

Rethinking Mental Health Laws

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Rethinking Mental Health Laws: Developing Model Frameworks

Criminal Justice Research Consortium Seminar

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In December 2007, the Australian Research Council commenced funding a five-year Federation Fellowship project entitled: *Rethinking Mental Health Laws: An Integrated Approach* which is based at the Faculty of Law, Monash University. This seminar aims to provide an overview of the project and to seek input as to which issues the project needs to address.

Aims of the Project

The main aim of the project is to explore the role the law has and should have in improving access to optimal mental health care and promoting and maintaining good mental health. Since 1993, when the Human Rights and Equal Opportunity Commission conducted its *National Inquiry into the Human Rights of People with Mental Illness*, there have been a number of inquiries pointing to existing deficiencies in Australia's mental health system. Most recently, the Mental Health Council of Australia, the Brain and Mind Research Institute and the Human Rights and Equal Opportunity Commission (Not for Service Report, 2005) and the Senate Select

Committee on Mental Health (Final Report, 28 April, 2006) have made numerous recommendations for mental health reform. This project aims to integrate the expertise of international and Australian mental health experts from a range of disciplines together with consumer representatives to address these recommendations by developing model frameworks for mental health laws in both the civil and criminal law fields.

While it remains the case that legal provisions alone do not lead to the development of new services (McSherry, 1994), Australian governments' endeavours to improve mental health services will only work if there are appropriate laws in existence shaping the way in which individuals with mental illnesses can access the highest attainable standard of mental health care. Clive Unsworth (1987, p 5) writes that '[l]aw actually constitutes the mental health system, in the sense that it authoritatively constructs, empowers, and regulates the relationship between the agents who perform mental health functions'.

The project therefore aims to:

- provide a comprehensive analysis of both civil and criminal laws relating to mental health and their conceptual frameworks in the common law countries of Canada, Ireland, England, Scotland, New Zealand and Australia;
- develop model frameworks for civil commitment and sentencing laws which reflect and conform to current international guidelines as to the principles and objectives of mental health law in order to inform mental health policy and practice; and
- enable Australia to set the international agenda in relation to providing model frameworks for access to the highest attainable standard of health care for other countries to follow.

The Project Team

At present, there are nine members of the project team (six full-time and three part-time) as follows:



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The Approach

The project will employ an international comparative approach in order to identify ways of designing legal frameworks and in order to negotiate the tensions that may arise when law seeks to shape access to the highest attainable standard of mental health care. One of the first steps will be to conduct a comparative analysis of existing laws in the common law countries of Canada, Ireland, England, Scotland, New Zealand and Australia to identify current trends in mental health laws.

Using such an international comparative approach is significant because most mental health law scholarship is domestically focused. While a domestic approach obviously has merit, there is a danger that focusing on domestic laws alone will mean losing sight of important international trends in this field. The project therefore seeks to look beyond Australia to foster international networks and to identify aspects of international theory and practice that will be of benefit to the development of model frameworks.

Through interviews and workshops, the project will draw on the expertise of not only legal academics, but also mental health professionals and consumer representatives with the aim of creating a truly integrated approach that is workable and complies with international standards. The model frameworks aim to take into account the clinical and service needs identified by mental health professionals and consumers. The program will thus go beyond a solely legal focus to ensure a truly interdisciplinary approach.

Civil and Criminal Mental Health Laws

The project will examine both civil and criminal mental health laws simultaneously as often researchers limit themselves to exploring one field only, leading to a false dichotomy between the two areas. Providing care and treatment for *all* those suffering from mental illness should be a priority, whether they are offenders or not and having the 'right' legal framework in place for such care and treatment has the potential to prevent future criminal behaviour. As Justice Richard Schneider of the Ontario Mental Health Court pointed out in a seminar for the Criminal Justice Research Council last year, if civil mental health systems are functioning well, there should be little need for specialist courts and diversionary programmes.

The next two sections deal with some of the main issues upon which the researchers in the project will be focusing.

Rethinking Civil Mental Health Laws

There are a number of issues that will be examined in this area during the course of the project. The Victorian Law Reform Commission Chairperson, Professor Neil Rees

(2007, 2008) has helpfully set out some of the key areas for civil commitment reform which will provide a basis for the project's focus. These issues can be grouped under three main headings.

