To the Little Hoover Commission:

Your last report on the Mental Health Services Act, which recommended the misnamed Mental Health Services Act Oversight and Accountability Commission ("MHSOAC" or "misnamed MHSOAC")) as the solution to the myriad problems under the Act, was based on completely one–sided testimony. (See the witness list at the front of the report.) You listened to the proverbial handsome fox, telling you that he wants to continue to guard the henhouse, despite all the bones and feathers from dead chickens lying around the yard.

This time, I hope you will listen to both sides of the story.

I. Who I am and What I Know

I am someone on the other side: a lawyer, BA Stanford, JD University of Chicago Law, retired after roughly 30 years of public practice, including 18 as an Assistant Attorney General in Minnesota, where (among other things) I represented state mental hospitals. My late husband, Prof. Philip Frickey of UC Berkeley Law, literally "wrote the book" on statutory interpretation for law students. (Anyone who does not know how to read a statute should study his article on the subject in the Stanford Law Review, which you can easily find by Googling "Frickey funnel.") We are also parents of an adopted child who descended abruptly into severe mental illness when the hormones of adolescence hit him. So I know statutes—especially the Mental Health Services Act—and severe mental illness from many different perspectives. And I use part of my time in retirement, volunteering to promote treatment for the severely mentally ill.

I have been going to MHSOAC meetings off and on since 2011. I have also myself represented government commissions, though not in California. So what I relate below is based on informed personal knowledge. I attach some documentation of my claims, and can provide more on request once I return to the United States in mid–June and have better access to my files.

II. Background: Proposition 63, the Mental Health Services Act

Everyone involved with this project should read Proposition 63, now the Mental Health Services Act, with particular focus on the purpose and intent provisions that are courts' key aids in the event of any ambiguity. (I attach the 2009 version which contains these provisions, in case they are not immediately available to you.) You will see that MHSA is a remarkably well–drafted statute that was intended to benefit two groups: the "severely mentally ill" as defined therein, and those with "mental illness" who are in danger of "severe mental illness." There are provisions, such as the anti–stigma and anti–discrimination provisions, that touch on families and the general public, but they are incidental. The main purpose is to help the severely mentally ill, and prevent those with genuine mental illness from descending into its severe forms.

MHSA allocates 20% of its funds for prevention and early intervention, including relapse prevention for people who *already have severe mental illness*:

> W.I.C. Section5840. (a) The State Department of Health Care Services shall establish a program designed to prevent mental illnesses from becoming severe and disabling. . .(c) The program . . . shall also include components similar to programs that have been

> successful *in reducing the duration of untreated severe mental illnesses* and assisting people in quickly regaining productive lives. (Emphasis added.)

III. How MHSOAC actually works

Unfortunately, the misnamed "Oversight and Accountability Commission" has historically been run by bureaucratic anarchists who treated the statute as if it were a rough draft. In my observation, misnamed MHSOAC has operated as if it were a giant charity, funding anything that struck key persons as useful. It is a matter of public record that misnamed MHSOAC approved/ misallocated millions in MHSA PEI funds for things like yoga, horseback riding, gardening ,hip hop car washes, and other happy–making activities for people *who are* not *and will never be* mentally ill, much less severely mentally ill. (See http://mentalillnesspolicy.org/states/california/mhsa/mhsa.prop63.baitswitch.fullreport.pdf). In fact, misnamed MHSOAC, by "policy" that was really an illegal underground regulation, for years prohibited anyone with a mental illness diagnosis from receiving any PEI funding, which is 20% of total MHSA funding. The statutory floor, "mental illness," became a ceiling by bureaucratic fiat, essentially standing Proposition 63 on its head.[1] (I can provide documentation of this on request.)

This is hardly surprising, considering how many Commission members have historically come from the Mental *Health* Association, which is a charity. As its name implies, this particular charity is much more about mental "health" for the masses (essentially, stay sober and eat your veggies) than about the groups the MHSA was drafted to assist, the severely mentally ill and the (truly) mentally ill who are in danger of severe mental illness.

