Australia’s international human rights obligations

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AUSTRALIA’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Australia has never had a national bill or charter of rights and, unlike Europe, America and Africa, the Asia-Pacific region does not have a human rights treaty or a regional court for the protection of human rights. However, Australia has ratified (formally approved) a number of international human rights conventions. In doing so, Australia has promised the international community that it will protect and promote the human rights set out in those conventions.

Australia has ratified:

- The International Covenant on Civil and Political Rights;
- The Convention on the Rights of the Child;
- The Convention Against Torture;
- The International Covenant on Economic, the Social and Cultural Rights;
- The Convention on the Elimination of All Forms of Racial Discrimination;
- The Convention on the Elimination of All Forms of Discrimination against Women; and

The Convention that is most relevant to mental health is the Convention on the Rights of Persons with Disabilities.

About the Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (the CRPD) was adopted by the General Assembly of the United Nations on 13 December 2006 and came into force on 3 May 2008. It was written over five years and the writing process involved around 800 representatives of disability organisations from across the world.

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The CRPD requires those countries which have ratified it to promote and protect the rights of persons with disabilities and sets out the steps that should be taken to ensure equality of treatment.

Australia ratified the CRPD on 17 July 2008. This means that Australia has promised the international community that it will comply with the CRPD. On 21 August 2009, Australia signed the CRPD’s Optional Protocol. Under this Protocol, individuals can complain to the United Nations Committee on the Rights of Persons with Disabilities if they think that Australia has breached any of the rights set out in the CRPD.

The legal status of the CRPD within Australia is complicated. Just because Australia has ratified the CRPD, does not mean that the CRPD automatically forms part of Australian law or that it is enforceable in Australian Courts. Instead, the Australian Parliament must enact a law that says that the CRPD is part of domestic law before it is enforceable in the courts. Thus far, the Australian Parliament has not done so. However, even though the CRPD is not directly enforceable in Australian courts, the fact that Australia has ratified it may shape how the courts interpret Australian law and the legality of government decisions in certain cases.

Why is the CRPD relevant to people with a lived experience of mental illness?

Neither ‘disability’ or ‘persons with disabilities’ is defined in the CRPD, but Article 1 states that ‘persons with disabilities’ include ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’ [Emphasis added]. While Article 1 refers to ‘long-term’ impairments, it does not prevent other impairments from being included.

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4 Kioa v West (1985) 159 CLR 550, 570.
The Preamble of the CRPD says that disability is ‘an evolving concept’ and results from the interaction between individuals with impairments and societal barriers. The inclusion of persons with mental impairments in Article 1 means that the rights set out in the CRPD apply to people with a lived experience of mental illness.

Outline of CRPD Rights

The general framework of the CRPD can be summarised as follows:

- Article 1 sets out the principles of equality and inherent dignity – these can be viewed as fundamental to the interpretation of the CRPD;
- Article 2 defines certain terms;
- Article 3 sets out the guiding principles, again referring to equality and inherent dignity as well as individual autonomy including the freedom to make one’s own choices, non-discrimination, accessibility and the full and effective participation and inclusion in society, amongst others;
- Articles 4 to 9 set out general obligations;
- Articles 10 to 30 refer to specific rights or freedoms;
- Articles 31 to 40 set out provisions relating to the implementation and monitoring of the treaty.

The rights outlined include the right to life (Article 10), the right to equal recognition before the law (Article 12), the right to liberty and security of the person (Article 14), the right to respect for physical and mental integrity (Article 17), the right to live in the community (Article 19), the right to education (Article 24) and the right to enjoyment of the highest attainable standard of health without discrimination on the basis of disability (Article 25).

The CRPD establishes two implementation bodies:

1. the United Nations Committee on the Rights of Persons with Disabilities which monitors implementation and hears individual complaints; and
2. the Conference of State Parties which considers matters regarding implementation.