Guiding Principles and Values

Patricia Allderidge (1979) has suggested that there are cycles in the care of those with mental illness, with phases of treatment in hospitals and phases of detention in private psychiatric institutions. At the same time, Allderidge points out that there are cycles giving precedence to medical discretion and cycles giving precedence to mental health laws which shift between protecting those with mental illnesses from society to protecting society from those considered dangerous. The current cycle is based 'upon an over-riding concept of legalism' (Prins, 2001, p 242), with mental health laws shaping the way in which individuals with mental illnesses can access treatment. While Stephen Rosenman (1994, p 564) has strongly critiqued mental health laws, he concedes that '[I]aws are needed to ensure treatment, care and (in some cases) preventive custody for mentally ill patients'.

The conceptual framework of legalism based on human rights is not universally accepted. Nikolas Rose (1985), for example, has criticised 'rights-strategists' on the basis that mental health laws based on rights simply switch the control of individuals with mental illnesses from doctors to lawyers. There is also a growing movement led by the World Network of Users and Survivors of Psychiatry (Minkowitz, 2007) challenging involuntary psychiatric treatment on the basis that it violates the universal prohibition on torture. Consideration also needs to be given to cultural, indigenous, gender and age issues in analysing the conceptual underpinnings of mental health laws.

By ratifying the *International Covenant on Economic, Social and Cultural Rights*, Australia has made a commitment to recognising 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (Article 12). Article 25 of the recent *United Nations Convention on the Rights of Persons with Disabilities*, which Australia has signed but has not yet ratified, requires State Parties to provide health care to persons with disabilities on an equal basis with others. The

effect of this Convention on mental health laws obviously needs careful consideration and doctoral candidate, Annegret Kämpf's thesis is focusing on this.

The project will bring together a number of academics at a workshop in May 2009 to focus on these broader conceptual issues and to really challenge the notion of rights-based mental health laws. It is hoped that an edited collection of the papers will be published early in 2010.

The Laws for Involuntary Detention and Treatment

A number of jurisdictions in Australia have just or are currently in the process of reforming their mental health legislation. This has opened up the way for a re-consideration of the criteria for involuntary detention and treatment as well as the potential use of advance directives, the current use of community treatment orders and the role of carers and independent mental health advocates.

The *Mental Health (Care and Treatment) (Scotland) Act 2003* is one of the newer mental health acts that has a specific Part dealing with rights, safeguards and duties and also has provisions concerning those in the criminal justice system. The Act allows for 'named persons' to be given information to support the patient as well as for 'advance statements'. Many of these provisions were included on the advice of the Mental Health Alliance which consists of members of user groups, psychiatrists, social workers, nurses, psychologists, lawyers, religious groups and carers' associations. The Scottish Act provides a good starting point for the analysis of what should be included in civil mental health laws.

Dr Weller and Dr Craze will be examining some of the recent developments in laws for involuntary detention and treatment. These developments include calls for the merger of mental health and guardianship laws (Rosenman, 1994; Dawson & Szmukler, 2006) on the basis that mental health should not be treated as something distinct from physical health in relation to positive rights.

Accountability Processes

If civil commitment laws are to be retained in their current 'stand alone' form, it is obviously important for there to be processes for independent external review. Such

review processes include the powers given to mental health review tribunals and the Australian Research Council has already funded a Discovery Project headed by Professor Terry Carney of the University of Sydney and Dr David Tait of the University of Canberra comparing tribunal review processes in New South Wales, Victoria and the Australian Capital Territory. The project will draw upon the findings of that study and also analyse the need to have independent complaints processes as well as procedures for review.

Most common law countries have national mental health commissions which generally advise the government on mental health policies and the project will also consider whether an equivalent Australian commission would boost accountability processes.

In England, the Mental Health Act Commission was established in 1983 to advise on policy matters and to review the operation of the *Mental Health Act 1983*. New Zealand's Mental Health Commission was established in 1998 to act as an advocate for individuals with mental illnesses and to monitor the national mental health strategy. In 2002, the Mental Health Commission of Ireland was established to 'promote, encourage and foster the establishment and maintenance of high standards in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres' under the *Mental Health Act 2001*. The Mental Welfare Commission for Scotland, has recently been given new powers under the *Mental Health (Care and Treatment) (Scotland) Act 2003* to:

- monitor the operation of the Act and to promote best practice;
- carry out visits to patients and to inspect records; and
- publish information and guidelines.

Finally, in March 2007, the Canadian Government announced funding for the Mental Health Commission of Canada and has appointed former Senator Michael Kirby as its first Chair. It has a strong educative and policy-making agenda.

Given that all these countries have a national Mental Health Commission, it is timely to assess whether Australia would also benefit from the existence of such a body. There have been periodic calls for such a Commission since the early 1990s (Centre for Health Law, Ethics and Policy, 1994; Zifcak, 1997; Hickie et al, 2005;

Rees, 2008) and part of the project will focus on assessing the advantages and disadvantages of existing commissions and what powers an Australian commission could have.

