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Submission to the Review of the *Mental Health Act 1990*

Comment on the Exposure Draft of the Mental Health Bill 2006

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1. Introduction

1.1 Introduction to the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works cooperatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

2. Introduction

In broad terms, PIAC supports the changes that have been proposed in the exposure draft of the Mental Health Bill 2006 (the Bill) and the rationale behind those changes.

However, PIAC considers that the Bill represents a lost opportunity to reflect the cutting edge of language and practice in mental health law. The timing of the release of the Bill in the lead up to the State Election is unfortunate as it is likely to result in the Bill being more open to political scrutiny, and less open to public scrutiny. PIAC shares the concerns of other organisations that there has not been sufficient time allocated for the Government to engage in appropriate public discussion and consultation around the language and possible operation of the Bill. The limited time being allowed between the closing date for making comments and the proposed tabling of the Bill is of concern as it suggests that there will be little or no opportunity for further discussion or consultation around changes proposed as a result of the comments received.

In terms of the 'Themes for Change' outlined in the Report, the Bill does not go as far as it could in encapsulating progressive change.

PIAC applauds the Government's aim of trying to make the Bill a more 'plain English' document. However, PIAC does not believe that this has been achieved. Feedback to PIAC from carers and consumers indicates that they do not necessarily find the Bill more user-friendly or accessible than the *Mental Health Act 1990.* In this context, PIAC strongly suggests that a guide be developed to explain to consumers, carers and professionals the changes and implications of the Bill, once passed.

3. The Bill

The Bill clearly endeavours to reflect the potentially important role of carers in the delivery of mental health services, and PIAC applauds this aim. Similarly, PIAC applauds the recognition that health-related services such as the Ambulance Service are better placed to deliver health care and support to those in need than the Police. This recognition is very positive.

Whilst PIAC supports the general direction of the changes proposed in the Bill. However, there remain aspects of the Bill that are of concern. In summary, PIAC's concerns focus on:

- The lack of a clear statement of principles to guide the interpretation of the legislation.
- The use of the term 'control' throughout the Bill.
- The lack of criteria for appointment of and exercise of powers by an 'accedited person'.
- The need for safeguards around nomination, variation and revocation of 'primary carer'.
- The need to ensure sufficient distance in relationship between a person issuing a certificate for detention and the person to be detained.
- The broadening of consent authorities for transfer from medical facilities to mental health facilities.
- The circumstances in which medical treatment without consent would be permitted.
- The inclusion of authorisation for special medical treatment in this legislation.
- The significant changes proposed to the composition of the Mental Health Review Tribunal.
- The extension of community treatment orders from six to twelve months.

These are considered below.

PIAC does not feel it is qualified to comment on Chapter 4, Part 2 – Mental health treatments.

3.1 Objects of the Mental Health Bill

PIAC submits that the objects of the Bill should be expanded to articulate the principles that apply to the care of mentally ill people.

A statement of principles would send a clear message that the legislation should be interpreted in a manner that is consistent with these principles. The principles would serve as the overarching guide in the interpretation of the legislation.

Section 6A of the Victorian *Mental Health Act 1986* provides a useful model for what could and should be included in this Bill.

3.2 The use of the word 'control'

It is of concern to PIAC that the word 'control', in the context of 'care, treatment and **control** of mentally ill and mentally disordered persons', is used throughout the Bill. PIAC submits that the word 'control' conjures up negative connotations of persons who experience mental illness, and that this word should be removed from the Bill. Repeatedly using the word 'control' suggests that people with mental illnesses need to be controlled, or that they are out of control. This does not assist with addressing significant discrimination and fear that people with mental illnesses are subjected to in the community at large.

In PIAC's view, the term 'care and treatment' of mentally ill and mentally disordered persons is more appropriate, as it respects the rights and needs of people with mental illnesses. The use of the word 'treatment' is sufficiently broad to include treatment that involves limited and appropriate constraint. The word 'control' in this context should be removed completely.

3.3 An 'accredited person'

The Bill revisits the concept of the 'accredited person' under clause 136, defined in section 287A of the Act and used in a range of provisions.

PIAC is concerned that neither the Act nor the Bill provide for any guidance on criteria for appointment as an accredited person. Given the term 'accredited person' is used more extensively in the Bill, the absence of criteria is more significant.

PIAC joins with other organisations and calls on the Government to specify more clearly who is eligible to become an 'accredited person' under the Bill.

3.4 The 'primary carer'

PIAC applauds the Government for trying to engage and include carers more in the operation of mental health law, by recognising their right to be consulted in decision-making, and their right to certain information.

However, PIAC has a range of concerns with the concept of the 'primary carer'. PIAC envisages that this model will not be free from problems in terms of:

- ensuring that conflicts do not arise between a primary carer, and the person being cared for; and
- the lack of specific process for dealing with concerns (if they arise) of treating healthcare professionals that the primary carer is not acting in the patient's best interests.

PIAC is concerned that there is insufficient reference to or existence of appropriate safeguards to deal with the latter situation. PIAC submits that Government should include in the Bill a process not unlike that established under the Guardianship Tribunal to review the role of a guardian, when required, to prevent exploitation, abuse and mistreatment of vulnerable individuals.

