

# Putting Safety First:

Human Rights in  
Mental Health Wards

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## Putting Safety First: Human Rights in Mental Health Wards

### The case for reform

Eighteen percent of women in Australia have reported experiencing sexual violence. But, by some estimates, up to 45 percent of women in Victorian psychiatric wards have reported experiencing sexual assault, and 85 percent have reported feeling unsafe while receiving inpatient treatment.<sup>1</sup>

Not only is there a clear problem with the scale of sexual violence against women in psychiatric care in Victoria, this harm occurs to women who have already suffered disproportionately high rates of sexual abuse and family violence. Compared to rates in the general population, women with serious mental illness who are sexually assaulted are much more likely to suffer adverse psychological effects (92 percent, compared to 64 percent) and much more likely to be at risk of suicide (53 percent, compared to three percent).<sup>2</sup>

In many cases, women are re-traumatised in spaces intended for their treatment and recovery. Further, when women report sexual violence to staff in psychiatric care, they are often not believed and there is no further investigation. Adding to the complexity of this issue is that the perpetrators of most reported incidents, who are predominantly male, have their own legitimate need for psychiatric treatment.

These issues are well known. In March 2018, the Mental Health Complaints Commissioner (MHCC) published *The Right to be Safe*, a report documenting the results of its comprehensive and significant inquiry into sexual safety in acute mental health inpatient environments. The MHCC found there was a

critical need for a comprehensive strategy to plan, coordinate and monitor actions to prevent and respond to breaches of sexual safety. The MHCC made a number of recommendations to the Victorian Department of Health and Human Services (DHHS), the Chief Psychiatrist and mental health services, including recommending the trial of single gender acute inpatient units.

These findings build upon previous research conducted by mental health consumer advocates that has identified a number of concerning features of Victorian mental health wards.<sup>3</sup> These include the lack of physical separation by gender, the absence of uniform policies regarding reporting of sexual violence, inconsistent data collection and investigation, and the lack of adequate support and training for front-line staff dealing with complaints made by patients.<sup>4</sup>

1 Victorian Mental Illness Awareness Council, *Zero tolerance for sexual assault* (2013).

2 Mental Health Complaints Commissioner, *The Right to be Safe - Ensuring Sexual Safety in Acute Mental Health Inpatient Units: Sexual Safety Project Report* (March 2018) 18.

3 In 2013 the Victorian Mental Illness Awareness Council released *Zero Tolerance for Sexual Assault: A Safe Admission for Women*, which detailed the alarmingly high incidence of sexual assaults in Victoria's mental health wards, and the horrifying impact that these assaults had on consumers in inpatient care. Research conducted by Professor Jayashri Kulkarni in the Alfred Hospital also found that women in women-only wards experienced significantly less sexual safety incidents, and that consumers in women only wards felt substantially safer.

4 The Victorian Chief Psychiatrist's Guidelines are intended to help staff in mental health wards protect the sexual safety of people receiving treatment but the guidelines are failing to provide adequate protections because they do not create compulsory obligations. The language used in these non-binding guidelines is technical, drafted for those who work in management, compliance officers or people who work in policy, and may not be accessible to consumers or staff who work directly with consumers.

## Human rights obligations

While these aspects of the problem are now receiving more attention, the legal and human rights risks for the Government and mental health service providers, by failing to adequately promote sexual safety, may be less well understood. The absence of strong measures to protect patients in psychiatric care from sexual violence violates their rights to privacy, humane treatment in detention and equality before the law.

These rights are protected by the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter), which applies to the Victorian Government and hospitals that provide public services. The Charter creates obligations modelled on rights enshrined in international instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).

Australia's recent ratification of the Optional Protocol to the Convention Against Torture (OPCAT) also requires psychiatric services to proactively promote the sexual safety of inpatient mental health consumers. In a recent report discussing Victoria's implementation of OPCAT, the Victorian Ombudsman underscored the importance of improving monitoring and inspection processes in places of psychiatric care.<sup>5</sup>

The mental health framework set up by the Mental Health Act 2014 (Vic) is consistent with the promotion of the rights identified above, as it is centred on a patient-oriented model of treating mental illness focused on safeguarding the rights and dignity of people with mental illness.<sup>6</sup> The below table provides an overview of relevant human rights and rights-related obligations and how they may be engaged and restricted in Victorian mental health wards.

## Action required

The Victorian Government must take meaningful action to promote sexual safety in mixed mental health wards. It is unacceptable that people face the risk of sexual violence in mental health wards. At a time when the Government has made reducing violence against women a priority, it should recognise the vulnerabilities of female patients in its care. The DHHS has committed to developing a comprehensive sexual safety strategy that responds to the recommendations made by the MHCC in its *The Right to be Safe* report, and to prepare an implementation plan in relation to all mental health services.

In support of that commitment, we call on the Government to develop its sexual safety strategy and implementation plan in accordance with the human rights obligations identified in this paper. In particular, we urge the Government to:

1. Investigate the extent and nature of sexual violence in inpatient mental health facilities;
2. Work with mental health consumers to co-design new policies, guidelines and practices; and
3. Develop processes and mechanisms that facilitate the ongoing monitoring and review of sexual safety in inpatient mental health wards.

5 Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (30 November 2017).

6 See Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2014, 458 (Mary Wooldridge) ('Statement of Compatibility'). See also *Mental Health Act 2014* (Vic) ss 10(b), (c), (d), (e) and (g) and 11(1)(c), (d), (e), (f) and (g).

