Submission No 91

INQUIRY INTO EQUITY, ACCESSIBILITY AND APPROPRIATE DELIVERY OF OUTPATIENT AND COMMUNITY MENTAL HEALTH CARE IN NEW SOUTH WALES

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Dear Committee,

Submission to the *Inquiry into the equity, accessibility and appropriate delivery of outpatient and community mental health care in New South Wales*

Thank you for the opportunity to submit to your inquiry. I am writing as someone with lived experience of mental distress and trauma and who has been a member of the consumer workforce. My designated and non-designated roles have included work in consumer peak bodies, legal and non-legal advocacy organisations, mental health regulators, statutory human rights agencies, and the Royal Commission into Victoria's Mental Health System. I am now a consultant who supports, supervises, and advises the government, the sector and the consumer workforce on systems change. In addition to my consumer workforce experience, I have a professional background in law, politics, psychology and regulation[1] and have written on these topics.[2] My submission is brief, focusing on the human right to non-discriminatory mental health and wellbeing services (Term of Reference, (a)), the use of community treatment orders under the *Mental Health Act 2007* (NSW) (Term of Reference, (f)), and digital mental health technologies and services (Term of Reference, (g)).

Before proceeding to these points, I make a few remarks that do not fit within the scope and timeframes for this submission. Community mental health should not be understood as separate from the community's health. The (e)quality, safety, and accessibility of homes and communities people live in often determine whether they access community mental health services. Many of the rights to an adequate standard of living – such as to housing or adequate social security – are reflected in international human rights law.[3] In our federation, the New South Wales government is responsible for giving effect to many of these human rights. I also note that discussions regarding the cultural safety and accessibility of new and existing mental health services should occur with the knowledge that these standards are primarily reflected in existing anti-discrimination laws.[4] This framing is vital to ensure that expectations of cultural safety and accessibility are not seen as distant aspirational goals, but rather present legal expectations that government and public mental health services should meet.

The final stand-alone point I wish to raise for the Committee to consider is the value of lived experience leadership.[5] In particular, consumer leadership.[6] This is not currently in the terms of reference for this inquiry, but I do hope it is given due consideration across all line items. Speaking as someone from the consumer workforce, I remind the Committee that the consumer movement has a strong, proud, and rich history of challenging, improving, and building alternatives to mainstream mental health systems.[7] Contemporary approaches to mental health reform identify the role of consumer leadership in, among other things:

- Systems management, for example, through the creation of designated lived experience branches within Departments
- Commissioning of services, such as the requirement for lived experience leadership on regional commissioning bodies[8]
- Regulatory oversight, such as designated lived experience commissioner roles in an agency to monitor compliance with mental health laws[9]
- Consumer-perspective supervision for the clinical mental health workforce[10]
- Creating fully consumer-led services,[11] and
- Adequate funding for consumer peak bodies, in this case, Being, to adequately represent consumers' rights and interests at a systemic level.

Despite this workforce's value and opportunity, we continue to experience poor work standards.[12] I note that a comparison of the annual reports from the Victorian Mental Illness Awareness Council and Being – the two consumer peak bodies in Victoria and NSW – finds that the former has approximately triple the revenue of the latter, despite Being needing to serve about 1.5 million more citizens in its advocacy. The Committee may consider both the opportunity that the consumer workforce and consumer movement provide to reform mental health care and how the systems manager, SafeWork NSW and public mental health services can better address the needs of the workforce and peak bodies.

This should be done in concert with carer representative bodies such as Mental Health Carers New South Wales (**MHCN**), as well as representative First Nations groups and organisations. Mental health systems often fail to meet the needs of carers and in fact often cause harm.[13] Annual report evidence suggests the comparative funding of MHCN is even more out of sync with the funding of the Victorian carer peak equivalent. The same is true of First Nations people who often report experiences of culturally unsafe care in general health and mental health systems. The strength of civil society organisations, such as consumer, carer and First Nations peaks are an indication of any government's resolve to addressing mental health issues.

(a) Equity of access to outpatient mental health services

People should not choose between their right to good mental health and their right to equality. Under Article 25 of the Convention on the Rights of Persons with Disabilities (**CRPD**), people have the right to the 'highest attainable standard of health without discrimination based on disability'. This right has two limbs. The first limb creates a positive right to conditions and supports that support a person to have the highest attainable standard of mental health. This includes, among other things, access to a range of psychosocial supports that support a person in distress while also enabling them to exercise their autonomy.[14] The second limb provides that this right must be met through non-discriminatory means, meaning best-interests paradigms such as those underpinning compulsory mental health laws cannot be used to further the first limb.

