Our approach to complaint handling and compliance monitoring

Mental Health & Wellbeing Commission

Contents

Version 1.0.
Published August 2024

Address: Level 26, 570 Bourke Street
Naarm / Melbourne, Victoria 3000

Phone: 1800 246 054 (free call from landlines)

Complaints: help@mhwc.vic.gov.au
General enquiries: info@mhwc.vic.gov.au

Website: mhwc.vic.gov.au

facebook.com/mentalhealthandwellbeingcommission

instagram.com/mhwc_vic

linkedin.com/company/mental-health-and-wellbeing-commission-vic

Mental Health & Wellbeing Commission

Understanding our role in compliance monitoring and complaints handling

This publication outlines in more detail how the Mental Health and Wellbeing Commission (the Commission) exercises its powers and provides system oversight as mandated by the *Mental Health and Wellbeing Act 2022* (the Act).

The Commission can help resolve complaints regarding individuals' experiences with the public mental health and wellbeing system in Victoria and has broader powers to address systemic issues.

The Commission adopts a proportionate, risk-based approach to compliance monitoring and collaborates with other oversight entities to ensure a safe mental health and wellbeing system that continuously improves in quality and effectiveness.

The Commission is not the system regulator – no single regulator governs the entire mental health and wellbeing system. We do, however, play a significant role in providing independent and impartial information about the collective strength of these oversight mechanisms, fostering a synergistic outcome within this governance network.

Our complaint handling, investigations and compliance practices aim to improve outcomes for consumers, families, carers and supporters, drive system reform and protect the public interest.

We aim to be neither overly accepting nor overly punitive, applying a continuous cycle of reviewing, learning and adjusting to our decision-making processes.

While the Act defines many of our functions and practices, we remain committed to listening to those with lived experiences of mental ill-health and their families, carers and supporters when considering and adjusting our approach.

We also encourage services to highlight barriers to compliance and advise us or other governance entities on how to address these issues.

Administering our functions appropriately and impactfully requires a balanced approach to risk.

Many insights into areas for improvement come through our complaints function, and we focus our most significant inquiries on areas posing the greatest risk to consumer safety and wellbeing and those representing the greatest public interest.

The Act requires that we apply the least formal approach necessary to resolving complaints.

This means we will often use processes that educate services and empower consumers, families, carers and supporters about their rights, including the human rights of those using the system. This includes a particular focus on elevating the principles within the Act to create a compassionate and effective system for all.

Purpose of this publication

This publication demonstrates how the Commission exercises its powers relating to compliance, as they arise from:

- single complaints and investigations; and
- broader concerns that may be systemic in nature across a service or the health care system.

In these pages we set out the Commission's operational framework and processes and communicate our approach with consumers and our key stakeholders so they may better understand and have confidence in the work of the Commission.

Our key audiences are:

Consumers, families, carers and supporters

Our will is that consumers, their carers, families, supporters and broader networks who are using or trying to access the system are empowered to understand how the Commission is set up to protect their rights and drive improvements.

It's also important for those wishing to raise an issue to understand the impact that making a complaint can have on driving change.

Services and their staff

These guidelines enable services and their staff to be clear on the expectations of the Commission and how we intend to use our various tools and powers, including how we determine what is reasonable in the circumstances.

For mental health and wellbeing system bodies, the Commission will clarify compliance expectations and report on system performance.

The staff of the MHWC

For Commission staff, the focus will be on working cohesively with a clear understanding of our role in system reform, elevating lived experience leadership and participation and diversity.

This document establishes a framework for staff at the Commission to operationalise our policies.

Co-oversight entities

This document clarifies responsibilities and explains our functions and the extent of our powers. It describes how we intend to refer matters or issues to others or share responsibilities for actions, and our expectations when doing so.

The broader community

Finally, we hope this document raises community confidence in how we efficiently use our resources, continuously improve our work and make decisions.

Foundations of our approach

The Commission works within a network of entities responsible for the mental health and wellbeing system's performance, quality and safety.

We consider the perspectives of those with lived experience

We take a trauma-informed and person-centred approach to complaint resolution. This includes keeping the complainant informed at every step of our process and seeking their views before closing a complaint on the basis that the resolution must comply with the principles of the Act.

We aim for early, informal resolution

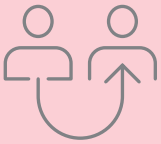
The Commission aims for early resolution – we will attempt informal resolution wherever this is appropriate or possible. This a requirement under the Act.

We will conduct detailed reviews when informal resolution is unsuitable.

Formal investigations will only be conducted for serious or systemic rights, safety or risk issues raised through complaints, where other complaint resolution pathways/mechanisms are not appropriate or effective.

We apply the following decision-making process

Review – understand the nature of the complaint and resolution sought.



Refer – if suitable, refer the matter to the service for direct resolution.

Resolve – work with the service and complainant for resolution.

Escalate – consider further action if issues remain unresolved.

Respecting, protecting and promoting rights

The Commission uses a responsive risk-based approach to safeguarding rights. This means we direct our resources based on the nature of the risk of potential harm or noncompliance we identify, the context of the issues and the conduct and culture of the service.

This approach is applied at two levels:

- Individual service level
- Broader systemic or sector-wide risks. This is detailed separately in our approach to monitoring systemic and system-wide issues.

This approach to risk intends to be both efficient and effective, and to minimise administrative burden. We design our response based on the characteristics of each risk within the issues raised.

Our methods don't only focus on enforcement but on changing behaviours, and can include education and training, audits, recommended policy or practice changes, referral to other entities for action and, where allowed, publication of performance results.

