



The Abolition Perspectives Report on the Abolition of Mental Health Law: An Evaluation

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The Controversy

Mental health law
authorizes involuntary
detention and psychiatric
treatment

Most controversial
issue in disability
law reform globally

Key Tensions:

- CRPD Committee calls for abolition
- No state has abolished mental health law
- Interpretive declaration
- Opposition based on concerns about safety and treatment access
- The 'Geneva impasse' continues

Rather than consider *should*
mental health law be
abolished, this presentation
will consider *how* it should
be abolished?

Three Strains of Abolitionist Thought

The Purists

Complete repeal of mental health law. Involuntary treatment can never be used.

Disability Neutralists

Laws must not discriminate based on disability. Same criteria applied to everyone.

The Incrementalists

Progressive reduction of coercion with eventual elimination as the goal.

All three strains incorporate supported decision-making.

ABOLITIONIST PERSPECTIVES

Project report



CENTRE FOR
MENTAL HEALTH
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Co-producing excellent practice.

The Abolition Perspectives Report

- Centre for Mental Health Nursing (CMHN), University of Melbourne, October 2022
- Recent Journal Article in *International Journal of Law and Psychiatry*
- Commissioned by the Victorian Government:
 - Independent Review Panel on Compulsory Treatment
 - Following Royal Commission recommendations
- Features:
 - First detailed exploration of abolition mechanics
 - Interviews with 15 abolitionists
 - Analysis of formal and informal literature
 - Proposes three alternative legal frameworks

Abolition Perspectives Report

- Positions Abolition within the broader abolitionist movement against oppression and carceral systems from the abolition of slavery, aboriginal activism and defunding prisons and police;
- Supported decision-making is 'out-of-scope' and not within the abolitionist project;
- Wide range of claims – repealing mental health law and coercion, discrimination and disability neutrality, abolition of psychiatry, defunding the police, criminal justice systems and prisons, payment of reparations and focus on community, relationships and love.
- Abolitionists cannot justify the existence of mental health law and it is morally necessary to abolish it due to causing ongoing violence and discrimination.
- It also points out the need to properly resource social supports (e.g. housing, employment etc).
- Recommends immediate abolition of mental health law. Existing laws can be used instead (Recommendation 1).
- Unclear how pre-existing laws would work as a replacement for mental health law because they aren't designed to deal with mental health patients.

Three Proposed Legal Alternatives

1. Personal Protection Orders

Family violence and personal safety
intervention orders

2. Good Samaritan Laws

Emergency assistance protections

3. Medical Necessity Doctrine

Common law defense for emergency treatment

Focus on Victorian Law an Example

What are personal protection orders?

- **Family Violence Safety Notices (FVSN)** – temporary orders issued by police until the family violence matter is heard in court.
- **Family Violence Intervention Orders (FIVOs)** – interim and final orders made by the court where the respondent has committed family violence and is likely to continue to do so. Family violence includes behaviour that is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive or controlling and causes a family member to feel fear for their safety or wellbeing or that of another family member.
- **Personal Safety Intervention Orders (PISOs)** – an affected person can apply for an order in relation to prohibited behaviour (e.g. assault, sexual assault, harassment, property damage, making threats and stalking which causes a reasonable person to fear for their safety).

Personal Protection Orders

Advantages

Apply to everyone and are widely used

Focus on actual behaviour not diagnosis and prognosis

Family violence is framed as a choice, although mental ill-health is a risk factor

Can require counselling but are less invasive than involuntary detention and psychiatric treatment

Problems

- **Too narrow:** only work where victims and potential victims are aware of the threat they face, not to general or random threats
- **Too wide:** definitions of family violence and prohibited behaviour extremely broad and include subjective feelings of fear, intimidation and threat
- Still require risk assessment and use a civil 'balance of probabilities standard'
- Courts err on the side of caution to protect victims and avoid blame
- Person must be thought capable of understanding and obeying an order
- Do not address what is driving the behaviours
- Involve removing someone from their home
- Criminalise breach, involve police and prison
- Limited appeal opportunities

What are Good Samaritan Laws?

- Good Samaritan (Luke 10:25-27) parable of injured man ignored by his countryman but helped by a despised foreigner.
- Common law does not compel bystanders to rescue others (except for health workers *Lowns v Woods*).
- Good Samaritan legislation provide some level of legal protection to those who attempt to rescue or assist a person in an emergency.
- *Wrongs Act 1958 (Vic) s31B*
- Provide assistance, advice and care to a person in an emergency (includes psychological or psychiatric injuries)
- Expects no money or financial reward
- Person is a risk of death or injury
- Protects anything done in good faith at the scene or by telephone

Good Samaritan Laws

Advantages

Provides protection for health workers in emergencies

Limited to acute situations rather than longer-term hospital admission or involuntary treatment

Does not involve prediction of future risk

Does not produce stigma and unlikely to be discriminatory

Problems

- Intended for acute and unforeseen emergencies like car accidents
- Defence to a negligence claim rather than authority to intervene
- Limited to people not on duty or paid for services
- Extent of intervention permitted is narrow and unclear
- Only one case in America *Estate of Youn v Kula* where a psychiatrist successfully relied on Good Samaritan legislation when assisting with a mental health emergency (suicidal person). The case illustrates the difficulties of defining an emergency in the mental health context.

What is the Doctrine of Medical Necessity?

- Defence to what would otherwise be a crime or civil wrong (e.g. tort).
- Applies to situations where a person is justified in breaking the law to avoid a worse harm or where obeying would be an intolerable burden
- In the medical context, it is claimed where it is necessary to treat a patient who lacks decision-making capacity without their consent to save their life or prevent serious harm.
- Text-book case is emergency treatment of an unconscious patient
- Boundaries of necessity unclear may apply outside the emergency context to longer-term treatment in the patients' best interests: *Re F (A Mental Patient)*
- In Victoria, the *Medical Treatment Planning and Decisions Act 2016 (Vic)* permits certain emergency interventions to save a patient's life, prevent serious damage to their health, or prevent suffering or distress provided they haven't refused it legally (although this doesn't apply to mental health patients).

Doctrine of Medical Necessity

Advantages

Applies to all patients;

Seeks to confine interventions to those of more immediate necessity/emergency;

Fits with 'disability neutralists' ideas that only physical interventions like holding a person back from jumping off a building or taking a knife out of their hand are permissible;

Problems

- Nebulous and uncertain boundaries;
- Mental Health, Guardianship and Medical Decision-Making legislation has sought to 'replace' the doctrine so that it is reserved for emergency situations
- Necessity is the "fall-back" where there isn't a "better" statutory authority
- Civil commitment criteria is based on necessity and "need" in the text
- *HL v United Kingdom* ECtHR held doctrine of necessity is ambiguous and gives medical professionals 'effective and unqualified' control over the patient.
- Requires someone to be with the patient at the perfect time to prevent harm

Conclusion

- There is fierce international debate about whether mental health laws should be abolished or reformed and whether the CRPD requires states parties to do so.
- At the international level there are three strands of abolitionist thought – Purists, Disability Neutralists and Incrementalists.
- Abolition Perspectives Report develops this thinking further and brings in some novel ideas and fresh thinking.
- The recommendation to abolish mental health laws and rely on pre-existing laws is however problematic and unwieldy.
- Not abolishing mental health laws doesn't mean accepting the status quo.
- If mental health law were abolished much reform of pre-existing laws would be required to better accommodate persons with mental ill-health.

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Any Questions?

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