The Committee should consider how to guide the development of a mental health system that puts equality and human rights at its heart. In addition to addressing the sociopolitical conditions that underpin distress, crises, or mental wellbeing, this commitment will necessitate a system that is rebalanced towards community investment rather than a concentrated focus on medical-based inpatient services. The Royal Commission into Victoria's Mental Health System sought to address elements of this through the creation of lived experience-led mental health services[15], Local Adult and Older Mental Health and Wellbeing Services[16], as well as local community support programs. This requires a systems manager to reorient investment in community, local and lived experience-led services that can support people in more inclusive and less rights-restricting models of care. The Committee may need to examine whether the current commissioning processes held by the New South Wales government are adequate to capture demand and to reorient investment into community services.

(f) The use of Community Treatment Orders under the *Mental Health Act 2007*

The Committee should consider the abolition of community treatment orders (**CTO**). The use of CTOs is inconsistent with the CRPD.[17] Some jurisdictions are examining whether they should be abolished entirely.[18] Evidence for their effectiveness has been mixed at best.[19] The Committee should consider how it can establish a planned exit from the use of community treatment orders. Such a plan should engage all arms of government – addressing both social policy and mental health policy – and engage deeply with alternatives to the use of force[20] and the value of consumer leadership.

As an interim step before abolition of CTOs, the Committee should consider whether people's existing rights under the *Mental Health Act 2007* (NSW) are being met. Even if a person is placed on CTO, their treatment should operate within strict legal boundaries. Evidence from and surrounding Victoria's Royal Commission suggests that breaches of these legal standards are so pervasive as to render rights under the law 'illusory'.[21] Views of established clinical leaders indicate this may be an issue in New South Wales, too.[22] To address the rights-compliance problems, the Committee may seek further examination of:

- the operation of the Mental Health Review Tribunal and whether it is making judgments in the least restrictive manner possible
- the regulatory oversight regime, noting that unlike Victoria,[23] New South Wales lacks a mental health commission with statutory powers to monitor and enforce compliance with consumer rights
- the access that mental health consumers have to independent legal and non-legal advocacy when they are placed on a community treatment order,[24] and
- the value of standalone human rights legislation to better embed human rights principles into the routine decision-making of the system manager, regulatory oversight bodies and public mental health services.[25]

Addressing these issues should be seen as interim steps towards eliminating the use of community treatment orders.[26]

This is an issue that matters a great deal to people who have experienced compulsory mental health treatment. To better understand the urgency of this issue, the Committee should consider a formal process to hear the harms associated with public mental health systems. A model[27] for such

an approach was provided by both consumer and carer leaders in 2023 and has garnered significant national and international support.

(g) Benefits and risks of online and telehealth services

The growth in digital mental health technologies is enormous.[28] Such technologies can expand the best and worst parts of our current mental health and digital technology systems and economies. Therefore, the opportunities and the risks associated with these technologies and economies should be explored.

I provide some cautionary notes about digital mental health technologies. Such technologies do not emerge from a blank sociocultural slate: they operate within or adjacent to mental health systems based on unhealthy power dynamics.[29] They have also appeared simultaneously as new logics of surveillance capitalism have taken hold of digital spaces and economies.[30] Such logics mean that, where technologies are for-profit by the private sector, they risk operating to exacerbate further wealth inequality,[31] which can undermine mental wellbeing.[32] A host of privacy and surveillance issues emerge within this context.[33] Other problems arise via artificial intelligence platforms that may reproduce rather than challenge existing biases and forms of discrimination found in the community.[34] These risks, and strategies to mitigate them, have been covered by Dr Piers Gooding.[35] The central risk mitigation strategy is conscious and intentional consumer leadership structures on the design, commissioning, operation and regulatory oversight of a system of digital mental health technologies.

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I hope this brief, time-limited submission is helpful to the Committee. I welcome any opportunity to explore these topics further.

With care,

Simon Katterl

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[1] LLB (Hons) / Bachelor of Politics & International Relations (Griffith University), Graduate Diploma in Psychological Sciences (University of Melbourne), Masters in Regulation and Governance (cont, Australian National University).

[2] Simon Katterl, 'Regulatory Oversight, Mental Health and Human Rights' (2021) 46(2) *Alternative Law Journal* 149; Simon Katterl, 'Preventing and Responding to Harm: Restorative and Responsive Regulation in Victoria, Australia' (2022) Early View *Journal of Social Issues*; Simon Katterl, 'Words That Hurt: Why Mental Health Stigma Is Often Vilification, and Requires Legal Protection' (2023) 0(0) *Alternative Law Journal* 1; Simon Katterl and Chris Maylea, 'Keeping Human Rights in Mind: Embedding the Victorian Charter of Human Rights into the Public Mental Health System' (2021) 27(1) *Australian Journal of Human Rights* 58; Chris Maylea et al, 'Consumers' Experiences of Rights-Based Mental Health Laws: Lessons from Victoria, Australia' (2021) 78 *International Journal of Law and Psychiatry* <https://doi.org/10.1016/j.ijlp.2021.101737.>; Simon Katterl, 'The Importance of Motivational Postures to Mental Health Regulators: Lessons for Victoria's Mental Health System in Reducing the Use of Force' [2021] *Australasian Psychiatry* 10398562211038913.