I have been going to MHSOAC meetings on and off since 2011. At that time, neither of the legislative members ever showed up, nor did many of the Commissioners. The Santa Barbara County Sheriff is a good member, but also a very busy man who is often not there. Two people appeared to have the majority of the power, and I believe still do: one is Richard Van Horn, the appointee of the Commissioner of Education, who has been chair off and on since MHSOAC inception and was chair for the time I attended most regularly. The second powerful person is the staff psychologist, Dr. Deborah Lee. These are the individuals with the most dedication and energy—and as MHSOAC is structured, it is inevitable that they will have their way.

What about the other members? None of them are paid, and any economist will tell you that you get what you pay for. Moreover, by statute, most of them come from the industry they are supposed to be overseeing. Such a structure begs for problems: the members have no motivation to pay attention to anything and either get their "utils" (a term from economics) from self–dealing or from feeling good about their charitable endeavors. There is substantial evidence of massive self–dealing on the part of some Commissioners and others involved in MHSA drafting. (See the "bait and switch" report, p. 21 *et seq*).

From what I have observed, the Commission functions as economists would predict. Most of the members show up, listen to Dr. Lee promise them that the project before them is wonderful, and vote for

[1] Regulations recently adopted by misnamed MHSOAC ameliorate this problem somewhat by acknowledging the statutory mandate quoted at the bottom of p.1, requiring services to the severely mentally ill. However, they have made the expenditure discretionary rather than mandatory. In other words, they changed the statutory "shall" into a permissive "may." See 9 CCR Section 3720(d).

anything that sounds good, probably without even studying the information packets they receive. Hundreds of millions are allocated yearly this way. I once stood up during public comment and told the Commission that the project before them, which supposedly helped children but had little or nothing to do with mental illness, was outside the purview of MHSA and should be rejected accordingly. They listened politely and voted unanimously for it anyway, then congratulated each other on the public–spirited thing they had just done.

Another structural flaw is that misnamed MHSOAC hires and fires its own (non civil service) employees, including its lawyer. An organization headed entirely by volunteers is going to be run by its paid staff, which was largely hired by early commissioners who had no interest in following the statute, and great interest in promoting goals outside its purview. If the Commission got its legal advice from the Attorney General, much of what has happened could possibly have been prevented. As a former AAG from another state, I can tell you that we did not hesitate to give agencies hard advice if they needed it, and told them we would not defend them if they didn't take it. There is no way this Commission will ever get disinterested legal advice under the present structure.[2]

I have spoken to (former) Chairman Van Horn and pointed out the statutory mandate quoted above to him, only to be told to my face that "those people [*ie*, the severely mentally ill] already get CSS [*ie*, welfare under the MHSA–funded programs for severely mentally ill adults and children]." As I understood him, he fully intended to continue ignoring a legal mandate because he thinks the severely mentally ill only deserve welfare, regardless of what the statute says. As to Dr. Lee, the psychologist who wields such incredible power: it is a matter of record, based on her writings, that her passion is for school bullying programs, which are outside the purview of the MHSA. It is a matter of record that misnamed MHSOAC has been spending millions on anti–bullying programs in schools —even though these programs are not authorized by MHSA, and studies show they don't even help to stop bullying.

You need look no further than the recently–adopted PEI regulations for proof that, as a collective body, MHSOAC is utterly incapable of tracking or measuring anything. Essentially, the tracking regulatons pick one of the most subjective terms in MHSA, "prolonged suffering," and demand that each county individually figure out how to measure it. Despite protests from counties and others, MHSOAC voted to adopt these regulations based on Dr. Lee's recommendation. They will generate reams of completely meaningless data, wasting massive amounts of valuable time and money

Drafting and adopting such regulations was at best incompetent and at worst, obfuscatory. It would be a great mistake to trust an organization that can do no better than this.

