring that they are adhered to in Australia. Having human rights enshrined in the constitution and protected by legislation would allow people more recourse to advocate for their rights, especially in interaction with legislation where human rights may be eroded.

We base our submission on:

- A public survey distributed to our members, open from the 15th June till the 30th June.
- Ongoing consultation with consumers in Western Australia on joint priorities for an improved mental health system.
- Advisement from staff in our Individual Advocacy service, who support people with psychosocial disability in having their Human Rights respected and their voices heard.
- Consumer representation in relevant settings, including but not limited to: Primary Health networks (WAPHA), WA regional equivalents of the Local Health Networks (regional mental health services under the WA Health Board structure), the Mental Health Commission and the health complaints agency, Health and Disability Services Complaints Office (HaDSCO).

Discussion and Recommendations

A Human Rights Act for Australia

Recommendation 1: The Government should adopt the Human Rights Act as broadly outlined by the Australian Human Rights Commission (A.H.R.C.).

Rationale: CoMHWA supports the submission put forward by the Australian Human Rights Commission to adopt a nationwide Human Rights Act. Currently, only three states in Australia have Human Rights Acts: Victoria, Australian Capital Territory and Queensland. Federal legislation for Human Rights would contribute to safeguarding Human Rights on a national level, compelling accountability for federal Governments and courts to acknowledge breaches of human rights and promote action to address such conflicts. The need for this Act is aptly demonstrated by the submission made by the A.H.R.C., who have listed the inadequacies and missed opportunities that emerged from the 2010 'Australia's Human Rights Framework' in their submission to this inquiry.¹

In particular, developing a Human Rights Act would compel government departments to consider the impact that decisions would have vis a vis the human rights of people involved in any particular issue. Currently, there is no federal requirement to consider how legislation would impact human rights, despite the Australian Government having signed on to seven international treaties and associated optional protocols designed to safeguard groups of human rights. The dialogical model of a Human Rights Act developed by the A.H.R.C. would prevent new acts of parliament being vetoed by any independent body in charge of overseeing human rights, and thus maintain parliamentary sovereignty, while also exposing the potential non-compliance of decisions with established rights in a transparent and public fashion. This model accordingly would take resolute steps towards ensuring accountability for human rights compliance, without ceding the authority of public representatives in parliament to freely decide upon legislation.

Recommendation 2: The list of Human Rights covered in any potential Act should include, in the appropriate Australian context and to the largest extent, the rights

¹ See Submission 1: Australian Human Rights Commission. 2023. 'Inquiry into Australia's Human Rights Framework Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights' https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Submissions pp. 37-40

outlined in the ‘International Covenant on Economic, Social and Cultural Rights’ (ICESCR).

Rationale: The consultation undertaken by CoMHWA with consumers highlighted a consistent desire to have rights enshrined that will guarantee both access to, and affordability of, healthcare services. Though the A.H.R.C. does propose a ‘Right to Health’ in their proposed model², CoMHWA’s position is that the proposed wording of this right should be extended to explicitly include economic accessibility for services both public and private. In order to avoid allowing vulnerable peoples to slip between the cracks of narrowly worded rights, CoMHWA advocates that the proposed Human Rights Act should incorporate the detailed rights established in the ‘International Covenant on Economic, Social and Cultural Rights’ (I.C.E.S.C.R.)

The I.C.E.S.C.R.’s Article 12, the ‘right to health’ is an example of the detailed and ambitious character of this covenant that an Australian Human Rights Act would do well to adopt. As mentioned above, the Australian Human Rights Commission has, at its own discretion, adopted narrower forms of some I.C.E.S.C.R. rights. The ‘right to health’ for example, proposed by the Commission, states that ‘Every person has the right to access physical and mental health services without discrimination.’ And ‘Every person has the right to emergency medical treatment that is immediately necessary.’ The I.C.E.S.C.R., by contrast, has a more expansive list of rights associated with healthcare, included provision for economic access that aim to ensure the affordability of care, be it from public or private services, for all members of society.³

Recommendation 3: The proposed Human Rights Act should include specific and clear protections for gender diverse, trans and intersex people, and feature the right to pursue gender affirming care.

Rationale: A view presented by consumers who CoMHWA has consulted with is that the proposed Human Rights Act should include explicit protections for gender diverse, trans and intersex people. In particular, there was a repeated call for the potential Human Rights Act to enshrine the right for people to pursue gender-affirming care. The concerns held are that gender affirming treatment may be vulnerable to political opportunism with regards to limiting access, and a clearly and explicitly worded right in this Act might help to prevent this issue being exploited for political gain. The A.H.R.C.’s position paper assert that the adoption of

² Australian Human Rights Commission. 2022. ‘Position Paper: A Human Rights Act for Australia’ https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf p. 115

³ United Nations. 1966. ‘International Covenant on Economic, Social and Cultural Rights’ <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

their model would provide an ‘assurance of equal treatment and respect, regardless of your sex, gender, sexuality, disability, age, nationality, race or religion’⁴, presumably because their proposed right to ‘Recognition and equality before the law; and Freedom from discrimination’ would address this access to gender affirming care. CoMHWA, however, supports making such implicit results of discrimination protections explicit, by clearly articulating a right for gender diverse, trans and intersex people to pursue gender affirming care.