[3] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993; *Convention on the Rights of Persons with Disabilities,* opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ("CRPD")

[4] Whether or not mental health providers comply with these laws may be a matter for the inquiry to consider.

[5] Stephanie Stewart, 'Power of Self as the Resource and the North Star: A Discursive Analysis of Lived Experience Leaders' Constructions of Lived Experience Leadership' (2023) 1(1) *International Mad Studies Journal* e1; Stephanie Stewart et al, '"It Depends What You Mean by

Leadership": An Analysis of Stakeholder Perspectives on Consumer Leadership' (2019) 28(1) *International journal of mental health nursing* 339.

[6] Stewart et al (n 5); Brenda Happell and Cath Roper, 'The Myth of Representation: The Case for Consumer Leadership' (2006) 5(3) *Australian e-Journal for the Advancement of Mental Health* 177.

[7] Merinda Epstein, *History of the Consumer Movement* (Our Consumer Place, 2013) <https://www.ourcommunity.com.au/files/OCP/HistoryOfConsumerMovement.pdf>; Robyn Dunlop and Hans Pols, 'Deinstitutionalisation and Mental Health Activism in Australia: Emerging Voices of Individuals with Lived Experience of Severe Mental Distress, 1975–1985' (2022) 19(1) *History Australia* 92.

[8] Recommendation 4: State of Victoria, *Royal Commission into Victoria's Mental Health System, Final Report, Summary and Recommendations* (No Parliamentary Paper no. 202, Session 2018-2021 (document 1 of 6), 2021) <https://finalreport.rcvmhs.vic.gov.au/>.

[9] Recommendation 44(2)(a): Ibid.

[10] Chiranth Bhagavan, Sarah Gordon and Frederick Sundram, 'From the Chemical Imbalance to the Power Imbalance: A Psychiatry Trainee's Perspectives on Service-User Supervision' [2023] *Australasian Psychiatry* 10398562231191695.

[11] 'Mind to Lead Development of New Lived Experience Residential Service | Mind Australia' <https://www.mindaustralia.org.au/mind-lead-development-new-lived-experience-residential-service>.

[12] Vrinda Edan et al, 'Employed but Not Included: The Case of Consumer-Workers in Mental Health Care Services' [2021] *The International Journal of Human Resource Management* 1.

[13] Katterl et al, *Not before Time: Lived Experience-Led Justice and Repair (Advice to the Victorian Mental Health Minister)* (January 2023); Caroline Lambert, 'From Time Slips to Visceral Disquiet: The Experience of Mental Health Caring – Croakey Health Media', *Croakey Health Media* (online, 12 October 2022) <https://www.croakey.org/from-time-slips-to-visceral-disquiet-the-experience-of-mental-health-caring/>; Leilani Darwin, 'Keeping Our Loved Ones Alive: The Compounding Effects of Racism and Exclusion on Mental Health Care', *Croakey Health Media* (online, 13 October 2022) <https://www.croakey.org/keeping-our-loved-ones-alive-the-compounding-effects-of-racism-and-exclusion-on-mental-health-care/> ('Keeping Our Loved Ones Alive').

[14] Maylea et al (n 2); Committee on the Rights of Persons with Disabilities, *General Comment No. 1, Article 12: Equal Recognition before the Law,* (UN Doc. CRPD/C/GC/1 (19 May 2014)).

[15] RCVMHS, *Royal Commission into Victoria's Mental Health System: Interim Report* (State of Victoria Melbourne, 2019).

[16] State of Victoria, *Royal Commission into Victoria's Mental Health System, Volume 1: A New Approach to Mental Health and Wellbeing in Victoria* (No Parliamentary Paper no. 202, Session 2018-2021 (document 2 of 6), State of Victoria, 2021) 191 <https://finalreport.rcvmhs.vic.gov.au/download-report/>.

[17] Chris Maylea and Asher Hirsch, 'The Right to Refuse: The Victorian Mental Health Act 2014 and the Convention on the Rights of Persons with Disabilities' (2017) 42(2) *Alternative Law Journal* 149; Committee on the Rights of Persons with Disabilities (n 13).

[18] Joint Committee on the Draft Mental Health Bill, *Draft Mental Health Bill 2022,* <https://publications.parliament.uk/pa/jt5803/jtselect/jtmentalhealth/696/report.html>

[19] Lisa Brophy, Christopher James Ryan and Penelope Weller, 'Community Treatment Orders: The Evidence and the Ethical Implications' in *Critical Perspectives on Coercive Interventions* (Routledge, 2018) 30.

