Submission: Civil Liberties Australia CLA

To: Mental Health Commission WA

Draft Bill

New Mental Health Act WA

Civil Liberties Australia (CLA) congratulates the Commission, the Minister and the Government for tackling the difficult area of mental health reform. Introducing a new bill provides the opportunity for a decided step forward for people who have few champions, and are often forgotten by society.

Despite some undoubted positive aspects of the proposals, CLA is concerned about the proposed Draft Bill for a new Mental Health Act: we hope that our critiques can be incorporated into the final, improved draft to go to Parliament.

A person's right to remain free from bodily interference and the freedom to choose what, if any, treatment they will submit themselves to, are two of the most basic and important freedoms enjoyed by Australians. The twin pillars are part of what separates liberal democracies from tyrannical or totalitarian regimes. The freedom to choose the treatment one will or will not submit to is far reaching in Australia. Every adult Australian with full mental capacity enjoys the right to refuse treatment, even if that refusal will result in their death. They need not explain to anyone their motives for refusal. It is their choice and their choice alone.

But this right is curtailed when someone becomes subject to Mental Health legislation.

Mental illness can have a profound and often devastating impact on the lives of sufferers. However, being dragged from your home, locked up and treated against your will can be equally devastating. Whereas the fact of mental illness is not something that society can change, the approach to the treatment of it is entirely within our grasp.

Part 2 – Objects, 6(1) of the proposed act probably sums up most people's attitude toward involuntary treatment:

> **6. Objects**
>
> **(1) The objects of this Act are as follows —**
>
> **(a) to ensure people who have a mental illness receive the best possible treatment and care with —**
>
> **(i) the least possible restriction of their freedom; and**
>
> **(ii) the least possible interference with their rights and dignity;**

Unfortunately some of the proposed Bill does not reflect these noble words.

Of particular concern are the proposals to:

- alter the circumstances where a person may warrant an involuntary treatment order to include where there is a significant risk to the health safety and welfare of the person;
- detain persons in a non-authorised facility for up to three days without being assessed by a psychiatrist;
- force medical examinations on involuntary patients and those who have merely been referred under the Act; and
- have no provision for a timely opportunity to appeal one's status.

Whilst the effort to include carers and relatives in some of the decision making processes is laudable, the absence of concern for the legal rights of people to decide on their own treatment and make their own decisions is a retrograde step.

While the bill aims to "ensure people receive the best possible treatment and care", it seems that many parts of the proposed bill have been included simply to make the life of clinicians easier, and to allow them to take control of every aspect of a mentally ill person's life without limitations. CLA believes that, rather than improve the care and treatment of the mentally ill, parts of the proposed bill would only result in further misery for this group of vulnerable people.

We have highlighted specific concerns in more detail below:

Regarding section 25(1) (b). Criteria for involuntary treatment order.

This section would change the enumerated risks contained in the Mental Health Act (1996) – which were arguably already far too broad – to a concept of risk to health safety and welfare. *Welfare* is not defined in the proposed draft. The Oxford Dictionary defines it as the *health, happiness and fortunes of an individual or group.* A risk to welfare is such a broad and nebulous term that it could conceivably encompass almost any perceived deficit to a person's functioning.

Should we be restricting a person's physical liberty and right to choose what treatment they subject themselves to on the basis that their decision to refuse psychiatric treatment may place their happiness at risk? Would the fact that their untreated illness put them at risk of missing out on opportunities for promotion at work be sufficient to render them subject to involuntary treatment? What if their university or TAFE studies are suffering? Do we place so little value in our rights to choose what medical treatment we will be subject to that we would give it away on such a flimsy and ill defined basis as *risk to welfare.*

Or should involuntary treatment be reserved, as CLA believes, only for those who pose a real risk of harm to themselves or others?

Regarding Section 27.

This section will enable a person to be detained for 6 hours, which can be extended repeatedly up to 72 hours, in a place other than an authorised hospital on the grounds that an authorised Mental Health Practitioner or a Medical Practitioner suspects that the individual requires an involuntary treatment order.

It appears that this proposed section has been included to legitimise the current practice of detaining people in emergency departments. This practice – which is currently of very doubtful legality – has only come about due to a shortage of authorised beds. As well as seemingly being in breach of the current Mental Health Act, it is extremely bad clinical practice.

The reason that the parliament stipulated in the 1996 Act that mentally ill persons can only be detained in an authorised hospital is that authorised hospitals are the only places which have the facilities to detain a person safely and in a minimally restrictive manner. They are also the only places staffed by experts in mental health.