The Commission takes the position that services are positively motivated to comply, and we will scale our efforts based on the motivation and engagement that is or has been demonstrated by the service in the past.

The Commission adopts the following principles:

Proportionate – each aspect of our process is appropriate to the scale of the issues and each element is compatible to our decision-making principles and framework.

Targeted – our processes are aimed toward the specific goals of system improvement and compliance with the Act and compatibility to the mental health and wellbeing principles.

Reliable – our processes are consistent, stable and well understood, and robust enough to account for variations in context.

Flexible – we build in review and feedback loops, so we remain adaptable and responsive.

Our functions

What are our functions?

The complaints handling and compliance monitoring functions of the Commission drive service improvements and include:

- **Handle and consider complaints** about mental health and wellbeing service delivery.
- **Obtain and share data** about service delivery and system performance.
- **Conduct investigations** following complaints, matters referred by the Minister, or on our own initiative.
- **Provide education and advice** to service providers about complaint management.
- **Initiate inquiries** into matters supporting the Commission's objectives.
- **Report serious contraventions** of the Act to the Health Secretary.
- **Make recommendations** to government bodies and publish performance reports.
- **Refer serious risks** to appropriate regulators or oversight bodies.

Taking and resolving complaints

The Commission can take complaints relating to any matter arising out of the provision, or failure to provide, a mental health and wellbeing service by a mental health and wellbeing service provider.

This includes such things as:

- failure to make all reasonable efforts to comply with the mental health and wellbeing principles and other principles and rights in the Act;
- communication including to nominated support persons, families and carers; or
- the way a service provider handled a complaint it received.

These complaints can come from consumers or from other people on behalf of consumers.

Carers, family members and supporters can also make complaints about their own experiences.

Disclosure and information sharing

The Commission deals with complaints about the experience of consumers, carers or families, as defined in the Act.

The Act also specifies the Commission must resolve complaints using the least formal approach that is appropriate in the circumstances (section 451(2)).

Complaints made to the Commission are confidential and no identifying details are made public. That said, the Commission shares non-identifying details, usually in an aggregated format, for the purposes of transparency about our work and service or system performance.

There are specific parts of the Act that restrict the type of information the Commission can make public or share.

We are not allowed to disclose any information obtained during an investigation, a complaint data review, complaint resolution process, or during a conciliation.

Disclosure is permitted in some limited circumstances, for example, where there is written consent from the person to whom the information relates, or if it is necessary to avoid a serious risk to the life, health or safety or welfare of a person.

It is also permitted – except in relation to conciliation – if it is necessary for the performance of the Commission's functions.

Our decision-making steps

The Commission must consider the mental health and wellbeing principles and make sure our decision-making processes are transparent, systemic and appropriate.

When taking complaints, the Commission must abide by the guiding principles in [section 430 of] the Act, which require us to:

- act in a fair, impartial and independent manner;
- seek to improve the quality and safety of mental health and wellbeing services;
- seek to protect the rights under this Act of persons seeking or receiving services from mental health and wellbeing service providers; and
- act in an efficient, effective and flexible manner that avoids unnecessary formality.

The Act says the Commission may attempt early resolution of a complaint in any manner using any means it considers appropriate.

When we are dealing with a complaint, we can use any appropriate method to resolve the complaint, including informal dispute resolution, conciliation or conducting an investigation.

How we decide on the appropriate action is explained further in this document.

The 4 As

When resolving complaints, the Commission will seek to deliver outcomes that broadly result in achieving at least one of the following,

1. **A**cknowledgement of a person's experience.
2. **A**nswers or explanations about the complaint issues.
3. **A**ctions taken because of the complaint.
4. **A**pology for the person's experience.

We refer to this as the 4 As of complaint resolution.

The 'making a complaint' page on the MHWC website sets out more information about each of the 4 As.

Systemic concerns

Independent of any specific complaint, the Commission can start or continue enquiries where, for example, a complaint has been finalised or withdrawn but further serious issues have been identified, or multiple complaints have been received on the same issue.

These are referred to as systemic issues and our approach to systemic issues is outlined in our *Exploring issues through inquiries and systemic reviews guide*.

The information gathered from complaints may inform other work conducted by the Commission including considering if broader system-wide issues exist and require further enquiry or action.

Our complaints handling and compliance monitoring model

Complaint is received from a consumer or someone on behalf of a consumer. Carers, family members, supporters and kin can make a complaint about their own experiences.

Early resolution

Our staff work with the complainant to determine the best approach to progress the complaint. Where possible we encourage the service to resolve the issues directly with the complainant and focus on rebuilding trust.

We may also work with the service and complainant using informal resolution techniques. We ask complainants what outcomes they are seeking, and may ask the service for more information – by teleconference or in writing – including about how the service has supported the complainant and complied with the Act and its mental health and wellbeing principles. We seek the complainant's view about the service's response and discuss whether the agreed changes or improvements to their care and treatment have resolved their concerns.

We also support services to implement service-led improvements.

If the complaint is resolved there is no further action.

The complaint contains significant concerns of safety and quality that are not suitable for early resolution.

We may escalate the complaint if it remains unresolved.

Detailed review

For significant quality or safety issues, the Commission will review the complaint, consider the issues and then look at what the Act says. We then request detailed information from the service. This information is then reviewed and we consider resolution options and actions, which may include providing improvement advice.