[20] Piers Gooding et al, 'Alternatives to Coercion in Mental Health Settings: A Literature Review' [2018] *Melbourne: Melbourne Social Equity Institute, University of Melbourne*.

[21] {Citation}

[22] Anne Wand and Timothy Wand, '"Admit Voluntary, Schedule If Tries to Leave": Placing Mental Health Acts in the Context of Mental Health Law and Human Rights' (2013) 21(2) *Australasian Psychiatry* 137; Christopher Ryan, 'Our Duty to Know and Understand the Law' (2018) 26(5) *Australasian Psychiatry* 453; Scott Lamont, Cameron Stewart and Mary Chiarella, 'The Misuse of "Duty of Care" as Justification for Non-Consensual Coercive Treatment' (2020) 71 *International journal of law and psychiatry* 101598.

[23] For comparison, see discussion of the Mental Health Complaints Commission (now the Mental Health and Wellbeing Commission) in: Katterl, 'Regulatory Oversight, Mental Health and Human Rights' (n 2); Katterl, 'Preventing and Responding to Harm: Restorative and Responsive Regulation in Victoria, Australia' (n 2); Simon Katterl and Sharon Friel, 'Regulating Rights: Developing a Human Rights and Mental Health Regulatory Framework' in Kay Wilson, Yvette Maker and Piers Gooding (eds), *The Future of Mental Health, Disability and Criminal Law* (Routledge, 2023).

[24] Brophy, Ryan and Weller (n 19).

[25] Katterl and Maylea (n 2); Simon Katterl and Kerin Leonard, *Putting Human Rights at the Heart: Thinking about Human Rights* (Simon Katterl Consulting & Lionheart Consulting Australia, August 2023) <https://www.simonkatterlconsulting.com/writing/launch-of-new-resources-putting-human-rights-at-the-heart>.

[26] Laura Davidson, 'A Key, Not a Straitjacket: The Case for Interim Mental Health Legislation Pending Complete Prohibition of Psychiatric Coercion in Accordance with the Convention on the Rights of Persons with Disabilities' (2020) 22(1) *Health and Human Rights* 163.

[27] Katterl et al (n 16).

[28] Anil Thapliyal, 'My View: Growing Challenges and Exciting Solutions in eMental Health - Health Informatics New Zealand', *Health Informatics New Zealand* (14 December 2021) <https://www.hinz.org.nz/news/590024/My-View-Growing-challenges-and-exciting-solutions-in-eMental-Health.htm>.

[29] Victoria Legal Aid, *Your Story, Your Say: Consumers' Priority Issues and Solutions for the Royal Commission into Victoria's Mental Health System* (Victoria Legal Aid, 2020) 16–20 <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-your-story-your-say-report.pdf>; Katterl et al (n 16).

[30] Susie Alegre, *Freedom to Think: The Long Struggle to Liberate Our Minds* (Atlantic Books, 2022); Lisa Cosgrove et al, 'Psychology and Surveillance Capitalism: The Risk of Pushing Mental Health Apps during the COVID-19 Pandemic' (2020) 60(5) *Journal of Humanistic Psychology* 611; Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power: Barack Obama's Books of 2019* (Profile books, 2019).

[31] Simon Johnson and Daron Acemoglu, *Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity* (Hachette UK, 2023).

[32] Richard Wilkinson and Kate Pickett, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-Being* (Penguin, 2019).

[33] Lisa Parker et al, 'How Private Is Your Mental Health App Data? An Empirical Study of Mental Health App Privacy Policies and Practices' (2019) 64 *International journal of law and psychiatry* 198.

[34] Piers M Gooding and David M Clifford, 'Semi-Automated Care: Video-Algorithmic Patient Monitoring and Surveillance in Care Settings' (2021) 18(4) *Journal of bioethical inquiry* 541.

[35] Piers Gooding, 'Mapping the Rise of Digital Mental Health Technologies: Emerging Issues for Law and Society' (2019) 67 *International journal of law and psychiatry* 101498; Jonah Bossewitch et al, *Digital Futures in Mind: Reflecting on Technological Experiments in Mental Health & Crisis Support* (University of Melbourne, 2022) <https://automatingmentalhealth.cc/media/pages/digital-futures-in-mind-report/ba660f37e9-1662080126/digital-futures-in-mind-report-aug-2022-final.pdf>; Piers Gooding, *Witness Statement 25 June 2020 to the Royal Commission into Victoria's Mental Health System* (2020) <http://rcvmhs.archive.royalcommission.vic.gov.au/Gooding_Piers.pdf>.