The Royal Australian & New Zealand College of Psychiatrists

Your Health in Mind

Queensland Branch

14 April 2022

Mr Scott McDougall
Commissioner
Queensland Human Rights Commission
Anti-Discrimination Act Review Team

Via email to: adareview@qhrc.qld.gov.au
CC: [redacted]

Dear Mr McDougall

Re: Anti-Discrimination Act 1991 (Queensland)

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) Queensland Branch welcomes the opportunity to respond to the review of the Anti-Discrimination Act 1991 (Queensland) ("the Act").

Current preamble and purpose

The Act currently contains a preamble that outlines Parliament's reasons for enacting the legislation when it was introduced in 1991. The preamble confirms Parliament's support of the Commonwealth's ratification of international instruments that recognise the need to protect and respect the principles of dignity and equality for everyone.

The term 'human rights' is defined in clause 6 to mean the rights and freedoms recognised or declared in the seven core international agreements to which Australia is a party and listed in the objects clause.

As well as the core international human rights treaties, there are many other universal instruments dealing with human rights. Of significance to Australia is the United Nations *Declaration on the Rights of Indigenous Peoples*. This declaration is significant for Australia in the role it has in protecting and improving conditions for our Aboriginal and Torres Strait Islander Peoples.

The RANZCP vision for reconciliation is one in which Aboriginal and Torres Strait Islander peoples have equal access to mental health and psychiatric care in a culturally appropriate environment. The RANZCP has in the past advocated for law reform to support the mental health and human rights of Aboriginal and Torres Strait Islander peoples, see RANZCP Position Statement 68: Recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

The RANZCP Queensland Branch supports including the United Nations Declaration on the Rights of Indigenous Peoples in the list of human rights instruments.

The United Nations *Declaration on the Rights of Mentally Retarded Persons* and *Declaration on the Rights of Disabled People* have now been replaced by the United Nations *Convention on the Rights of Persons with Disability*.

The RANZCP Queensland Branch supports that the human rights instruments should also be defined in an inclusive way so that any instruments ratified subsequently are included without having to amend the Act.

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Psychological harms that can be caused by discrimination

A definition for 'good mental health' is provided by The World Health Organisation (WHO) as:

> *a state of wellbeing in which an individual realises their own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to contribute to their community.*[1]

One in five Australians experience mental ill health, including substance abuse disorders, in any given year.[2] The effect of mental illness on individuals, families and carers can be severe and its influence on society, far reaching. In addition, many Australians living with mental illness or other mental health conditions do not receive the treatment and support that they need. This means that many Australians experience preventable mental distress, disruptions in education and employment, relationship breakdown and loss of life satisfaction and opportunities. People with lived experience of mental illness may also experience isolation, discrimination and stigma.[3]

As psychiatrists, we aim to prevent and treat mental disorders, and to support and promote good mental health. The RANZCP will continue to embody culturally safe practices and care for all patients, work with vulnerable communities to reduce mental health inequities, and advocate for the right of all people to be treated justly, ethically and without discrimination: see RANZCP College statement on racism, Principles and Guidelines for Aboriginal and Torres Strait Islander Mental Health, Position Statement 83: Recognising and addressing the mental health needs of the LGBTIQ+ population, Position Statement 103: Recognising and addressing the mental health needs of people experiencing Gender Dysphoria/Gender Incongruence, and Position Statement 96: The relevance of religion and spirituality to psychiatric practice.

Despite public campaigns to improve the community's understanding of mental illness, many people who would benefit from treatment, do not seek care because of their concerns around stigma and discrimination; instead preferring to keep their mental illness hidden.[4]

One significant motivating factor for hiding a mental illness, or refusing to access mental health treatment and support is that many life insurance and travel insurance policies will not cover a person for any claim arising from a mental health condition.

The *Discussion Paper* to this call for submission referenced The Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance (Report, 2019)*, which found that over an eight-month period, three major insurers sold more than 365,000 policies containing terms that discriminated against people with mental health conditions.

Currently, International Labour Organisation (ILO) attributes (medical history, or previously 'medical record') are protected attributes under the law, but only in the work and work-related areas. The RANZCP Queensland Branch advocates that it would be simpler for businesses and the community if these attributes (specifically 'medical history') were protected in all areas of public life, including life insurance and travel insurance policies.

