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**VALS Submission to the Scrutiny of Acts and Regulations Committee in
response to the Severe Substance Dependence Treatment Bill 2009 – sent 22
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The Victorian Aboriginal Legal Service Co-operative Limited provides the following comments on the Severe Substance Dependence Treatment Bill 2009 (Bill). Whilst there are some positives about the Bill, these are outweighed by the concerns VALS has about the Bill.

VALS acknowledges that much of this submission draws on the work of the following organisations who have also responded to the Bill:

- Harm Reduction Victoria;
- Fitzroy Legal Service;
- Public Law Interest Clearing House;
- Federation of Community Legal Centres.

Positive

On a positive note, it is important to recognise that the Bill is part of a response to a review of the Alcoholics and Drug Dependent Person's Act 1968, which has been ridiculed by lawyers as a cumbersome and a useless piece of legislation. For instance, VALS' lawyers are keen to see that the Bill does not mirror sections 11-13 of the 1968 Act because they are ineffective and dangerous.

Context

VALS has concerns about the Bill in the context of Aboriginal and Torres Strait Islander Peoples' experience of institutionalisation as a result of stolen generation policies. Aboriginal and Torres Strait Islander peoples have had negative experiences with authorities which enforce decisions rather than facilitate agency of an individual.¹

VALS is concerned about the lack of detail in the Bill as to the criteria for 'less restrictive means reasonably available to ensure treatment provided' (part 1 clause 8). While in the Second Reading Speech the Minister talks about the importance of taking into account the social and cultural circumstances of the person to be detained, the Bill, at this stage, contains no provisions requiring such an inquiry to take place. This is particularly relevant in considering how the

¹ VALS' submission to the Community Consultation Panel: *Mental Health Act 1986* Review – sent 16 March 2009, page 1

proposed legislation might impact members of the Aboriginal and Torres Strait Islander community.

Consultation

In light of the unique context of the Bill in relation to members of the Aboriginal and Torres Strait Islander community, it is disappointing that consultation with the Aboriginal and Torres Strait Islander community regarding the Bill has, to our knowledge, not occurred. This is especially the case given the Reading Speeches suggest there are concerns regarding impacts on Aboriginal members of the community.

Human Rights

VALS agrees with HRV that there should be as robust and inclusive consultation process as possible, and a review of the Human Rights implications of the Bill, as there has been with the Mental Health Act.² VALS also agrees that the second reading speech was too brief when outlining how the Bill complies with the Victorian Charter of Human Rights and Responsibilities.

The provision of involuntary treatment raises a plethora of considerations and concerns in respect of the rights contained in the Victorian Charter of Human Rights and Responsibilities. The Bill clearly impinges on human rights such as the right to liberty and security of the person, right not to be subjected medical treatment without full and informed consent (s10c *protection from torture, cruel and inhuman or degrading treatment*), and the right not to be subjected to arbitrary detention. The Bill means the law of consent is suspended for drug and alcohol dependent persons in a discriminatory fashion. The issue of the Bill infringing basic human rights and leading to discrimination is unacceptable.

Breadth

VALS is concerned that the wide definition of ‘severe substance dependence’, and definitions surrounding it (in particular the arm relating to ‘serious damage to the person’s health’), will capture too broad a spectrum of the substance dependent community. This is a concern given that those who fall within the parameters of the Bill will be subjected to various powers (ie: warrant, sedation). Arguments made against sedation under the Mental Health Act in a recent review of the Act apply here (please contact us for a copy of VALS’ submission in response to this review if you wish).

Oversight/Review

VALS is concerned that the oversight and review mechanisms in the Bill are too weak. The safeguards are only as strong as the framework.

Capacity

VALS agrees with HRV that the criterion in the Bill around “*capacity to make decisions about their dependency*” must be replaced. Also, should the Bill proceed the following change should

² Brogan D, Harm Reduction Victoria, Draft of submission to Scrutiny of Acts and Regulations Committee, 18th January 2010, page 1.

be made: with “*capacity to make free and informed consent to treatment*”.³ VALS also agrees with HRV that substance dependence, in and of itself, does not limit capacity for consent.⁴ While it may be, perhaps, theoretically possible for substance dependence in and of itself, to be deemed to limit their capacity to make free and informed decisions about treatment, like HRV, “we do not accept that sufficient evidence has been established to enact legislation abrogating the most inviolable and non-derogable human rights in this manner”.⁵

Treatment: Too narrow

VALS agrees with HRV that “the definition of “treatment” proposed in the Bill is very limited, consisting basically of detoxification, or involuntary withdrawal. Options should be more diverse given, as HRV explains, “[d]ependence involves such a broad range of substances and such complex interactions between pharmacology, social environment, personal choice and cultural values.”⁶

Risk of Arbitrary Implementation (due to lack of definition)

The Bill is dangerously vague in its definitions regarding “risk of death or serious ill-health”. VALS agrees with HRV that “[w]ithout more rigid definition, this term is so open to arbitrary interpretation that it may constitute a general danger to Liberty.”⁷ VALS agrees with HRV that the wording should be changed as follows: *risks of death or ill-health that are imminent and of the maximum, immediate gravity* should be sufficient for the grant of a treatment order.⁸

Involuntary Withdrawal

VALS agrees with HRV that “any involuntary imposition of withdrawal upon a substance dependent person to constitute a cruel and unusual punishment.”⁹ The capacity in the Bill to allow for medical treatment alleviating the symptoms of withdrawal does not assuage our concerns”.¹⁰ VALS repeats HRV’s concern that the involuntary withdrawal imposed on persons detained in police custody and on remand would, under the Bill, also occur to a person who has *not* been convicted of an offence. Research findings from offender populations are generalisable to non-offenders.

