Reform of the Mental Health Act
Treating Mental Illness, Protecting Human Rights. How can we do both?

11:10 – 11:40 United Nations Convention on the Rights of Persons with Disabilities and Mental Health - A New Beginning?

I thought that I might start with a brief mention of where we are in the Review at the moment. Our latest interim report was published last month and gives a fuller idea of the work of the five advisory groups and the evidence we have been seeking in addition to what we learned from the responses to our Call for Evidence last Spring. We plan another interim report in or around June with a final report being submitted in September 2022. Our intention is to maintain, indeed to enhance, the dialogue we have with interested parties and organisations, offering several opportunities to road-test our thinking before finalising any recommendations.
The College has continued to be a great help and support to our work, starting with a conversation within days of my appointment with our chair for the day, John Crichton, up to and including our recent discussions which have involved, among other things, participation in advisory groups and, more recently, preparing several very useful examples of clinical scenarios seen in real-life, intended to highlight challenges in the application of mental health laws. This includes examples of normal practice, the challenges and complications of using laws in clinical situations, and to potentially indicate where there may be gaps in current legislation.

As someone selected for my lack of involvement in your field, I continue to be daunted, from time to time, but bolstered and encouraged by my wonderful colleagues on the Executive Team, the advisory groups and the generosity, passion and commitment of those who are engaging with the review, whether from lived experience or practitioners.

I take the opportunity today to thank you and your organisation for your help. Onto my topic for today, which is partly in the field of human rights and therefore partly why I was asked to chair this review.

In the terms of reference of the Scottish Mental Health Law Review it states that we will be making recommendations that give effect to the rights, will and preferences of the individual by ensuring that mental health, incapacity and adult support and protection legislation reflects people's social economic and cultural rights including UNCRPD and ECHR requirements.

The UK became a state party to the CRPD in 2009, *after* the enactment of our existing mental health, incapacity and adult support and protection legislation.

The UK is accordingly obliged to give effect to the CRPD under international law. In terms of the Scotland Act 1998[1] the Scottish Parliament and Government require to comply with international treaty obligations, such as the CRPD. In addition, CRPD compliance forms part of the Scottish Government's Mental Health Strategy 2017-2027 and the Scottish Government committed to giving effect to CRPD rights in its ' A Fairer Scotland for Disabled People: Delivery Plan (2016).

Its rights are not currently directly enforceable through our national courts and tribunals. This may change. It is possible, perhaps even likely, that the First Minister's National Taskforce for Human Rights Leadership, due to report in March 2021, will recommend incorporation of UNCRPD into Scots law in a manner similar to aspects of ECHR and, soon, the UNCRC.

The question is therefore not if the SMHLR will make recommendations to give effect to CRPD in mental health legislation, but what those recommendations might look like in the context of an important international convention that can be controversial and, as with many conventions involving economic, social and cultural rights, not quite as well understood as some of the classic civil and political rights.

Over the past few years, there has been a lot of debate about the impact of CRPD and how reflecting its requirements may be worked out practically in people's lives, particularly in the field of mental health and incapacity legislation. These debates have often resulted in polarising views.

Some of our work is around clarifying what the rights involved mean and how they might offer a new basis for dialogue between individuals, their carers and practitioners working with them.

Today, I offer a few thoughts on, if not a new beginning, at least further shifting of some large tectonic plates.
With your help, we want to try to ensure that human rights can play a key role in improved awareness, understanding, collaboration and care.

1. **A different approach to human rights: it is about equality of human rights enjoyment**

[1] Ss 35(1((a) and 58(1).

> The overarching purpose of the CRPD is to ensure that support and protection is provided at the point of actual need and that all human rights are enjoyed on an equal basis by everyone.

The CRPD was adopted by the United Nations after it became clear that existing human rights approaches were not working for persons with disabilities. It is a long-established international human rights principle that all human beings are entitled to enjoy human rights on an equal basis and without discrimination. However, there was evidence that this is not the reality for persons with disabilities.

[For example, in allowing for the different treatment of persons with mental disorder certain existing human rights-based practices are in fact perpetuating inequality and discrimination.[2]]

The inequalities arguably permitted by these human rights approaches include:

1. Defining the limits of restrictions on the autonomy of persons with mental disorder[3] by psychiatric interventions and protective measures but otherwise accepting that such rights restrictions are an inevitable consequence of mental disorder.
2. Allowing for unequal human rights enjoyment to be considered lawful where they can be reasonably and objectively justified and by reference to what was normal for other persons with mental disorder rather than by reference to the rest of society.
3. Targeting of persons with mental disorder, and therefore limiting their rights, in the name of protection where the risk comes from something or someone else.

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[2] The CRPD defines discrimination as follows:
'…"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;' (Article 2)

[3] It is acknowledged that the term 'mental disorder' may no longer be appropriate – 'mental distress' may be more so – and the CRPD does not expressly refer to it. However, for the sake of clarity this is used here since it is referred to in Scottish legislation. Note also that the CRPD does not define mental disorder or mental disability as such but refers to it in terms of state and societal action and inaction which prevents equal rights enjoyment:
'...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.' (Article 1)
Instead of referring to persons with mental disorder the Committee on the Rights of Persons with Disabilities refers to persons with 'cognitive and psychosocial disabilities' (CRPD General Comment No. 1).
However, the fact that disability is described in these ways rather than by diagnosis means that mental illness is intended to be covered by the CRPD.