The following sections focus on four rights that have particular relevance to those with lived experience of mental illness:

1. the right to liberty and security of the person;
2. the right to equal recognition before the law;
3. the right to enjoy the highest attainable standard of health; and
4. the right to respect for physical and mental integrity.

Each right is analysed with respect to what they may mean for the practice of mental health services within Australia.

1. The Right to Liberty and Security of the Person

Article 14.1 of the CRPD sets out that:

States Parties shall ensure that persons with disabilities, on an equal basis with others:

a. Enjoy the right to liberty and security of person;

b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. [emphasis added]

In relation to this Article, the United Nations Committee has recommended that Australia:

repeal all legislation that authorizes medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community, by means of Community Treatment Orders.7

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While this statement is a recommendation and is not legally binding, it clearly establishes that mental health laws that enable the involuntary detention of those with mental health problems are considered at an international level to be in breach of the right to liberty. The focus of Australian mental health services should therefore be on voluntary mental health treatment in the community with each individual’s free and informed consent.

*Article 14 of the CRPD indicates that resources should shift away from maintaining a focus on involuntary and emergency treatment in hospitals towards community-based, voluntary mental health care.*

2. The Right to Equal Recognition Before the Law

Article 12 of the CRPD sets out the right to equal recognition before the law and refers to the right to “enjoy legal capacity on an equal basis with others in all aspects of life”.

Legal capacity means having ‘legal standing’ in being a holder of rights and ‘legal agency’ in the sense of being able to perform acts with legal effect. Such acts include making contracts, wills, voting, getting married, owning property and the like. It also means making lifestyle and health decisions that are respected by others.

Of particular relevance are the following paragraphs:

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that

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measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. [Emphasis added]

Significantly, there is no mention in Article 12 of substituted decision-making which is the basis for involuntary treatment. That is, it is the treating psychiatrist who, under Australian mental health laws, substitutes his or her decision to provide treatment in place of the decision of a person with lived experience of mental illness. This means that the psychiatrist’s substituted decision can apply even when the person with lived experience of mental illness does not want treatment. Substituted decision-making also underpins Australia’s guardianship and administration laws.

The Committee on the CRPD has stated that ‘substitute decision-making regimes ...need to be abolished to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others’. 9 Instead, the emphasis should be on supports to help individuals with lived experience of mental illness choose the care and treatment they prefer.

While the statement by the Committee is not legally binding, it again indicates that the focus should be on ways of providing people with access to supports to exercise their legal capacity. Michael Bach and Lana Kerzner have outlined a range of supports in this regard under the headings ‘life planning supports’, ‘independent advocacy’, ‘communicational and interpretive supports’, ‘representational relationship-building supports’ and ‘administrative supports’. 10

There are also obligations to ensure broader financial and community supports to persons with disabilities under other Articles of the CRPD such as Article 9 ‘Accessibility’; Article 19 ‘Living independently and being included in the community’; Article 24 ‘Education’; and Article 28 ‘Adequate

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9 Ibid, para 7.
standard of living and social protection’.

In the mental health field, access to supports to exercise legal capacity could include:

- The use of mental health advance statements or directives;\(^{11}\)
- Access to informal support networks made up of peers, family members and partners;\(^{12}\)
- The inclusion of mental health advocates and/or those nominated by the person with lived experience of mental illness to assist in health care decisions.\(^{13}\)

*Article 12 of the CRPD indicates that people with lived experience of mental impairment should be engaged in planning and implementing their own treatment and peer workers should be included wherever possible to help promote empathetic services and improve health outcomes.*

3. The Right to the Highest Attainable Standard of Mental Health

Article 25 requires countries which have ratified the CRPD to recognise “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

It includes obligations to:

(b) *Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;*

(c) *Provide these health services as close as possible to people's own communities,* including in rural areas;

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(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care... [Emphasis added].

Article 25 requires the provision of a well resourced system of community mental health care, designed to ensure that people with a lived experience of mental illness live well in the community, in their own homes.