The RANZCP Queensland Branch supports that the right to equality before the law be extended to all attributes, and recommends that coverage of medical history be extended to all areas of public life.

Direct discrimination test

The Terms of Reference ask stakeholders to consider 'whether the requirement for less favourable treatment, as imported by the concept of the *comparator*, remains an appropriate requirement to establish discrimination, or whether there are other contemporary responses that would be appropriate'.

In Queensland, the 'direct discrimination test' is currently defined as:

> *less favourable treatment compared to a person without the attribute in the same or similar circumstances.*

This less favourable, or differential treatment, is sometimes referred to as the 'comparative model'.

The Australian Capital Territory and Victoria have now moved away from the comparative model, towards a test of 'unfavourable treatment'.

The RANZCP Queensland Branch supports that the 'unfavourable treatment' approach be adopted in Queensland. By removing the comparator as an *essential* element, considerations by a decision-maker about the comparator become part of their analysis only when it is a useful exercise.

Once the *essential* nature of the element is removed, a decision may be informed by consideration of the treatment afforded to others, but the 'unfavourable' approach only requires 'an analysis of the impact of the treatment *on the person complaining of it*'.

The RANZCP Queensland Branch supports that the 'unfavourable treatment' approach be adopted.

The Terms of Reference also ask stakeholders to consider the compatibility of the Act with the *Human Rights Act 2019.*

Specifically of concern to the RANZCP Queensland Branch are the mental health needs of adults with an intellectual and / or developmental disability (including persons in the criminal justice system), and locked wards in public inpatient units.

The mental health needs of adults with an intellectual and / or developmental disability

The RANZCP Queensland Branch advocates that the mental health needs of adults with an intellectual and / or developmental disability (including autism) are currently underserved in Queensland.

Despite the significant burden of disease experienced by people with intellectual and developmental disability, and specifically autism, Queensland has limited treatment services available for this vulnerable population cohort. Mainstream public mental health services lack skills and workforce capacity in this area and often fail to recognise or appropriately care for mental illness presentations in people with intellectual and developmental disability.

The only notable intellectual and developmental disability service in Queensland is a 10-bed facility operated by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships. This facility is located at "The Park" at Wacol and is permanently operating at capacity, rendering it largely inaccessible to most people with intellectual disability in Queensland.

While two consultation-liaison services are available in Queensland to meet the needs of persons living with intellectual disability (the Mater Intellectual Disability and Autism Service and the Specialist Mental Health and Intellectual Disability Service), these services cannot adequately address the current level of statewide need. They can only offer assessments and management advice, but do not offer dedicated inpatient beds. This is insufficient to support mental health services to work with this complex cohort effectively, meaning that extended hospital admissions continue, or alternatively persons with intellectual disability who require inpatient mental health treatment and support are often turned away as public health services cannot accommodate them.

Two reports, published in 2006, found evidence of inappropriate models of care for people with intellectual disability in Queensland health facilities:

- *Promoting Balance in the Forensic Mental Health System: Review of the Queensland Mental Health Act 2000* – a report by Brendan Butler AM SC (Butler Report); tabled in Parliament 11 October 2007
- *Challenging Behaviour and Disability: A Targeted Response* – a report by William Carter QC (Carter Report), tabled in Parliament 22 May 2007.

Both the Butler and Carter reports noted that people with intellectual and developmental disability, but no mental illness, continued to reside in mental health hospitals in Queensland. The Butler and Carter reports also found that persons with an intellectual or developmental disability may experience extended stays in hospital and are often mislabeled as having a mental illness. This included those persons subject to a forensic order made by the Mental Health Court and those who had neither a mental illness nor were subject to either a forensic order, or an involuntary treatment order.

People with intellectual and / or developmental disability and challenging behaviours are regularly admitted to inpatient mental health units across Queensland, as there are no other suitable services that can provide adequate care and support for their condition and associated behavioural disturbances.

It is the view of the RANZCP Queensland Branch that this is an abuse of the human rights of persons living with an intellectual and / or developmental disability.

Mental health and wellbeing of persons with intellectual and developmental disability (forensic)

Mental health acts define the circumstances where compulsory measures can be taken to treat a person where illness has impaired their capacity to direct their care. The RANZCP has previously advocated for greater consistency between state and territory Mental Health Acts, and that such Acts across Australia and New Zealand should reflect community expectations, see Position Statement 92: Mental health legislation and psychiatrists: putting the principles into practice.