Recommendation 4: There should be an inclusion of a right to humane medical treatment that forbids restrictive practices and coercive treatment, particularly for people living with mental health issues.

Rationale: A clear response from the consumers CoMHWA consulted was the desire for restrictive practices – the use of physical, mechanical, chemical, emotional restraint and seclusion in healthcare settings – to be forbidden, and the positive freedom from these practices and coercive treatments to be enshrined in the Act. The reduction and elimination of restrictive practices is an already established goal in Australia, and is clearly outlined in the ‘National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector’⁵. The rationale for reducing and eventually eliminating these restrictive practices rests on the argument that the people subjected to such procedures are having their human rights violated. It is therefore appropriate that the proposed Human Rights Act adopts a clear and explicit articulation of the right to freedom from restrictive practices.

The importance of explicitly providing a right to freedom from restrictive practices and forced treatment can be seen in the example of the state of Victoria, where human rights have, at a state level, been enshrined since 2008. Despite the presence of human rights in legislation, coercive treatment and restrictive practices have continued to occur, and, as outlined in the ‘Not Before Time’ report, mechanisms for complaint against these frequent events have been broadly ineffective.⁶ The lesson from the Victorian example is clear: there are limitations in the effectiveness of establishing human rights that *indirectly* challenge forced treatment or restrictive practices. Specifically, restrictive practices and coercive treatment continue despite the presence of Section 10(c) of the Victorian ‘Charter of Human Rights and Responsibilities Act’ which states ‘A person must not be subjected to medical or scientific experimentation or

⁴ Australian Human Rights Commission. 2022. ‘Position paper: A Human Rights Act for Australia’ https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf p. 35

⁵ Australian Government Department of Social Services. 2013. ‘National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector’ https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf

⁶ S. Katterl C. Lambert, F. Grey, I. Daya, L. Downes, M. Cataldo, K. Clarke, R. Stephen-Dettman, S. Williams. 2023. ‘Not Before Time: Lived experience-led justice and repair’ <https://www.livedexperiencejustice.au/> pp. 17-22

treatment without that person's full, free and informed consent'⁷ Developing a specific right focused upon the freedom from restrictive practices and coercive treatment when receiving medical care would offer a firmer, if still somewhat flexible, defence against the routine breach of consumer human rights in clinical settings.

Concluding remarks

The key themes — drawn from consultation and survey with consumers—that informed CoMHWA's submission to the inquiry can be grouped as follows:

- CoMHWA, alongside the consumers that were consulted, is strongly in favour of the creation of a federal Human Rights Act, and supports the broad structure and mechanisms of such an Act proposed by the A.H.R.C. in their submission to this inquiry.
- Based on the desires communicated to us by consumers, CoMHWA recommends adopting, to the greatest possible extent, a comprehensive and thorough range of human rights. In particular, the ambitious scope and phrasing of the I.C.E.S.C.R. framework's 'right to health' should be adopted to ensure medical access is not contingent upon wealth.
- The proposed federal Human Rights Act should feature specific rights to protect medical access to gender affirming care for trans, intersex and gender diverse people.
- The proposed federal Human Rights Act should also have an explicit right included that refers to the freedom from restrictive practices of medical care and coercive methods of treatment.

In conclusion, CoMHWA is committed to supporting the development of a federal Human Rights Act, which would serve to strengthen the protections available for vulnerable consumers who have historically been subject repeated and grievous abuse at the hands of institutions. Though CoMHWA is firmly in support of the model for a Human Rights Act developed by the A.H.R.C., our belief is that the proposed legislation should aim to be as ambitious as possible, as there is no guarantee that an inherently limited framework with narrowly written rights would be reviewed and expanded upon in future. Despite the challenges of design, implementation and future accountability involved in a Human Rights Act, CoMHWA wishes to follow in the thinking of the consumers we surveyed, who were

⁷ State Government of Victoria. 2006. Charter of Human Rights and Responsibilities Act 2006 (Vic) <https://content.legislation.vic.gov.au/sites/default/files/2022-06/06-43aa015%20authorised.pdf> p. 12

extremely hopeful about the potential impact that enshrining Human Rights may have for their future and the wellbeing of all Australians.