There are fundamental differences between detaining a person in an emergency department and detaining them in an authorised hospital. An authorised hospital has facilities designed especially for the purpose. They have minimal risks to the patient's safety due to design features such as locked doors that enable people to be kept under observation by staff without excessively limiting their freedom of movement. They have been designed to limit the environmental risks such as availability of potential weapons or items that may be used to self harm or suicide. They are staffed by expert mental health clinicians who are skilled and experienced in de-escalation and containment techniques. They also by their very nature have a high tolerance to disruptive behaviour which is commonly a feature of people suffering from serious mental illness, particularly when they are being held against their will.

Emergency departments on the other hand are full of serious risks to the mentally ill. They are noisy and stimulating environments which tend to cause escalation in levels of agitation and distress. They are staffed by people without specialist skills in mental health. They are full of equipment that may be used to self harm or as weapons to be

used against others. They have no facilities to detain people without excessively impeding their freedom of movement (such as locked doors). They also have a very low tolerance to disruptive behaviour, for obvious reasons. This frequently results in people being restrained in a manner that would be utterly unacceptable in a mental health facility such as through sedating a person into a state of unconsciousness (a procedure that has no clinical benefit but is fraught with serious risks to the health of the patient) or through the use of physical restraints (strapping a person to a bed).

However, the most serious flaw with this section is that the detained person has not been assessed by a psychiatrist. It is not acceptable to detain a person in such an environment for up to three days on the basis that a medical practitioner (who may have no experience and only very limited knowledge of mental illness) or an authorised mental health practitioner merely *suspects* that they may require involuntary treatment.

Every adult with capacity has the right to determine what treatment they will submit themselves to. This right can only be curtailed through use of the Mental Health Act and the first protection afforded to the proposed patient is that the person who authorises their detention is a qualified psychiatrist. The current limit on detaining a person for a period not exceeding 24 hours without being assessed by a psychiatrist is quite long enough.

The proposed s27 would extend this period to a potential 96 hours – four (4) days that somebody can be held against their will, without even the opportunity of having the "suspicion" that they require involuntary treatment tested by a psychiatrist.

Overriding an individual's autonomy to make their own health care decisions should only take place with the strictest of safeguards. This section allows that to take place with almost no safeguards whatsoever.

Whilst this practice (which may be illegal) appears to be occurring now, it is a practice that we should be endeavouring to stop, not simply accepting and legitimising by lowering proper standards. Under the proposed s27, any sense of urgency in getting a person admitted to an authorised hospital will disappear.

Far from protecting the rights of persons suspected of requiring involuntary treatment, this section strips away their rights for the convenience of the system and the clinicians working within it.

To compare this with the justice system, imagine a situation where a police officer could arrest you on suspicion of committing a crime, and detain you for four (4) days before placing you before a magistrate. Most people would consider that a grotesque violation of their rights. And so is this proposed s27.

Regarding section 52(1)(b).

This section enables a person to be detained at a place other than an authorised hospital for a period of up to 24 hours for the purpose of being assessed by a psychiatrist provided the referring clinician is of the opinion that the place is appropriate for such an assessment.

There is no specification of how it is proposed that the person be detained at this place; there are no guidelines, or restrictions, on the basis that the referrer can come to be of the opinion that such a place is suitable.

Given that such an environment is unlikely to have been designed to detain people, the likely outcome is that the person will be sedated into a state of unconsciousness or simply strapped to a bed. Such practices are utterly unacceptable in an authorised hospital, and should be seen as just as unacceptable in an unauthorised environment.

This is particularly so given that the person being detained would not have even been assessed by a psychiatrist to confirm that they are indeed requiring involuntary treatment.

If it is proposed that this section only be used in areas of the state that do not have an authorised hospital, then a proviso to that effect needs to be explicitly written into the Act, along with rules and guidelines/protocols.

Section 202. Physical examination on arrival at authorised hospital

This section enables a person to be subjected to a medical examination and the taking of blood, tissue and excreta, *without their consent.* It applies not only to involuntary patients but to those who have been referred for assessment by a psychiatrist but not as yet assessed.

There are many good reasons why a person may refuse a physical assessment by a doctor or refuse to give samples of blood, excreta or tissue. The person may have a fear of needles, may have been traumatised by a doctor previously, or simply feel that their physical health care needs are best addressed by their own doctor at a time of their choosing. CLA believes it is an unnecessary encroachment on the rights of the mentally ill (and of those who – at this unassessed stage – are merely suspected of being mentally ill) to have the right to refuse a physical examination taken away from them. Is this really necessary for the effective assessment and treatment of mental illness?