On the other side, it is helpful that the new legislative members, Senator Beall and Representative Thurston, were showing up for MHSOAC Commission meetings, at least at the beginning of their tenures when I was attending. In addition, the new Executive Director, who comes from your office, appears to be an able, committed and hard–working person. However, he has been given an impossible

[2] I watched MHSOAC's attorney help them fire their second Executive Director, Andrea Jackson, a former member of Senator Steinberg's staff, whom he loaned to them after the Legislative Auditor's second highly critical report. As soon as Senator Steinberg was useless to MHSOAC as a lame–duck, they fired her and brought back the ED who helped them drive the organization and the MHSA into the ground. Their attorney did a good job with the firing, while watching a red–faced Chairman Van Horn, who was clearly in charge, like a mouse peering out of a mouse hole. If she wants to keep her job, she obviously knows what she has to do.

task. Moreover, he is doubtless opposed by the old line Commissioners, who take hubristic pride in having driven MHSOAC and the Mental Health Services Act into the ground. Further, it is too late for him to undo damage that has occurred from a decade of deliberate, systematic mismanagement.

What To Do About This

The best course of action for the Legislature is to follow the example of Governor Brown when he first came into office. As the former Attorney General, he was in possession of a great deal of insider information. One of his first acts in office was to propose AB100 (2011) which dismantled the former Department of Mental Health**, disempowered MHSOAC, and took away a good deal of its hugely overblown budget.**

Unfortunately, Governor Brown could not dismantle MHSOAC entirely and neither can the Legislature, because it is part of the structure Prop. 63, a voter initiative that, by its terms, does not allow for such meddling. (See Section 18.) Even more unfortunately, former Senator Steinberg restored the MHSOAC budget and gave it new and different powers in a budget trailer the following year. This was a mistake, and Little Hoover Commission should recommend that the Legislature rectify it by following Governor Brown's earlier, informed example.

Obviously, some other government body needs to take over the functions of misnamed MHSOAC. As a recent transplant to California, I don't know which structure within state government would be best — probably someone within the Department of Finance or the Legislative Auditor's Office. At any rate, an organization that does not have internal conflicts of interest, actually respects statutes, and knows how to measure outcomes and set up/decipher budgets.

Do NOT let the counties take over regulating themselves. Their organizations, the county mental health directors and CalMHSA, now have a huge vested interest in the *status quo*. They have spent the last 12 years cheerfully sending hundreds of millions in MHSA funds down the drain to fund misguided projects pushed by misnamed MHSOAC . Meanwhile, the severely mentally ill under county care still don't get the treatment they need. The voters did not intend the counties to be self–regulating with all this money. The statute promised them accountability and oversight, and the Legislature should deliver it.

IV. Another Problem Little Hoover Should Address

Many lives could be saved and much human misery averted, if the bulk of MHSA PEI funds and MHSOAC administrative funds were devoted to the (truly) mentally ill and severely mentally ill. Right now, most of this money is being wasted, largely thanks to historical actions of misnamed MHSOAC. For example, hundreds of millions have been wasted on a "suicide prevention" program MHSOAC instituted for the general public, with a questionable statutory basis in an MHSA provision that lists "suicide" as one of a number of indices of *severe mental illness*, see W.I.C. Section 5840(d). Despite hundreds of millions in expenditures over the past ten years, suicide rates in California continue to rise.[3]

[3] For rising California suicide rate data, see http://www.sacbee.com/site-services/databases/article42695862.html and http://www.sacbee.com/site-services/databases/article12287822.html .Misnamed MHSOAC has paid for—and doubtless massaged—several RAND reports on PEI–funded programs. The first essentially says, "Millions have been spent but even after ten years it's too early to tell whether anything has been accomplished." (I can furnish it on request.) A more recent report claims success with ameliorating stigma. However, as far as I have seen, no one is claiming success in suicide prevention. Properly, MHSA money should only be expended on suicide prevention

Essentially, while treatment of severe mental illness can drastically cut the dramatic suicide rates in the SMI population, most suicides occur among the undiagnosed because of life circumstances that suicide prevention programs cannot address.