Clause 72(1) of the Bill allows a person to nominate a person to be their primary carer. Under clause 72(2), a person may also nominate persons who are *excluded* from being given notice or information about the person, and may also revoke or vary any such nomination.

If a person is in an acute episode of mental illness, one wonders how this process of nomination and revocation may be safeguarded against person with the illness having altered perceptions to the extent that they wish to revoke or nominate a 'primary carer'? The Bill, under clause 72(7) does give to relevant professionals (an authorised medical officer or director of community treatment) the power not to give effect to a nomination, or a variation of a nomination, if the professional reasonably believes that to do so may put the patient, or nominated person, or any other person 'at risk of serious harm'.

Firstly, the word 'serious' should be removed from clause 72(7)(a).

Secondly, PIAC has broad concerns about how this discretionary process will work in practice. PIAC believes that more detailed safeguards should be in place to protect the person being cared for from the imposition of decisions by an inappropriate primary carer. Providing such a wide discretion to relevant professionals to make determinations about whether nominations, variations or revocations of nominations, may put a person at risk of serious harm will prove to be a very challenging task, and may have very problematic outcomes in terms of negotiating relationships with carers and patients.

3.5 Detention on certificate: certifiers relationship with person subject to the certificate

Clause 19(2)(d) creates some concern for PIAC. The relevant comparable section of the Act—section 21—specifies under sub-section (1)(d) that a person may be taken to and detained in a hospital on the certificate of a medical practitioner or an accredited person, who is *not a near relative of the person.*

Clause 19(2)(d) specifies that the medical practitioner or accredited person issuing a mental health certificate must not be the *primary carer of the person.* In PIAC's view, not being the primary carer does not ensure a sufficiently distant relationship from a possible patient. PIAC submits that the previous wording of *not a near relative of the person* be retained in sub-clause 19(2)(d).

3.6 Detention after transfer from another facility

In PIAC's view, clause 25—Detention after transfer from another facility—of the Bill is too broad, and too vague to be an acceptable part of the such important legislation.

Clause 25 reads as follows:

> (1) A person may be transferred from a health facility to a declared mental health facility and detained in the mental health facility if a responsible medical officer of the health facility, or the authorised medical officer of the mental health facility, considers the person to be a mentally ill person or a mentally disordered person.
>
> (2) Any such person is taken to have been detained in the declared mental health facility under section 19 when the person is transferred to the facility.

In respect of this clause, PIAC has two broad concerns:

- Who is a 'responsible medical officer' in this context? Is it the medical officer responsible for the care and treatment of the patient? Why is this not limited to the authorised medical officer given the powers exercised under this clause are broad? It appears in this clause that the 'responsible medical officer' has identical powers to the authorised medical officer to decide that a person should be admitted to a mental health facility.

- Clause 25(2) provides that, once a person has been transferred to a facility, they are automatically detained in the mental health facility. In PIAC's view, the powers under this section are not appropriately clear, and will possibly be open to misuse.

3.7 Non-consensual medical treatment

PIAC is unclear on a number of clauses in Chapter 4, Part 3 – Other Medical Treatments. This Part of the Bill generally lacks clarity and in PIAC's submission, needs further work if the Government wishes to achieve a 'plain English' legal document. PIAC is also concerned about the content of this Part.

Specifically, PIAC is concerned by clause 99(1) referring to empowering an authorised medical officer of medical practitioner to consent to the performance of a operation on an involuntary patient '(other than a forensic patient not suffering from a mental illness)'. PIAC is unclear about who might fall within this excluded group as it seems contradictory to refer to a forensic patient who doesn't have a mental illness, and believes that a definition of this term should be provided under the definitions clause 98.

Similarly in this part PIAC is concerned by clause 100 of the Bill. Clause 100 reads as follows:

(1) An authorised medical officer may apply to an authorised medical practitioner for consent to the performance of a surgical operation on an involuntary patient.

(2) On an application, the authorised medical practitioner may consent to the performance of a surgical operation on an involuntary patient (other than a forensic patient not suffering from a mental illness) if of the opinion that:
   (a) the patient is incapable of giving consent to the operation or is capable of giving consent but refuses to give that consent or neither gives nor refuses to give that consent, and
   (b) it is desirable, having regard to the interests of the patient, to perform the surgical operation on the patient.

(3) An application must be made not earlier than 14 days after notice of the proposed application is given under section 78, but may be made sooner if the authorised medical officer is of the opinion that the urgency of the circumstances requires an earlier determination of the matter or the person notified agrees.

(4) The consent is to be in writing and signed by the person giving the consent.

PIAC is of the opinion that is section has an outmoded and outdated approach to the consent and performance of surgical treatment on mentally ill patients. It is also unclear to PIAC why the Tribunal should not perform this function under clause 101 of the Bill, and why powers are given to both the Tribunal and an authorized medical practitioner in this context.