Evidence about the merit of compulsory treatment is not adequate as highlighted by a 2008 literature review aimed to assist the New Zealand Ministry of Health in reviewing the NZ *Alcoholism and Drug Addiction Act 1966* (‘NZ review’):¹¹

‘Of the evidence base considered, the study design, implementation and reporting is *generally inadequate* for the assessment of efficacy, and *results have been inconsistent*. Also, there is *wide variation* in the implied meaning and usage of specific terminology

³ Brogan D (18th January 2010, above no 2, page 1.

⁴ Brogan D(18th January 2010, above no 2, page 1.

⁵ Brogan D (18th January 2010, above no 2, page 1.

⁶ Brogan D (18th January 2010, above no 2, page 3.

⁷ Brogan D (18th January 2010, above no 2, page 6.

⁸ Brogan D (18th January 2010, above no 2, page 7.

⁹ Brogan D (18th January 2010, above no 2, page 7.

¹⁰ Brogan D (18th January 2010, above no 2, page 9.

¹¹ Marita Broadstock, David Brinson and Adele Weston, ‘A Systematic Review of the Literature: The Effectiveness of Compulsory, Residential Treatment of Chronic Alcohol or Drug Addiction in Non-Offenders’ (Health Services Assessment Collaboration, 2008).

(for example, compulsion, coercion, voluntary, mandated treatment, civil commitment) and *this generally makes meaningful comparison of findings difficult.*¹²

The NZ review further concludes: '[C]ompulsory civil commitment may be *one* mechanism to prevent deaths and minimize harm. *However, there may be other mechanisms that are as effective, or more so.*'¹³

Wild and colleagues use social determination theory to consider how drug and alcohol users may experience compulsory treatment.¹⁴ Self-determination theory addresses how social events are perceived and how those perceptions affect motivation: "[w]hen social events promote perceptions of being controlled or coerced, intrinsic motivation (ie interest and engagement in activities) is undermined" (see how this relates to the Aboriginal and Torres Strait Islander community be referred back to the section 'context' above).¹⁵ Conversely, "when social events promote perceptions of autonomy support, intrinsic motivation toward activities is enhanced".¹⁶

Adverse Risks from Compulsory Detention and Treatment

An adverse risk of involuntary treatment orders is the risk of drug overdose. Some speculate that the increased risk is the result of reduced tolerance produced by periods of abstinence or reduced dosages.

Impact on Voluntary Treatment

The Bill may have an adverse impact on voluntary clients as the injection of resources linked to the Bill may reduce resourcing of voluntary withdrawal premises. This raises the question: how can compulsory treatment meet the test of "no less coercive options being available in the community when the very existence of involuntary treatment will further limit access for voluntary treatment? VALS agree with HRV that "[t]he real need in Victoria should be for legislation guaranteeing the rights of individuals to access appropriate treatment services and appropriate treatment options."¹⁷ VALS agrees with HRV that "[t]here is no need to trample upon human rights; the overriding community need is for better funded, better located and more easily accessed drug and alcohol treatment services and options."¹⁸

Resources

VALS is concerned about the availability of the very treatment/rehabilitation centres referred to in the proposed legislation. If the proposed detention and treatment order is designed to be necessary and urgent to save the person's life or prevent serious damage to that person's health, the Bill does not seem to guarantee that such a treatment centre will be available to satisfy the order. If it is an emergency measure to protect the life of the person, how does the proposed

¹² Marita Broadstock, David Brinson and Adele Weston, 'A Systematic Review of the Literature: The Effectiveness of Compulsory, Residential Treatment of Chronic Alcohol or Drug Addiction in Non-Offenders' (Health Services Assessment Collaboration, 2008).

¹³ Broadstock,(2008) above no 12, p v (emphasis added).

¹⁴ Wild, T Cameron Cunningham John A and Ryan Richard, 'Social Pressure, Coercion, and Client Engagement at Treatment Entry: A Self-Determination Theory Perspective' (2006) 31 *Addictive Behaviors* 1858.

¹⁵ Wild T Cameron et al (2006) above no 14, 1870.

¹⁶ Wild T Cameron et al (2006) above no 14, 1860.

¹⁷ Brogan (18th January 2010, above no 2, page 10.

¹⁸ Brogan (18th January 2010, above no 2, page 11.

legislation guarantee that a bed will be available in the proposed treatment centre? Also, VALS has concerns about how it is to be decided that a treatment centre might be deemed 'appropriate' in the event that there are no beds available in the treatment centre first proposed: sub-clause 3 of Clause 21 provides that if there are no beds available in the proposed treatment centre, the person may be admitted to 'any other appropriate treatment centre.'

CONCLUSION

Whilst there are some positives about the Bill, these are outweighed by the concerns VALS has about the Bill that relate to:

- Context behind Aboriginal and Torres Strait Islander potential experience of the Bill;
- Lack of consultation about the Bill with the Aboriginal and Torres Strait Islander community.
- Human Rights issues;
- Breadth and lack of definitions that can lead to arbitrariness;
- Inadequate oversight and review mechanisms;
- Inadequate framing of capacity and treatment;
- Lack of evidence about effectiveness of involuntary withdrawal;
- Adverse risks from compulsory detention and treatment;
- Negative impact on voluntary treatment
- How the Bill will work in practice in terms of resources.