This wasted money should be diverted to programs benefitting the severely mentally ill and those with mental illness who are in danger of its severe forms. There is a movement afoot to use some of the MHSA billions for housing the homeless, which is a better use and legally more defensible than the suicide prevention program ***if and only if*** PEI/ MHSOAC administrative funds are used for evidence–based "housing first" programs ***only*** *for the severely mentally ill and the mentally ill at risk of severe mental illness.* The factual basis for the expenditures are studies showing that good "housing first" programs for the severely mentally ill(which combine housing with extensive services) drastically cut arrests, suicides, hospitalizations, violence, and other outcomes of severe mental illness set forth in W.I.C. Section 5840(d). The essential statutory basis for such expenditures is here:

> W.I.C. Section 5840. (a) The State Department of Mental Health shall establish a program designed to prevent mental illnesses from becoming severe and disabling.. . . (c) The program shall include mental health services *similar to those provided under other programs effective* in preventing mental illnesses from becoming severe, and shall also include components *similar to programs that have been successful* in reducing the duration of untreated severe mental illnesses and assisting people in quickly regaining productive lives. (d)The program shall emphasize strategies to reduce the following negative outcomes that may result from untreated mental illness: . . . .(6) Homelessness.

I have italicized the language above that requires evidence–based programs. (You will find more such language in the Purpose and Intent provisions, as well as in the promises made by Senator Steinberg to the public when Proposition 63 was proposed.)

The current proposal has severe legal problems, however. First, sponsors propose diverting MHSA money to house homeless people who do not have a diagnosis of either "severe mental illness" as defined in the MHSA, or of "mental illness" that is in danger of becoming "severe mental illness." This is blatantly illegal. Second, the proposal is not to use PEI/administrative money directly, but to use *all* MHSA money to guarantee bonds. This violates the anti–bonding provision within the MHSA, W.I.C. §5891(a), as emphatically and definitively construed by the California Attorney General, in Atty Gen Op. 05–1007(2/06). MHSA provides that ". . . These funds may not be used to pay for any other program. These funds may not be loaned to the state General Fund or any other fund of the state, or a county general fund or any other county fund for any purpose other than those authorized by Section 5892." The Attorney General opinion you should read for yourselves.

Bonds are not my area, but a famous Wall Street expert who is a close personal acquaintance told me that no one will underwrite or buy these bonds even if issued, because of the AG opinion. Here is what he said, in part:

> State issues are considered municipal bonds. As a professional, I would not underwrite those bonds. As an investor, I would not buy the bonds. Wouldn't matter to me why the AG opined that they are illegal.

---

for the (truly) mentally ill and severely mentally ill, who commit suicide at many times the rate of the rest of the population.

> If the new AG writes a clean opinion, an underwriter might take the risk. If they thought they could get sued successfully if something went legally haywire, they would not. They would ask their lawyers. All about "underwriter's liability."

I have personally pledged to see to it that every bond lawyer and bond firm in California knows about the MHSA anti–bonding provision and Attorney General opinion in the event the current bonding proposal passes. I didn't ask the above–quoted expert, but it seems to me there is potential direct liability for California, and a potential threat to California's good bond rating if this goes forward.

The Little Hoover Commission should see to it that it doesn't.

Conclusion

I am out of the country until June 16 but reacheable sporadically by e–mail. *Please acknowledge this filing.* Thank you for your attention, and feel free to contact me if you have questions or want further information.

Respectfully submitted,

Mary Ann Bernard
BA Stanford, JD University of Chicago School of Law
30 years in public practice (now retired)
mary_ann_bernard@hotmail.com