



**MONASH** University

Centre for the Advancement of Law and Mental Health

**Revised National Mental Health  
Statement of Rights and  
Responsibilities:**

**Brief Consultation Paper**

September 2011

**Faculty of Law**

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## Project Scope

The *Revised National Mental Health Statement of Rights and Responsibilities (2011) – Consultation Draft* seeks to update the existing *National Mental Health Statement of Rights and Responsibilities (1991)*. It does not intend to rewrite the 1991 Statement in its entirety but revise it in light of the National Mental Health Policy (2008) and Australia's international obligations.

For a full explanation of the key updates included in the Consultation Draft of the Statement, please refer to the Consultation documentation at:  
<http://www.health.gov.au/internet/mhsc/publishing.nsf/Content/Review-of-NMHSRR>

## Key Changes

### 1. Revised Structure

The structure of the Statement has been revised to:

- provide an overarching statement of principle that establishes the human rights framework of the updated draft Statement (Part 1)
- restate the principles of non-discrimination, social inclusion and social participation as they apply in mental health (Part II)
- refer to the service elements of a population based framework for mental health (Part III)
- refer to rights and responsibilities that arise when individuals seek assistance or treatment for mental health problems and/or mental illnesses (Part IV)
- correspond with Parts V to X in the current Statement

### 2. Policy and international obligations

The updated draft Statement is aligned with the National Mental Health Policy (2008) and incorporates Australia's international obligations,<sup>1</sup> with particular respect to the United Nations Convention on the Rights of Persons with Disabilities (the CRPD)<sup>2</sup> and the United Nations Convention on the Rights of the Child (the CRC).<sup>3</sup>

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<sup>1</sup> Australia has ratified all the United Nations' core international human rights treaties, apart from the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

<sup>2</sup> GA Res Doc A/61/611, opened for signature 30 March 2007, entered into force 3 May 2008, signed by Australia on 30 March 2007 and ratified on 17 July 2008. On 21 August 2009, Australia acceded to the Optional Protocol to the *Convention on the Rights of Persons with Disabilities*.

<sup>3</sup> GA Res Doc A/44/25, opened for signature 20 November 1989, entered into force 2 September 1990.

Australia has signed and ratified the CRPD<sup>4</sup> and its Option Protocol,<sup>5</sup> and has posted a declaratory statement to the effect that the CRPD is interpreted by the Australian government as permitting involuntary psychiatric treatment, provided that involuntary treatment is a measure of last resort.<sup>6</sup>

The guiding principles of the CRPD are non-discrimination, social inclusion and full social participation. These principles support the emphasis in the updated draft Statement on:

- a human rights framework;
- non-discrimination;
- social participation and inclusion;
- the promotion of mental health;
- the prevention of mental illness;
- the right to access services that provide support, care, treatment, recovery and rehabilitation;
- the right to a presumption of capacity;
- the right to capacity based mental health laws;
- the right to decision making support;
- the right of individuals to participate in decisions that affect them, regardless of a determination of incapacity;
- the right to make psychiatric advance directives;
- the right to participate in the development of health and mental health policy; and
- the right to inclusion and reintegration of individuals with mental health problems and/or mental illnesses in the community.

The CRC also imposes specific obligations in relation to children and young people.

### **3. Concepts and Terminology**

*Rights and responsibilities* - The updated draft Statement stresses the responsibility of governments and service providers to work toward providing services that support the rights and entitlements of individuals with mental health problems and/or mental illnesses, and the rights of their families, supporters and carers. The main responsibility of individuals involved in the mental health system is to respect the rights of others.

*Individuals with Mental Health Problems and/or Mental Illnesses* - The updated Statement adopts the phrase 'individuals with mental health problems and/or mental illnesses'. This phrase stresses the individual first. The use of 'mental illnesses' in the plural and in the alternative recognises that there are many forms of mental illness and different combinations of 'problems' and 'illnesses', and 'problem' refers to mental difficulties of any kind. This terminology reflects the internationally recognised

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<sup>4</sup> Above, note 2.

<sup>5</sup> Ibid.

<sup>6</sup> Report No 95, Joint Standing Committee on Treaties (JSCOT), 16 October 2008, Chapter 2: Convention on the Rights of Persons with Disabilities, para 2.7.

(and regularly updated) term ‘mental illness’, and encompasses flexible responses to those who may benefit from health and/or mental health services prior to a clinical assessment or prior to developing a mental illness.

*Support, Care, Treatment, Recovery and Rehabilitation* - The phrase ‘support, care, treatment, recovery and rehabilitation’ is used throughout to refer to the full range of responses and interventions that may be provided.

*Young People* - The term ‘young people’ is used in preference to the medical term ‘adolescent’ to indicate that young people are individuals with rights.

*Participation* - Refers to the involvement of people in the decisions that affect them.

*Supporters* - Refers to individuals who provide decision making and other support to individuals with mental health problems and/or mental illnesses, but who do not make decisions on the particular individual’s behalf. The inclusion of this term reflects the shift expressed in Article 12 of the CRPD towards supported decision making wherever possible.

*Advance Instructions* - Indicates an instruction about care, support, treatment, recovery or rehabilitation that is made in advance. This term is used in preference to the more familiar terms ‘advance statement’ or ‘advance directive’ because these terms are sometimes interpreted as referring to the legal status of an advance instruction.

*Informed Consent* - Refers to the exchange of personal and medical information that is required whenever medical treatment is provided.<sup>7</sup>

#### **4. Background Issues**

Several background issues have informed this review. These issues are currently the subject of national and international debate, and generate a range of views about the content of mental health law and policy. For a full discussion of these issues please refer to the Introduction of the Revised Statement.

- Capacity
- Accurate and appropriately communicated information
- Children and Young People
- Advance Instructions
- The Principle of Least Restriction
- Safety
- Comorbidity and Substance Use

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<sup>7</sup> This derives from the decision of the High Court in *Rogers v Whitaker* (1992) 175 CLR 479.