At all times:

- We consider the perspectives of those with lived experience
- We aim for early, informal resolution

Our complaints handling and compliance monitoring model

Formal investigation

Compliance notice

The service responds detailing the action it has or will take (and this is monitored by the Commission). The response addresses the Commission's concerns and, in consultation with the complainant, the complaint can be closed.

A review of documents or other records and enquiries does not satisfy the Commission's concerns regarding compliance.

The service does not elect to make an undertaking, or we are unsatisfied that an undertaking or other actions by the service are sufficient. An undertaking is an agreement to take remedial action.

An investigation of the complaint is initiated. We may concurrently or subsequently investigate issues that may be systemic.

We will make findings, issue formal recommendations and consider further compliance action.

The Commission makes findings regarding issues of quality and safety. In most cases recommendations are provided to the services. The Commission may also make recommendations to other oversight bodies such as the Chief Psychiatrist or the Chief Mental Health Officer.

The Commission may also suggest the service offer an undertaking or issue a compliance notice if satisfied there has been a contravention of the Act or regulations.

The Act limits the circumstances in which the Commission can issue a compliance notice. Compliance notices can only be issued in three situations:

1. Where a service provider has given the Commission an undertaking, and has failed to comply with it
2. Where the Commission has conducted an investigation or a follow-up investigation, and is satisfied that the service provider has contravened the Act or regulations
3. Where the service provider acknowledges it has contravened the Act or regulations and has not given the Commission an undertaking. Compliance notices will only be issued for clear and serious contraventions of the Act if it is appropriate in all the circumstances, with criteria including the severity of the issue and service history.

✓ We respect, protect and promote rights

✓ We take a risk-based approach and apply the following principles: we are proportionate, targeted, reliable and flexible

How our model works

Informal resolution

Where a complaint identifies mostly issues of quality and no imminent or past barrier to safety is reported.

Methodology for informal resolution

Review:

Our staff review the issues to understand the nature of the complaint and the resolution sought by the complainant and gain a preliminary understanding of how best to address the issues of quality contained within the complaint.

Refer:

Where suitable and by agreement, the matter may be referred to the service for resolution directly with the complainant. We assist the complainant to know their rights and what to expect through the process, noting a complainant may return to the Commission if they remain dissatisfied. In some cases, our assessment means referring to a more appropriate entity, such as the Health Complaints Commissioner or the Victorian Equal Opportunity and Human Rights Commission.

Resolve:

If the complaint isn't referred to the service to resolve, or if the complainant is not satisfied with the service's response, the Commission works directly with the service and the complainant to resolve the matter using a range of techniques to reach an appropriate outcome.

Escalate:

Where a complaint raises issues that haven't been resolved through informal steps, or informal steps are not appropriate, the Commission will consider if the issues raised should be pursued further.

The complaint scenarios in this section illustrate how the MHWC uses a proportionate, risk-based approach to complaint resolution. These hypothetical scenarios demonstrate how our model is applied across informal resolution, detailed reviews, and formal investigations.

The scenarios also highlight how significant quality and safety concerns, such as the use of restrictive interventions, can trigger compliance actions, such as an undertaking.

Complaint scenario – informal resolution (assisted referral)

Complaint
Sheeba, a vegan consumer, expressed dissatisfaction with the limited dietary options available during her inpatient mental health admission. She told us that that the food choices for vegans and vegetarians were repetitive and unappealing, leading her to eat the same few items on the menu again and again. Sheeba felt unheard and unsupported after attempting to address these concerns directly with service staff.

Principles
We would assess Sheeba's complaint in the light of the principles contained in the Mental Health and Wellbeing Act (e.g. dignity and autonomy, supported decision-making and health needs principles).

Actions we may take
Initial steps:
As a first step, we would review Sheeba's concerns to understand the nature of the complaint and the outcome(s) that she is seeking to resolve the matter for her. We would assist Sheeba in understanding her rights according to the relevant laws.

Given that Sheeba's concerns relate to quality issues with no imminent safety risk, we would seek Sheeba's consent and refer her complaint to the service for resolution for a suitable outcome.

We would let Sheeba know that she may return to the Commission at any time if she is not satisfied with the service's response to her complaint.

Assisted referral to the service:
Early, informal complaint resolution can often be the fastest way to achieve the outcomes that consumers, carers and families are seeking. We would also let the service know what outcomes Sheeba is seeking. We would ask the service to speak with Sheeba about her concerns and encourage them to resolve the issues directly with Sheeba while focussing on rebuilding trust and communication with her.

We would ask the service to write to the MHWC after the discussion to advise of the actions they have taken to address Sheeba's concerns, and the outcome of her complaint.

Assessing the service response:
For Sheeba: We would review the actions that the service has taken in addressing Sheeba's concerns. For example, successful resolution may include the service meeting with Sheeba to acknowledge her concerns, apologising for the limited range of options and taking steps to diversify the vegan food options.

At a systemic level: Frequently, an individual complaint from a consumer or carer can result in improved future experiences for consumers, carers and families. Services often identify and make improvements in response to complaints, and our staff may also share ideas or changes that have been made in other services. In this example, permanent changes could be made to the service's menu to better meet the needs of vegan and vegetarian consumers. We may ask that the service ensures staff assess a consumer's dietary needs and communicate the available options during their orientation to the unit.

Outcomes: In the assisted referral process, if the service advised us that Sheeba was satisfied with the service's response and we did not hear from Sheeba, we would consider the complaint closed.

However, if Sheeba contacted us to advise she is not satisfied, we would assess if there were further steps we could take. Alternatively, if there were fresh concerns, then we would assess the most appropriate pathway. For example, if Sheeba's concerns now raised rights or safety issues, then these could escalate into **a detailed review**.