Human right or rights-related obligation	Scope of the right	How is the right engaged and limited in inpatient mental health facilities?
<p><b>Right to privacy</b> Section 13(a) of the Charter</p> <p>A person has the right “not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with”.</p>	<p>“Privacy” has a broad definition. It requires protection of the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.<sup>7</sup></p> <p>Interference with privacy may be indirect, by an omission of certain conduct required to be undertaken in safeguarding the right. There may be a positive obligation to protect individuals from violence by third parties, including by a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private persons.<sup>8</sup></p>	<p>Female mental health consumers have their physical and psychological integrity violated when they experience sexual and/or violent offending.</p> <p>While mental health consumers alleged to have committed sexual or violent offences could be prosecuted under the Crimes Act 1958 (Vic) or the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), proper reporting protocols are absent in mental health wards. This has resulted in the failure to properly investigate alleged offences.</p>
<p><b>Right to humane treatment when deprived of liberty</b> Section 22(1) of the Charter</p> <p>“All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.”</p>	<p>Section 22(1) extends to detainees in a civil context (“all persons”).<sup>9</sup></p> <p>Persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.<sup>10</sup></p> <p>Measures to protect the special status of women are a condition of humane detention.<sup>11</sup></p>	<p>Section 22(1) applies to places of psychiatric care where a person is deprived of their liberty.</p> <p>This right is likely to be engaged by circumstances in which detainees in mental health wards are placed at risk of physical and psychological harm, which is not justified by the ordinary hardships caused by the deprivation of liberty. There has been little focus on special measures to safeguard women in these spaces.</p>

7 *Kracke v Mental Health Review Board (General)* (2009) 29 VAR 1; [2009] VCAT 646 (Bell J), interpreting Charter s 13(a). This is consistent with how the right has been interpreted by international authorities: see, eg, the European Court of Human

Rights in *YF v Turkey* (2004) 39 EHRR 34 [33]; *X and Y v The Netherlands* (1986) 8 EHRR 235 [23].

8 *Jankovic v Croatia* (2000) 30 EHRR 183. See *Stubbings v United Kingdom* (1997) 23 EHRR 213 and *Botta v Italy* (1998) 26 EHRR 241 for consideration of the limits of the positive operation of the right to privacy.

Human right or rights-related obligation	Scope of the right	How is the right engaged and limited in inpatient mental health facilities?
<p><b>Right to recognition and equality before the law</b> Section 8 of the Charter</p> <p>Section 8(2): “Every person has the right to enjoy his or her human rights without discrimination.”</p> <p>Section 8(3): “Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.”</p>	<p>“Discrimination” includes gender and sex discrimination.<sup>12</sup> It extends to indirect discrimination, where particular conduct has, or is likely to have, the effect of disadvantaging persons with the relevant attribute.</p> <p>Section 8(2) is an accessory right, and is engaged when another Charter right is limited; the limitation of another right must not be discriminatory in effect.</p>	<p>Section 8(2) may be contravened by the discriminatory way in which sections 13(a) and 22(1) operate given the gendered prevalence of sexual assault in mixed mental health wards.</p> <p>The failure to offer protective measures such as separate facilities or better reporting protocols for women who experience a disproportionate risk to their sexual safety is arguably a form of indirect discrimination engaging section 8(3). The current framework of mixed mental health wards falls short of a reasonable limitation of the right or “effective protection” given the persistence of sexual assault at high levels.</p>

9 Paragraph 2 of General Comment 21 of the ICCPR on the parallel ICCPR right stresses that this right applies “particularly” to psychiatric hospitals.

10 *Castles v Secretary to the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 [108]-[113]; *Certain Children v Minister for Families and Children (No 1)* [2016] VSC 796; *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251. See also international authorities, eg *Giri v Nepal*

(1761/08), UN Human Rights Committee, UN Doc CCPR/C/101/D/1761/2008 [7.9].

11 See the United Nations Standards, the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) (Principle 5).

12 *Equal Opportunity Act 2010* (Vic) ss 3(1), 6, 7(1)(a), 9(1).

Human right or rights-related obligation	Scope of the right	How is the right engaged and limited in inpatient mental health facilities?
<p><b>Obligation to establish an independent National Preventive Mechanism to conduct inspections of all places of detention and closed environments</b></p> <p><i>Optional Protocol to the Convention against Torture</i></p>	<p>OPCAT requires an inspection regime for any place where persons are or may be deprived of their liberty. Deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.</p> <p>Although the scope of Australia's National Preventive Mechanism will be determined in 2020, many States Parties to OPCAT, including the Council of Europe and New Zealand, have recognised that inpatient psychiatric facilities fall within the purview of the Optional Protocol.</p> <p>In Europe, there is some support for separating genders in places where people are deprived of their liberty with a sufficient level of same-gendered staff to supervise. Checklists for inspectors visiting places of detention require consideration of inter-resident violence and the responses of staff.<sup>13</sup></p>	<p>Currently, most inspection mechanisms for places of detention in Victoria operate at a predominantly reactionary level, with limited capacity to inspect and report on a preventative basis.</p> <p>The Victorian Ombudsman found that existing monitoring and inspection activities conducted in Victoria would not meet OPCAT standards as they presently stand, principally due to limited resources and scope of jurisdiction. The Ombudsman's conclusions support the development of practices to prevent and respond to breaches of sexual safety: first, by ensuring that staff are equipped to monitor and engage with consumers in order to identify and minimise the risk of sexual safety incidents occurring and, secondly, by putting in place robust reporting systems for violence and abuse.<sup>14</sup></p>

13 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *10th General Report*.

14 Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (30 November 2017)

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