As has been outlined by other interested organisations , it is unclear to PIAC why there are not clearer guidelines in place to the consent of non-psychiatric medical treatment of mentally ill patients, such as the protocols that are available under the *Guardianship Act 1987* (NSW) (**the Guardianship Act**) or the usual requirement that either the person or their next of kin consent. Those protocols first look to the patient's own consent, and then to the consent of a substitute decision-maker closer to the patient than the authorised medical practitioner is likely to be.

In PIAC's view, wherever possible, the patient must be given the opportunity to give his or her consent to the treatment proposed. If the patient does not or cannot give consent, protocols similar to those in Part 5 of the Guardianship Act should apply. For example, the substitute decision-maker—the 'person responsible' as defined in section 33A of the Guardianship Act—would usually be the person empowered to make these decisions where the person is unable to consent.

The protocols in Part 5 of the Guardianship Act reserve certain decisions to the Guardianship Tribunal, including decisions when the patient objects to the proposed treatment. In PIAC's view, similar protocols should be in place within the Bill, or else the Bill itself should defer decision-making in this context to the Guardianship Tribunal, as a process for adults with reduced or no capacity is already in place under that legislation.

3.8 Special medical treatment and prescribed special medical treatment

In PIAC's view the definitions and distinction between special medical treatment and prescribed special medical treatment under clause 103 is cumbersome and confusing, and will be especially difficult to interpret for consumers and carers who are dealing with this section. In PIAC's view, clearer terminology and definitions should be used in this section.

Further, PIAC is concerned that the Bill does not appear to take account of the current work being undertaken by the Standing Committee of Attorneys General in relation to the consent to medical treatments that may result in sterilisation. No provisions for consent to such treatment should be included at this stage.

3.9 Composition of the Tribunal

The Bill alters the composition of the Tribunal quite considerably, and this is of concern to PIAC. For example, clause 150 of the Bill, is considerably different from current sections 264 and 265.

Under sections 264 and 265 of the Act, the Tribunal must be composed as follows:

> **264 Composition of the Tribunal generally**
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> In the exercise of its functions (other than those relating to forensic patients), the Tribunal is to be constituted by the following members nominated by the President:
>
> (a) the President, a Deputy President or a member who is an Australian lawyer,
> (b) a member who is a psychiatrist,
> (c) a member who (not being an Australian lawyer or psychiatrist) has other suitable qualifications or experience.
>
> **265 Composition of the Tribunal for dealing with forensic patients**
>
> In the exercise of its functions relating to forensic patients, the Tribunal is to be constituted by the following members nominated by the President:
>
> (a) the President or a Deputy President,
> (b) a member who is a psychiatrist,
> (c) a member (not being an Australian lawyer or a psychiatrist) who has other suitable qualifications or experience.

Under clause 150 of the Bill the composition of the Tribunal is differently constituted:

> (1) The Tribunal is to be constituted by 1 or more members nominated by the President for the exercise of its functions.
>
> (2) For the purpose of exercising any of its functions, the Tribunal must consist of at least 1 member who is to be the President, a Deputy President or a member who is an Australian legal practitioner.
>
> (3) The President may nominate other members of the following kinds:
> (a) a member who is a psychiatrist,
> (b) a member who (not being an Australian legal practitioner) has other suitable qualifications or experience.
>
> (4) The regulations may make provision for or with respect to the members who are to constitute the Tribunal for the exercise of any of its functions.

PIAC is unclear on what the rationale is behind these proposed changes. PIAC perceives a major problem with the clause in terms of permitting the Tribunal to be constituted of only one member. Indeed, the clause seems to suggest that a single member would become the usual arrangement rather than an exception. The Tribunal is currently composed the Act of three members with different expertise to allow a range of expert views to be taken into consideration in making decisions and recommendations. PIAC submits that this model works well, and is based on a sound justification. PIAC cannot see any need, or any justification, for the proposed shift to a Tribunal made up of only one member, who would be a legal member. On the contrary, PIAC is of the view that this will substantially weaken the effectiveness of and support for the Tribunal.

As the decision-making process of the Tribunal is not open to public scrutiny in the same way that courts' decision-making processes are, PIAC considers placing decision-making power in the hands

of one individual to be an extraordinary, unnecessary and potentially compromising change to the Tribunal.

Further, altering the composition of the Tribunal would mean that NSW would be in breach of Principle 17, paragraph 1 of the UN *Principles for the protection of persons with mental illness and the improvement of mental health care*, which reads:

> **Principle 17**
>
> **Review body**
>
> 1. The review body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions, have the assistance of one or more qualified and independent mental health practitioners and take their advice into account.

3.10 Community Treatment Orders (CTOs)

PIAC does not agree with the extension of CTOs from six months to twelve months. PIAC is of the view that the existing six-month limit should remain in place as it is consistent with the approach of the Mental Health Legislation prepared in 1994 for the Australian Health Ministers' Advisory Council.

4. Conclusions

In general terms, PIAC is of the view that the Bill goes some way to improving the current system. However, it does so in the context of some serious problems being created and it lacks clarity and/or could be improved. We hope that the above comments assist in this process.