Detailed reviews

The Commission may conduct a detailed review where a complaint identifies issues of quality or safety that are not suitable for referral or informal resolution, or the matter has escalated because informal resolution was not achieved, and the Commission is not satisfied the matter should close.

Methodology for detailed reviews

Review:

Review (or review again) the issues contained within the complaint and the aspects of the Act that may be relevant to these issues. The Commission may attempt informal resolution again, consider closing the matter or request further detail from the service.

Pursue:

Request the service provide greater details about the issues raised, including gathering relevant information such as medical records.

Consider:

The Commission will decide on actions to resolve the issue and may recommend changes to the service's processes, which could be provided as improvement advice.

We may also issue a notice requiring the service to provide a written response to the issues raised in the complaint. This notice may also contain improvement advice.

If the service does not respond to the notice, it risks a penalty. The service may also offer an undertaking to the Commission to take remedial action in response to the complaint.

Escalate:

Where the Commission believes potentially serious issues remain unacknowledged and unresolved, the Commission may conduct a formal investigation into the matter.

Complaint scenario – detailed review

Complaint
Sammy (they/their), a non-binary consumer, called the Commission while they were on a compulsory treatment order in an inpatient unit. Sammy told us they had a history of trauma and that they felt unsafe around men. Sammy told us that a male consumer had approached them while they were on the ward, and that Sammy felt harassed during their interaction.

Sammy told us that they had tried speaking with the service about their concerns, however, Sammy reported that when they raised these concerns, a staff member was dismissive and their only suggestion to promote Sammy's safety was to move Sammy to an Intensive Care Area (ICA) where there would be a higher level of staff supervision.

Sammy had declined this, as they felt that ICA would be a less safe and more restrictive environment for them, and that there were better ways to ensure they feel and are safe.

Principles
In assessing Sammy's complaint, we would refer to the Act's requirements, including relevant mental health and wellbeing principles (e.g. gender safety, dignity and autonomy, least restrictive, diversity and supported decision-making principles) and relevant guidance including the Chief Psychiatrist's guidelines on improving sexual safety in mental health and wellbeing services.

Actions we may take:
The MHWC would ensure Sammy is aware of their rights and support individual improvements for Sammy by exploring whether Sammy had an advance statement of preferences (and if so, how it informed decisions about Sammy's treatment), whether they had a nominated support person (and if so, how they were consulted and included) and, as a compulsory patient, access to an IMHA advocate. If Sammy had neither an advance statement of preferences nor a nominated support person, we would explore whether they would like support to make or nominate one as an outcome of the complaint.

When a complaint is about significant quality or safety issues such as Sammy's, the Commission will review the complaint, and determine that it is unsuitable for the informal resolution pathway. In Sammy's example, we would make the decision to conduct a detailed review.

We would assess Sammy's concerns in light of relevant Act requirements and guidelines, as noted above.

With Sammy's consent, we would immediately escalate their concerns to the service, to ensure Sammy's concerns about their immediate safety are responded to and that Sammy is supported to be and feel safe.

As our next steps, we would conduct a detailed review of Sammy's concerns and hold a teleconference with the service's senior clinicians to discuss the issues raised. We would talk with the service about how they responded to the concerns Sammy raised and whether and how the requirements of the Act, the Chief Psychiatrist's guidelines and their internal policies were met.

These would include:

- whether the service supported Sammy with what they need to be and feel safe
- whether they supported Sammy to contact the police
- whether debriefing was provided to Sammy as well as access to supports
- the steps the service took to address any further risk from the other consumer
- whether the service reminded all consumers about expected behaviours to support the safety and recovery of other consumers
- whether staff had adequate training to respond to disclosures about sexual safety incidents
- whether the service complied with all reporting requirements
- whether the service recorded the harassment as an incident as required by OCP guidelines.

Complaint scenario – detailed review (continued)

During the teleconference, we would also consider actions for resolution, which may include providing improvement advice, such as:

- **Gender-specific care:** Arranging for Sammy to receive treatment and care in a gender-sensitive area designated for individuals who identify as cisgender or transgender women or girls, transgender men, or non-binary people
- **Bed or room relocation:** If possible, exploring options to change Sammy's bed or room location, such as beds near the nurses' station
- **Staff preferences:** Acknowledging that staff preferences may not always be met, we would discuss how the service can support Sammy's sense of safety. For example, if treatment by a male staff member is sometimes necessary, could the service explore assigning a female primary or contact nurse or arranging for Sammy to have support from peer support or lived experience staff.

Assessing the service response:
We would review the service response to understand whether and how they have shown they have met relevant requirements and demonstrated proper consideration of the mental health and wellbeing principles. We would seek a further discussion with Sammy to share information about the service response and seek their views. This discussion will often result in us going back to the service to seek clarification about aspects of the response, for instance if a consumer has a different version of events, or an alternative suggestion to address the concerns.

Outcomes for Sammy: We would assess Sammy's feedback as well as the service response to see what measures were taken to resolve Sammy's concerns and whether any further steps can be taken. We would also assess how Sammy's concerns were responded to, in a trauma-informed and recovery-oriented way. These may include:

- the re-establishment of physical, psychological and emotional safety for Sammy
- psychological support and validation
- referral to specialist services
- staff receiving re-training or further training
- updates to service-wide policies and procedures.