The forensic disability service system is a source of great concern to the RANZCP Queensland Branch. One of the problems with the forensic disability service system is that the current Queensland *Mental Health Act 2016* places persons with an intellectual or developmental disability who commit crimes on forensic disability orders. These orders tend to be long-term and few people come off them.

There was an extensive governmental review, including a commissioned external review that was tabled in Queensland Parliament in 2018, and yet the problems in the forensic disability system continue.

A Forensic Order (Disability) requires that the individual is managed by authorised public mental health services, often by staff who do not have the experience to work with people with intellectual and developmental disability. When such patients break their leave provisions, usually through challenging behaviour, they are regularly readmitted to mental health inpatient units of public hospitals. There is no capacity for mental health services to offer the mental healthcare treatment and support that this cohort needs, such as behavioural interventions or therapies. Thus, the public mental health services are inappropriately forced to act as parole services.

Both the *Butler* and *Carter* reports noted that people with intellectual and developmental disability, but no mental illness, continued to reside in mental health hospitals in Queensland, and that this is often an inappropriate clinical treatment setting for such patients. The reports noted that this included those persons subject to a forensic order made by the Mental Health Court and those who had neither a mental illness nor were subject to either a forensic order, or an involuntary treatment order.

The RANZCP Queensland Branch recommends that the *Mental Health Act 2016 (Qld)*, which currently enables health services to act as parole services for individuals on existing forensic disability orders, be revised.

The RANZCP Queensland Branch would also like to see the *Serious violent offences scheme in the Penalties and Sentences Act 1992 (Qld)* reflect this amendment to ensure that mental health services are not inappropriately forced to act as parole services.

Locked wards policy for public mental health inpatient units in Queensland

In 2013, the Queensland Government issued a policy directive to lock all acute adult public mental health inpatient wards. The RANZCP, among other stakeholders, critiqued the decision of the Queensland Government at the time. The RANZCP advocated that vulnerable persons need care and consideration, and there is no cause to lock all vulnerable people receiving mental health treatment away for 24 hours a day. Some persons, say patients under orders from authorities, may need to be restricted and detained but there is no need to make this the standard of care for everyone.

Most recently, *Gill et al* argued in an article published in the *Australian & New Zealand Journal of Psychiatry* (2021) that locked wards are inconsistent with least restrictive recovery-oriented care, and that this policy directive goes against the principles of the *United Nations Convention on the Rights of Persons with Disabilities*, to which Australia is a signatory.

To embed a culture of person-centred care, the RANZCP Queensland Branch advocates that it is necessary for Queensland Health services to reassess unexamined assumptions underlying this existing policy directive, for example that locked wards prevent absconding. *Gill et al* reports that a review of the international literature found little evidence of reduced absconding from locked wards.

Further, *Gill et al* reported that disadvantages for inpatients of locked wards include lowered self-esteem and autonomy, and a sense of exclusion, confinement and stigma. Locked wards are also associated with lower satisfaction with services and higher rates of medication refusal.

On the contrary, *Gill et al* argued that there is significant international evidence that models of care like Safewards and having open door policies can improve the ward environment on inpatient units and may lead to less need for containment and restrictive practices.

Tensions and risks in the blanket use of locked door policies in acute mental health inpatient facilities across Queensland require striking a delicate balance between respect for human rights and autonomy, clinical utility and public and patient protection. The RANZCP Queensland Branch acknowledges the nuanced complexity of this policy directive but argues that any potential benefits in preventing absconding through locking all mental health inpatient facilities is outweighed by the adverse effects locked wards have on those detained.

The RANZCP Queensland Branch recommends that the Queensland Government review the locked wards policy for public mental health inpatient units, in light of human rights principles and international evidence.

To discuss the contents of this letter please contact me via [redacted] at [redacted] or on [redacted]

Yours sincerely

Professor Brett Emmerson AM
Chair, RANZCP Queensland Branch Committee

[1] World Health Organisation (WHO), Mental health: a state of well-being, 2014.
[2] More funding needed for mental health. The North West Star. 8 July 2019.
[3] The Australian Institute of Health and Welfare (AIHW), Australia's Health 2018, 2018.
[4] Mental Health Foundation Australia, Fight Stigma, 2019.