

EXPLORATIONS IN MENTAL HEALTH SERIES

New Law and Ethics in Mental Health Advance Directives

The Convention on the Rights of Persons with Disabilities and the Right to Choose

Penelope Weller

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**This book is dedicated to the memory of my father
Frederick George Weller 1925–2011**

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Foreword

Professor Bernadette McSherry

Ensuring mental health laws protect human rights both in theory and practice is an ongoing challenge. The law regulates and shapes the way in which mental health care is delivered and the way in which individuals with mental health problems are treated by both civil and criminal justice systems.

The medical treatment of many individuals with mental health problems generally corresponds with the medical treatment of other patients in the sense that they can (at least in theory) refuse treatment and, if hospitalized, leave hospital at any time and use the same complaints procedures as any other patient.

However, this is not always how the system operates in practice. When people are considered unable or incapable of consenting to treatment, or are deemed to be a danger to themselves or others because of mental health problems, legislation in many countries enables them to be detained as involuntary patients.

This important book examines the role of mental health advance directives in ensuring that the health and lifestyle decisions of those experiencing mental health problems are respected. It argues that mental health advance directives can help shift the current focus in mental health laws away from that of 'negative' rights, in the sense of freedom from state interference, towards recognizing 'positive' rights which place obligations on governments to ensure that certain rights, such as the right to the enjoyment of the highest attainable standard of health, are upheld.

It is crucial that laws which enable involuntary detention and treatment are firmly rooted in the latest international human rights standards set out in the UN Convention on the Rights of Persons with Disabilities (CRPD), which includes people with mental health problems.

The CRPD clarifies the obligations on States Parties to promote and ensure the rights of persons with disabilities and sets out the steps that should be taken to ensure equality of treatment. It goes into much more detail than previous general human rights conventions concerning what action needs to be taken to prohibit discrimination.

The CRPD is clear that States Parties must recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

This means looking at the decision making supports people might need to be able to exercise this right. Mental health advance directives can be seen as one avenue of supporting optimal decision making.

This book argues that the CRPD provides a framework for reassessing the efficacy of mental health advance directives. As explored in Chapter 8, the Scottish legislative model for advance directives has been hailed as the best to date, yet the use of such directives is still rare. This may be because those who could use them have difficulty in understanding how they work or are sceptical about their benefit. If there are too many regulations relating to filling out advance directives and registering them, then they are unlikely to be used.

There may also be barriers to the use of mental health advance directives stemming from mental health professionals' attitudes towards them. There may be concerns about how advance directives can be used in relation to involuntary treatment. There may also be concerns about how advance directives can be accessed, if and how they can be overridden and the time involved in reviewing them.

Despite challenges with implementation, this book argues that mental health advance directives show great potential in developing a communicative model of mental health care. It is important to keep in mind that mental health problems are not rare. Estimates suggest that 13 per cent of global disease is constituted by mental, neurological and substance-use disorders – a total that surpasses both cardiovascular disease and cancer. Informed consent in relation to the treatment of such disorders is of the utmost importance in ensuring that the right to the enjoyment of the highest attainable standard of (mental) health can be upheld.

Dr Weller has been a generous and inspirational colleague during her time working on the Australian Research Council's *Rethinking Mental Health Laws* project at Monash University. It is gratifying to see her work on the project culminate in this thought-provoking book and I recommend that it be read by all those interested in mental health policy. As argued throughout, changing the law to incorporate mental health advance directives should be viewed as a positive step towards implementing the principles set out in the CRPD.

Professor Bernadette McSherry is an Australian Research Council Federation Fellow and the Director of the Centre for the Advancement of Law and Mental Health.

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