The service may have identified improvements that could arise from the complaint, for example, working with lived experience and quality staff to identify and make changes that will help consumers to be and feel safe. This could include co-designing materials to ensure all consumers are aware of behavioural expectations and supports available. The MHWC may also suggest improvements that could be made, in the course of resolving the complaint.

Outcomes at a systemic level: If the service responded by detailing the action it has or will take (this would be monitored by the Commission) and if the service had complied with the requirements of the Act, internal policies and procedures, as well as the Chief Psychiatrist's guidelines, there may be no compliance action necessary.

However, if the detailed review did not satisfy our concerns regarding compliance, the Commission will consider what actions may be suitable to resolve the matter and any further actions regarding amending the service's process or practice. These may be made in the form of an improvement advice.

An improvement advice may be included in a formal request to the service to give a written response to issues raised in the complaint. The service must respond to our request or risk incurring a penalty.

The service may offer an undertaking to the Commission to take remedial action in relation to the complaint.

Escalate:
Where the Commission believes potentially serious issues remain unacknowledged and unresolved, or identifies that the service has breached the Act, or their own policies, we may conduct a formal investigation into the matter.

Formal investigations

Investigations are a formal process (section 476) and are undertaken when the risks identified through our enquiries are significant and lead us to believe that only through formal investigation can the full extent of the issues be confirmed, and a conclusion reached.

Methodology for formal investigations

Review:

A review of documents or other records and enquiries are unable to satisfy the Commission's concerns regarding compliance. The Commission notifies the service of its intention to investigate.

Investigate:

The Commission initiates an investigation of the complaint. The Commission may concurrently or subsequently investigate issues that may be systemic.

Make a finding:

The Commission makes findings regarding issues of quality and safety and, in most cases, determines recommendations including to public mental health and wellbeing services as well as other oversight bodies such as the Chief Psychiatrist or the Chief Mental Health Officer.

The Commission may suggest the service offer an undertaking or issue a compliance notice if satisfied there has been a contravention of the Act or regulations. Issuing a compliance notice is explained in further detail below.

Complaint scenario – formal investigation

When will we investigate?
In responding to complaints, we use a responsive risk-based approach to safeguarding rights according to the Act. This includes a comprehensive assessment of each complaint. The complaint example below, about lengthy seclusion that may not have been the least restrictive option, highlights safety and quality issues that require, at minimum, a formal resolution process.

Investigations are undertaken when the issues identified through our enquiries are significant and lead us to believe that only through formal investigation can the full extent of the issues be examined, and findings made.

Complaint
Andrew contacted us following a recent inpatient admission to make a complaint about experiencing a long period of seclusion. He was not sure how long the seclusion had lasted for but advised that it 'felt like days'. Andrew acknowledged that before the seclusion, he had been physically aggressive towards staff when attempting to leave the service, and that the service may have considered him to be a risk to himself and to others. However, Andrew did not believe the service had made sufficient efforts to support him and to de-escalate the situation before using seclusion, or to work towards ending the seclusion.

Decision to conduct an investigation
Our first step for most complaints about the use of restrictive interventions is to ask services to complete our Restrictive Interventions Questionnaire (RIQ) and Seclusion Questionnaire. The service would have already completed and returned it to us while the complaint was undergoing detailed review. The MHWC developed this questionnaire to strengthen and ensure consistency in the process of reviewing the use of restrictive interventions. It was developed in consultation with the Office of the Chief Psychiatrist, designated mental health services, and lived experience advisors. The RIQ asks services to explain:

- decision-making that led to the use of a restrictive intervention, e.g. why it was used, how it was authorised and what less restrictive options were tried or considered
- details about the use of a restrictive intervention, e.g. what type of restrictive intervention, when it occurred, for how long and where it occurred
- how rights were protected during the restrictive intervention, e.g. how any advance statements of preferences were considered, how dignity was protected, how relevant persons such as nominated support persons, carers, etc, were notified of the use of the restrictive intervention
- whether the person was observed and examined in line with Act requirements during the restrictive intervention
- how the restrictive intervention was reported to the Chief Psychiatrist
- how debriefing with the consumer occurred following a restrictive intervention.

If our assessment found that the service was not able to give clear or satisfactory responses about matters, including whether:

- less restrictive options were tried or considered
- the seclusion was ended as soon as it could have been
- Andrew was supported to understand what would need to happen for the seclusion to end
- any other requirements of the Act had been met or appropriately documented.

Then the Commission would consider further action including conducting a formal investigation.

Conducting the investigation
Investigations can only be conducted in circumstances set out in the Act, including that a less formal approach has been attempted and the complaint was not resolved or the complaint was not suitable for a less formal process. The Act has requirements for how investigations are conducted (for example notice requirements, and requirements to afford procedural fairness and natural justice), which can mean that investigations can take a long time (e.g. over a year) to complete.

Investigations can involve actions including:

- conducting investigation hearings
- attending the service to inspect or examine premises, inspect and take extracts from documents, and speak to people at the service
- compel services to produce documents, or compel a person to give evidence at an investigation hearing.

Consumers and complainants are central to the investigation process. We would speak to Andrew about his experience and provide feedback to

Complaint scenario – formal investigation (continued)

the service about anything he thinks could have prevented the seclusion and discuss opportunities for service improvement.

As part of the investigation process, the MHWC will generally review and analyse all relevant evidence including medical and clinical records, conduct interviews with service staff and the complainant and consumer (if different) and consult with other bodies such as the OCP if relevant. We then draft a report which includes any findings that we make in relation to the investigation and any recommendation of action including compliance notice served or undertaking accepted. The service provider must be given the opportunity to make submissions on any finding or recommendation affecting them before they are made.