Rethinking Options for Mentally Ill Offenders

Individuals with mental illnesses comprise a disproportionate number of people who are arrested, appear before the courts and who are imprisoned (Wallace, Mullen et al, 1998; Ogloff, 2002, Butler & Allnutt, 2003). In relation to prisoners with mental illnesses, Principle 20 of the United Nations' *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (December 1991) stipulates that prisoners are entitled to the best available mental health care, and to all the rights specified in the Principles, 'with only such limited modifications and exceptions as are necessary in the circumstances'.

The Senate's Select Committee on Mental Health (First Report, March 2006, p 344) found that while '[a]ll jurisdictions make some provision for the care of forensic patients...that provision is inadequate, both for secure facilities and for follow-up care in the community'. The Senate Select Committee recommended that 'there be a significant expansion of mental health courts and diversion programs, focused on keeping people with mental illness out of prison' (Final Report, April 2006, p 20). There is also a need to ensure the provision of adequate services to those individuals with mental illnesses in prisons.

Given this background, the project aims to concentrate on three main areas of research.

Guiding Principles and Values

In many western common law countries, security has become a driving force behind new laws which are increasingly used as a method of controlling those perceived as 'dangerous' through mandatory forms of punishment for repeat offences and new forms of control and surveillance for those considered to be exhibiting anti-social tendencies. Certain authors (Sunstein, 2005; Zedner, 2006; Ericson, 2007) have focussed on a growing preoccupation with uncertainty as the guiding justification for

pre-emptive forms of control and this trend seems to be carrying over to offenders with mental illnesses.

Recent sentencing legislation has emphasised public protection in relation to those considered 'dangerous' (Prins, 2001; McSherry, 2005) and dispositional options following a finding of not guilty on the ground of mental impairment are firmly based on notions of preventing future harm. The issue here is how to balance notions of punishment and community protection with the treatment and care of offenders with mental illnesses.

The project will again take a comparative approach to examining how laws in other countries and in Australian jurisdictions have attempted to balance protection and care in order to establish some of the guiding principles and values that should be taken into account in developing legal frameworks in this area.

Keeping Mentally Ill Offenders out of Prison

The project will examine developments across common law countries in relation to police discretion, granting of bail, special mental health courts and diversionary programs designed to keep those with mental illnesses out of the prison system. Queensland is the only jurisdiction in Australia to have established a Mental Health Court which determines the defences of insanity and diminished responsibility. However, there have been a number of diversionary programs developed (Payne, 2005, 2006) that may form the basis for further implementation. Doctoral candidate, Liz Richardson will be looking specifically at this area as the focus of her thesis while doctoral candidate, Ronli Sifris will be looking more generally at women's experiences of mental illness and the criminal justice system.

Options for Sentencing and Treatment Programs

At present, there is a great deal of discrepancy between sentencing options across Australia. While each Australian criminal law jurisdiction has provisions for the prosecution and disposition of those with mental illnesses, some jurisdictions enable judges and magistrates to make hospital orders in lieu of a sentence so that mentally

ill offenders cross from the criminal justice system to the civil mental health system, but other jurisdictions do not.

In Victoria, for example, judges and magistrates can now make 'Restricted Involuntary Treatment Orders' for up to two years, providing the offender has not committed a serious offence. An authorised psychiatrist or the Chief Psychiatrist can then make a restricted community treatment order for a person who is subject to a restricted involuntary treatment order, potentially enabling some offenders to stay in the community rather than being detained in a hospital setting. Part of the project will look at the availability and use of such orders across common law countries as well as other forms of bridging treatment programs. Doctoral Candidate, Jamie Walvisch will be concentrating on forms of sentencing options in his thesis.

I will also be working on another Australian Research Council project on preventive detention which will overlap to some degree with this area of the *Rethinking Mental Health Laws* project. A workshop of invited papers will also be held in 2010 to develop some of these issues and an edited collection published in 2011.

Conclusion

In 2006, the Senate Select Committee on Mental Health classified mental illness as the number one health problem in Australia causing years lost to disability. While diseases such as cancer and heart disease may take more lives, mental illness causes the greatest amount of ongoing suffering and disablement.

This Australian Research Council Federation Fellowship project provides an opportunity to spend a concentrated period of time on reforming mental health laws and I see it as but a small cog in an ever-growing machine committed to improving access to mental health care across Australia.

I look forward to your comments and suggestions for the project.

Thank you.

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