CLA suggests that it would be useful if MPs or members of the Commission imagined themselves being detained against their will on the basis that a medical officer or authorised mental health practitioner *suspects* that they should be an involuntary patient; then, before they have even had the opportunity of putting their case to the psychiatrist who will determine their fate, they are *forced* to submit to what they may consider a humiliating medical examination and the forced taking of blood, urine, faeces or other bodily tissues?

CLA believes this section is not compatible with treating the patient with the least restrictions on their rights, dignity and freedom?

Section 269(1) Chief mental health advocate remains under Ministerial control

It is not apparent to CLA why the Chief Mental Health Advocate should remain under the control of the Minister. The two positions have fundamentally opposing

objectives. The Minister's position is political, which requires him or her to show the public that the health system is functioning well and patients' rights are being respected. On the other hand, the role of the Chief Mental Health Advocate is to monitor whether/how the rights of patients are being respected, and to speak up for ("advocate") a patient or patients is they are not being respected. To do this job effectively the Chief Mental Health Advocate must be able to speak and act free from political considerations. Placing him/her under the control of the Minister will ensure that the Advocate is restricted in what he/she can say/do, and therefore is curtailed in how well he/she can represent patients.

Section 271 mandates that a person who has been made involuntary must be visited by a Mental Health Advocate within 7 days.

Seven (7) days is far too long a period for an involuntary patient to wait. If we genuinely take the rights of involuntary patients seriously, then we should be aiming at the shortest possible time before a person is given some independent advocacy and information on their rights. CLA believes that 24 hours would be a more suitable time frame, in normal circumstances, with an extension to 48 hours over a Christmas/holiday period.

Section 294 mandates that a person subject to an involuntary treatment order must have that order reviewed within a period of 35 days of it being made.

This section means that a person may have been detained under s27 for 72 hours, before being moved to an authorised hospital where they may be detained for a further 24 hours before being assessed by a psychiatrist. On the say-so of this psychiatrist alone, they may be locked up and treated with potent psychotropic medications they do not want, for an illness that they do not believe they have, for another five weeks (35 days) before any opportunity arises to have the psychiatrist's decision reviewed. This makes a total of 39 days.

Unless we believe that psychiatrists are infallible, there will always be cases where the Mental Health Review Board will release the person from their involuntary

treatment order. There is no good reason why those people should have to wait 39 days for this to take place.
An appeal should be entirely practical within the first week, CLA believes.

WA is a relatively wealthy community: there should be no reason why it is not possible to resource a mental health review system to be able to carry out its hearings in a timely fashion. For most patients, they will be long released from their involuntary status before they even get this hearing, rendering the whole appeal process quite worthless.

Whilst reviews may be an inconvenience to clinicians, they are a small price to pay for having a system that actually affords some natural justice to people being detained under the Act. They are vital to ensure that people are not wrongly detained, and to ensure that those who are rightly detained still have the opportunity to put their case..

General length and unwieldiness of the proposed Bill.

CLA remains extremely doubtful that good mental health care will be achieved through an Act of Parliament alone. Good mental health care will come about through a well-resourced system with skilled and compassionate clinicians, operating to laws are that respect the civil liberties and human rights of the patient.

The attempt to improve the health outcomes of the mentally ill through this bill may backfire: the attempt to legislate the daily minutiae of mental health practice has rendered the proposed Bill extremely long and difficult to read. It runs to 456 sections, in comparison to the 215 sections of the 1996 Act. Whilst well intentioned, it will do nothing to protect the rights of the mentally ill if clinicians are unable to read or understand it. If clinicians are unable to understand it then it is highly unlikely that many of the people being detained under it will be able to understand it either.

The bill should limit itself strictly to the issues of when and how a person may be treated against their will in the context of mental illness. Other issues such as the rights of family to information could be contained in regulations or in another Act dealing specifically with those issues.

Rather than ensuring people suffering from mental illness are treated with the least restrictions on their rights, freedom and dignity, this proposed bill increases the occasions and manner in which they can be treated against their will. Many of the changes – despite the Objects of the bill – seem to have been made not to improve the health outcomes for patients, but rather to make life easier for clinicians by removing existing limitations on their powers. When people have unlimited power, they tend to misuse, even sometimes abuse, it.

An abusive mental health system is not in the interests of either patients, clinicians or society in general. In terms of changing the power balance between the (possibly) mentally-ill person and the state, CLA agrees with the comment by the Federal Member for Pearce, Judi Moylan, in her maiden speech to the Australian Parliament on 6 May 1993:

> *"The assumption that each additional state power will always be used for the common good is a proven lie".*

CLA believes the draft bill should be amended in the way we have outlined…

…to ensure people who have a mental illness receive the best possible treatment and care

ENDS ENDS ENDS

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7 March 2012

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