In Andrew's example we would review the evidence to assess whether the service demonstrated that they met the requirements of the Act, including whether they considered the mental health and wellbeing principles, the decision-making principles and relevant guidance before, during and after using seclusion. Relevant guidance may include the Act's requirements for the use of restrictive interventions and Chief Psychiatrist guidance about restrictive interventions. Relevant principles may include the decision-making principles, and the mental health and wellbeing principles of least restrictive, dignity and autonomy, and supported decision-making. We would also consider whether Andrew's treatment was consistent with his human rights under the human rights charter.

We would seek a further discussion with Andrew to share information about the service response and seek his views, including to find out if he disagrees with any parts of the service response or feels there were opportunities for the service to take a different course of action that may have prevented the seclusion.

Actions we may take

We outline our findings in an investigation report and will generally make recommendations to the service for improvement. Recommendations may be personal to the individual consumer or systemic in nature.

For example, if Andrew did not have an advance statement of preferences or nominated support person, one recommendation may be that the service support him to prepare an advance statement of preferences, or to nominate a support person, should Andrew wish to do so.

If our investigation determined that the service had complied with the requirements of the Act's principles and guidelines, no compliance action will be required.

During the investigation process, the service may acknowledge key areas of safety or quality concerns and offer an undertaking to the MHWC, whereby they detail actions the service will take to ensure the circumstances that led to the complaint are not repeated. An undertaking is an agreement to take remedial action. The MHWC monitors these actions and ensures they are sufficient and effective.

Alternatively, if the investigation made a finding that there was a breach of the Act (for example, if there were earlier opportunities to end the seclusion, we may find that there was a breach of the requirement to release a person from a restrictive intervention when the use of the restrictive intervention was no longer necessary for the purpose for which it was authorised), the MHWC may give the service an opportunity to offer an undertaking to take action to remedy the breach. It might include a commitment to review and change policies and procedures, train staff, and audit practice to ensure that the desired changes have occurred. The MHWC will monitor the undertaking and require the service to report on the changes they have made.

If changes that were committed to in the undertaking are not made, or if the service declined to offer an undertaking, the MHWC would have the option to issue a compliance notice as the investigation report has made a finding that there had been a breach of the Act.

Compliance notices will only be issued for clear and serious contraventions of the Act if it is appropriate in all the circumstances, with criteria including the severity of the issue and service's history. The decision to issue a compliance notice will be based on all the circumstances, including whether the service is demonstrating acknowledgement of the issues and appropriate actions to address compliance, or this is a repeat of the same issue about which previous undertakings have been made.

Accepting an undertaking and issuing a compliance notice

The Commission may accept an undertaking given by a service to take remedial action in relation to either a complaint or an investigation. The Commission may require the service to report on the remedial action taken. If we do, then we can specify the time by which the service must do so, and this cannot exceed 12 months. Failure to comply with the undertaking can result in the Commission issuing a compliance notice. Where we have concluded a formal investigation and determined the service has contravened the Act, we may choose to issue a compliance notice.

The Act limits the circumstances in which the Commission can issue a compliance notice to three situations:

1. Where a service provider has given the Commission an undertaking, and has failed to comply with it
2. Where the Commission has conducted an investigation or a follow-up investigation, and is satisfied that the service provider has contravened the Act or regulations
3. Where the service provider acknowledges it has contravened the Act or regulations and has not given the Commission an undertaking.

The decision to issue a compliance notice is taken on a case-by-case basis, including considering if the issuing of a compliance notice is the best course of action to rectify the identified breach.

When assessing if a compliance notice is appropriate in all the circumstances the Commission will consider a range of criteria, including, but not limited to, the following:

- the contravention is clear and relates to specific breaches of the Act or regulations;
- the seriousness of the contravention;
- the contravention can adequately be rectified through issuing a compliance notice;
- the matter relates to significant issues regarding the safety and rights of an individual as defined by the Act;
- that previous investigations and formal reviews highlight that the matter relates to the same or similar issues of noncompliance and no reasonable attempts by the service to improve or mitigate the concerns have been demonstrated; and
- the approach of the service demonstrates an unwillingness toward the need to improve or comply, including, but not limited to, demonstration of deliberate defiance of the Act or the recommendations of the Commission, or unwillingness to offer an undertaking.

Not all these criteria are necessary to decide to issue a compliance notice and the Commission will consider all the facts relevant in each circumstance.

Background

About the Mental Health and Wellbeing Commission

What is the purpose of the Commission?

The Commission aims to ensure all Victorians are socially and emotionally well and can access safe services when needed. Its purpose is to highlight systemic issues in the mental health and wellbeing system and recognise effective practices.

At a high level, our role includes:

- holding the government accountable for implementing Royal Commission recommendations
- promoting mental health as a priority
- elevating the leadership and effective participation of lived experience
- monitoring system performance
- conducting investigations and resolving complaints
- reducing stigma and discrimination associated with mental health issues.

The Commission is committed to continuous improvement and being independent, transparent and an exemplar for lived experience leadership, addressing the most critical issues to serve the public interest.

Why was the Commission set up?

The Royal Commission into Victoria's Mental Health System (RCVMHS) recommended setting up the Commission as an independent statutory authority to oversee the performance, quality and safety of the state's Mental Health and Wellbeing System.

Among other things, the Commission is tasked with monitoring the Victorian Government's progress in implementing the Royal Commission's recommendations, addressing stigma and promoting lived experience leadership.