Proper access to well resourced community mental health services has been an ongoing problem in Australia. Mental health laws are generally silent on this point. However, in the Northern Territory, the Mental Health Tribunal can review a decision to refuse access to a mental health facility. Currently, in New South Wales, an individual can ask the ‘medical superintendent’ (the psychiatrist in charge of the mental health facility) to reconsider a decision by a psychiatrist to refuse to admit him or her to hospital. The ability to appeal to the Mental Health Review Tribunal (as in the Northern Territory) would strengthen the rights of those who are refused access to mental health services in New South Wales.

Article 25 of the CRPD indicates that there needs to be a shift away from the current focus on emergency-driven hospital care towards providing access to voluntary, community based services with an emphasis on early identification and intervention.

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15 Mental Health and Related Services Act (Northern Territory), s 127(5).
16 Mental Health Act 2007 (NSW) s. 11
4. The Right to Respect for Physical and Mental Integrity

Article 17 of the CRPD states:

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Unlike most of the other Articles in the CRPD, there are no further details given as to obligations necessary to ensure this right, nor is there any guidance as to what it encompasses. It could, however, be viewed as developing limitations on certain practices such as seclusion and restraint and unbeneficial and overly intrusive treatment.\(^\text{18}\)

The United Nations Special Rapporteur on Torture, Juan E. Méndez, in a Report to the United Nations Human Rights Council has called for "an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities...in all places of deprivation of liberty, including in psychiatric and social care institutions".\(^\text{19}\)

The term “seclusion” is defined in mental health legislation and generally refers to the deliberate confinement of a person, alone, in a room or area that the person cannot freely exit. How often seclusion is used can vary markedly across facilities. The term “restraint” is more difficult to define as it can mean:

- **Physical restraint**: where bodily force is used to control a person’s freedom of movement;
- **Chemical restraint**: where medication is given primarily to control a person’s behaviour, not to treat a mental health problem or physical condition; and/or
- **Mechanical restraint**: where a device (such as straps, safety vest or mittens) is used to control a person’s freedom of movement.

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A Report by the National Consumer and Carer Forum also refers to:

- **Emotional restraint**: where “the individual consumer is conditioned to such an extent that there is a loss of confidence in being able to express their views openly and honestly to clinical staff for fear of the consequences”.  

New South Wales has guidelines in relation to the use of seclusion, mechanical, physical and chemical restraint. These guidelines (New South Wales Government 2012) state that “[i]n the use of (physical or mechanical) restraint, staff must be satisfied that the intervention is reasonable and accepted as safe, competent professional practice i.e. the least amount of restraint/force necessary to respond to the situation”. It also states that “chemical restraint through the overuse of sedation is not an acceptable form of restraint and is not used in NSW”. 

In 2012, the National Mental Health Commission released *A Contributing Life: The National Report Card on Mental Health and Suicide Prevention*. One of its ten recommendations targets the reduction of “the use of involuntary practices and work to eliminate seclusion and restraint”. The right to respect for physical and mental integrity means that these restrictive interventions need to be targeted as a matter of priority and ways of eliminating them explored.

*Article 17 of the CRPD indicates that restrictive practices such as seclusion and restraint and unbeneficial and overly intrusive treatment need to be curtailed and eliminated wherever possible.*

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22 Ibid, 5.


The Importance of Human Rights Compliance

In 1993, a National Inquiry into Human Rights and Mental Health found that there were serious human rights breaches and widespread discrimination against people with lived experience of mental illness.\(^{25}\) Over a decade later, the Senate Select Committee on Mental Health’s Final Report urged that the National Mental Health Strategy be reformed to:

Guarantee the right of people with mental illness to access services in the least restrictive environment, to be actively engaged in determining their treatment and to be assisted in social reintegration... \(^{26}\)

Compliance with the CRPD will help redress the discrimination that continues to be experienced by people with lived experience of mental illness. The CRPD provides a framework for ensuring substantive equality by requiring governments to be proactive in providing services in the community so that persons with lived experience of mental illness can participate in society.