In addition, the Commission can help resolve complaints about the public mental health and wellbeing system in Victoria and address systemic issues affecting the performance, quality and safety of the system.

About the Royal Commission into Victoria's Mental Health System (RCVMHS)

The Royal Commission into Victoria's Mental Health System (RCVMHS) was set up in 2019 and in that year received more than 3,200 submissions from organisations and individuals, including people with lived experience, families and carers, and the workforce.

A wide range of community, legal and health organisations made submissions.

The final report, delivered on 3 February 2021, recommended the establishment of a Commission as an independent statutory authority.

The vision was to hold government to account for the performance, quality and safety of the mental health and wellbeing system.

It was also a desired outcome that the Commission would empower people living with mental illness or psychological distress, families, carers and supporters to lead and partner in the improvement of the system.

In addition, the Commission was given the tasks of:

- monitoring the Victorian Government's progress in implementing the Royal Commission's recommendations
- addressing stigma related to mental health
- promoting lived experience leadership throughout the system.

A new model

The Royal Commission was clear that for reforms to the mental health and wellbeing system to deliver meaningful change, consumers, families and carers need to be at the centre of decision-making and system design.

There was also an expectation that system oversight would be strengthened if the Commission had the powers and reach to consider broader issues to better support a culture of compliance and consistency within and across services.

This would in turn engender feelings of safety and trust within those who use and interact with mental health services while we will use our powers to exercise our oversight role to meaningfully build and reinforce compliance to the Act.

System oversight is achieved through a network of different entities, practices and people who inform the focus of the Commission's work and use of our resources.

Our model seeks a broad range of views, and we intend that consumers, families and carers, their representative peak bodies and services are all providing insights into system improvements.

The Commission has an important role to play in the elevation of lived experience and we intend to involve these voices in our decision-making and to promote a shared knowledge about the realities faced by consumers and their support networks.

We also intend the impact of our activities that result from complaints and investigations will be well understood and to build confidence in making a complaint.

Our operating framework

To give effect to the RCVMHS's recommendations, the Commission was given the power to:

- handle and consider complaints about mental health and wellbeing service delivery (Part 9.2);
- conduct investigations into complaints made to the Commission (section 476), matters referred to the Commission by the Minister (section 477), or on its own initiative (section 478); and
- initiate its own inquiries into matters that support its objectives (Part 9.6).

Under the Mental Health and Wellbeing Act, the Commission also has the power to:

- make recommendations to the Premier, any minister and the heads of public service bodies (415 (w), 415 (za);
- provide a copy of the investigation report to the Premier, the Minister and the heads of public service bodies in investigation reports (section 482 and 488);
- publish reports on the performance and quality and safety of the mental health and wellbeing system (sections 427 and 428);
- obtain data and information about mental health and wellbeing service delivery, system performance and outcomes, and other relevant information, from all government agencies (section 526);
- work with and share data and information with the Department of Health and other relevant entities (for example, the Victorian Collaborative Centre for Mental Health and Wellbeing and Safer Care Victoria) (section 415(n), 415 (zb));
- provide information, education and advice to mental health and wellbeing service providers in managing complaints and developing complaint handling procedures (section 415(r));
- report any significant contravention of the Act to the Health Secretary (section 415(zd)); and
- refer any matter relating to the operation of a mental health and wellbeing service that poses a serious risk of harm to a person or the community to the relevant regulator or oversight body (section 415(ze)).

Outcomes

Confidence

We aim to promote human rights, safety, fairness and ethical practice that enhance both confidence and overall satisfaction with the system.

Continuous improvement

We aim to encourage innovation, promote self-regulation and self-correction and continuous improvement within services.

Transparency and accountability

We aim to encourage system accountability through effective enforcement and deterrent methods and provide clarity to services on the expectations of the Commission.

System oversight

Within the system, there are a range of entities and authorities responsible for the overarching governance, performance monitoring and system safety.

Mental Health and Wellbeing Commission: The Commission is an independent statutory authority. It has a key role in holding government to account for system-wide performance, quality and safety. The Commission receives, manages and resolves complaints about mental health services provided to consumers.

Secretary of the Department of Health and Chief Officer for Mental Health and Wellbeing: Their role aims to elevate the status of mental health and wellbeing within the department and strengthen leadership of the mental health and wellbeing system. Under the Act, both the Secretary and the Chief Officer have critical functions as the stewards and managers of the mental health and wellbeing system.

Chief Psychiatrist: The Chief Psychiatrist is an independent statutory officer with powers and responsibilities to uphold quality and safety in Victoria's mental health and wellbeing system.

Mental Health Tribunal: The Mental Health Tribunal is independent and is established under the MHA to decide whether patients need compulsory mental health treatment. They protect patient rights by conducting hearings to identify the least restrictive way people can receive treatment they need.

Safer Care Victoria: Safer Care Victoria works with clinicians and consumers to help health services deliver better, safer health care to Victorians.

The Chief Quality and Safety Officer (CQSO) is appointed by the Health Secretary and conducts quality and safety reviews of services provided in or by health service entities and provides information to the Secretary from these reviews. The MHWC may refer concerns to the CQSO.

Chief Health Officer: The Chief Health Officer undertakes a variety of statutory functions under health and food-related legislation. The role also provides expert clinical and scientific advice and leadership on issues impacting public health.

Victorian Collaborative Centre for Mental Health and Wellbeing: The centre aims to bring together people with lived experience, researchers and mental health service providers to:

- conduct research for the benefit of consumers, carers, families, and the community
- share knowledge of advances in mental health treatment, care and support
- support the mental health workforce
- provide treatment, care and support to adults and older adults.

Office of the Public Advocate (the OPA): The OPA safeguards people with disability and mental illness.

Mental Health and Wellbeing Interim Regional Bodies: The Royal Commission into Victoria's mental health system recommended regional approaches to mental health and wellbeing services, moving away from centralised decision making towards more localised approaches with the aim of ensuring service responses are tailored to local needs.

Glossary

The Act

For the purposes of this document the Act is the *Mental Health and Wellbeing Act 2022* (Vic).

Carer

A person, including a person under the age of 18 years, who provides care to another person with whom they are in a relationship of care.

Clinical governance

The systems and processes that health services need to have in place to be accountable to the community for ensuring that care is safe, effective, patient-centred and continuously improving.

The Commission

For the purposes of this document the Commission referred to is the Mental Health and Wellbeing Commission.

Complaint

Complaint means a complaint made to the Commission under Part 9.2 of the Act.

Complainant

Complainant means a person who makes a complaint to the Commission under Part 9.2 of the Act.

Compliance notice

Compliance notice means a compliance notice served under section 502. Section 502 specifies when a compliance notice can be served and what it may require.

Compliance powers

Compliance powers are the Commission's powers to enforce compliance and compel those under its jurisdiction to act according to its direction.

Consumer

People who identify as having a living or lived experience of mental illness or psychological distress, irrespective of whether they have a formal diagnosis, who have used mental health services and/or received treatment.

Contravention

Refers to any action or inaction that goes against the provisions outlined in the Act.

Family

May refer to family of origin and/or family of choice.

Good mental health

A state of wellbeing in which a person realises their own abilities, can cope with the normal stresses of life, can work productively and is able to make a contribution to their community.

Improvement advice

Informal recommendations made during the complaints resolution process (as distinct from recommendations made at the conclusion of an investigation). The power for this derives from the function of the MHWC in section 415(w)(x) – to provide information and make recommendations to a mental health and wellbeing service provider in relation to improving the provision of mental health and wellbeing services.

Lived experience

People with lived experience identify either as someone who is living with (or has lived with) mental illness or psychological distress, or someone who is caring for or otherwise supporting (or has cared for or otherwise supported) a person who is living with (or has lived with) mental illness or psychological distress.

People with lived experience are sometimes referred to as 'consumers' or 'carers'. The Commission acknowledges that the experiences of consumers and carers are different.

Mental health and wellbeing system

Mental health and wellbeing does not refer simply to the absence of mental illness but to creating the conditions in which people are supported to achieve their potential and ensuring there is a system in place that supports them to do this.

A comprehensive mental health and wellbeing system strikes a balance between hospital-based services and care in the community, in line with international evidence. The Commission acknowledges that concepts of treatment, care and support will need to evolve to provide each person with dependable access to mental health services and links to other supports they may seek.

The addition of the concept of 'wellbeing' represents a fundamental shift in the role and structure of the system.

Mental illness

A medical condition that is characterised by a significant disturbance of thought, mood, perception or memory. The Commission uses this definition of mental illness in line with the Mental Health and Wellbeing Act 2022 (Vic).

However, the Commission also recognises the Victorian Mental Illness Awareness Council Declaration, released on 1 November 2019, which notes that people with lived experience can have varying ways of understanding the experiences that are often called 'mental illness'. It acknowledges that mental illness can be described using terms such as 'neurodiversity', 'emotional distress', 'trauma' and 'mental health challenges'.

Monitoring

To observe and check on the progress or quality of the system or a specific service over a period of time or to keep under systematic review.

Oversight powers

Oversight refers to the capacity or scope of an organisation or body to regulate, review, monitor and make recommendations.

Psychological distress

One measure of poor mental health, which can be described as feelings of tiredness, anxiety, nervousness, hopelessness, depression and sadness. This is consistent with the definition accepted by the National Mental Health Commission.

Royal Commission

The Royal Commission this document refers to is the Royal Commission into Victoria's mental health system.

A Royal Commission is an investigation, independent of government, into a matter of importance. Royal Commissions have broad powers to hold public hearings, call witnesses under oath and compel evidence. Royal Commissions make recommendations to the government about potential reforms and positive change.

Social and emotional wellbeing

Being resilient, being and feeling culturally safe and connected, having and realising aspirations, and being satisfied with life. This is consistent with Balit Murrup, Victoria's Aboriginal social and emotional wellbeing framework.

Service provider

The Act defines a mental health and wellbeing service provider as an entity that receives funding from the state for the primary purpose of providing mental health and wellbeing services and employs or engages a mental health and wellbeing professional in connection with providing these services, unless prescribed otherwise.

Stakeholders

Those who have an interest or stake in the work of the Commission. This may include, but is not limited to, complainants, families, service providers, government and the wider community.

Statutory authority

A statutory authority is a body established by an act of Parliament, often to undertake work in a specific area. The structure, power and purpose of the statutory authority is defined by legislation enacted by the government. The Commission is a statutory authority.

Systemic

This relates to a system, as opposed to a particular part. For example, an individual complaint might be one of many that make up an issue that needs to be addressed to improve the system as a whole. The Commission can help resolve complaints about the public mental health and wellbeing system in Victoria and address holistic issues affecting the performance, quality and safety of the system.

Undertaking

Undertakings are described in section 475 – at any time while dealing with a complaint, the Mental Health and Wellbeing Commission may accept an undertaking given by a mental health and wellbeing service provider to take remedial action in relation to the complaint.

Mental Health
& Wellbeing
Commission