4. Paying little attention to the human rights of persons with mental disorder (civil, political, social, economic cultural) beyond institutional care and treatment.

To address this the CRPD's primary message essentially is that:

1. States and society must give genuine effect to all the rights of persons with mental disorder on an equal basis with others. Equal and non-discriminatory rights enjoyment means that rights apply to everyone, with or without a mental disorder, in the same way. If they are limited then the same criteria apply to everyone.
2. To achieve equal rights enjoyment persons with mental disorder may require:
    a. Particular types of support to be able to enjoy rights equally, such as support for the exercise of legal capacity (often referred to as 'supported decision-making'),[4] universal design[5] and reasonable accommodation,[6] and to protect them from unwarranted and unequal restrictions of these rights; and
    b. Safeguards to ensure that if these rights are limited it is on the same basis for everyone.

2. The CRPD, care and treatment of persons with mental disorder and psychiatric compulsion

Obviously psychiatric compulsion does significantly impact on an individual's liberty and autonomy. A great deal of the debate around compulsion and the CRPD has therefore understandably focused on Articles 12 (equal recognition before the law) and 14 (the right to liberty) and the interpretation of these by the CRPD monitoring body, the CRPD Committee.

However, compulsion must be considered in the context of the overall CRPD message. It does not advocate less support and protection. However, it does raise questions about how equal and non-discriminatory current mental health law approaches actually are.

The CRPD Committee has stated that detention and compulsory treatment justified on the basis of mental disability must be abolished and replaced by "supported decision-making". This stance on the rights to liberty and to exercise legal capacity reflect the fact that persons with lived experience, their representatives and supporters and activists were unhappy that psychiatric

[4] Article 12 CRPD and CRPD General Comment No. 1 (2014).

[5] '"Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.' (Article 2 CRPD)

[6] '"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;' (Article 2 CRPD)

compulsion is often justified on the basis of diagnosis and assessments of mental incapacity, the individual's 'best interests' and risk. The concern is that these assessments may be heavily influenced by biased and unsubstantiated considerations about the individual, their capabilities and risk. This, in turn, leads to decisions being made which limit the individual's liberty and legal capacity where this would not happen for a person without a diagnosis of mental disorder.

This does not, however, appear to suggest that diagnoses, or consideration of impairments related to these, ought to also be redundant. Whilst the CRPD Committee has stated that these must not justify compulsory treatment they may still have a role in shaping the nature and type of any support provided.

3. Legal capacity

Article 12 CRPD[7] states that persons with mental disorder are entitled to exercise legal capacity on an equal basis with others. This means having one's views – referred to in Article 12 as 'will and preferences'[8] – respected under the law in the same way as others.

The CRPD Committee has noted that persons with mental disorder are often unable to exercise legal capacity on an equal basis with others because of an assessment of mental capacity or decision-making difficulties (which are a matter of intellectual or cognitive functioning) which can all too easily result in others substituting their own decisions for that person (in other words, their legal capacity being denied). Respect for the person's views is therefore effectively lost in the process.

The Committee points out that difficulties with decision-making can be overcome by using appropriate support and mechanisms (in the law and elsewhere) which ensure that the individual's will and preferences are always paramount. This means that policy, law and practice must ensure that:

1. There is appropriate support available to always give effect to the individual's will and preferences. This will either be through 'supported decision-making' or where, despite strenuous efforts to do so, it is impossible to ascertain the individual's will and preferences then by making a 'best interpretation'[9] of what these are; and
2. Where the individual's or society's protection and rights demand, any compulsory measures which do not accord with the individual's will and preferences are not applied in a discriminatory manner.

[7] Articles 12(1) and (2).

[8] Article 12(4).

[9] 'Best interpretation' should probably be read as "an educated guess" and a certain amount of latitude would clearly have to be given to those who have make this best interpretation where no reliable relevant information on the person's values exists. It has, of course, been argued that 'best interpretation' is really a form of substituted decision-making (albeit very much as a last resort/emergency measure). The counter-argument is that this represents 100% supported decision-making.

4. Putting the CRPD psychiatric compulsion and legal capacity requirements in context

The CRPD Committee requirement for the abolition of psychiatric compulsion does not mean that it is never appropriate to detain a person with mental disorder or to treat them. This may occur provided it can be demonstrated that the same restrictions would be placed on anyone under the same circumstances, for example where an offence has been committed or to prevent significant harm.

Nor does it mean that the individual's will and preferences will always prevail. The point is that the exercise of legal capacity must be enjoyed equally by all. There has been some debate, which is ongoing, about what exactly 'will and preferences' mean, what happens if they conflict and the extent to which wishes expressed when a person is suffering mental distress are truly representative of that person's will and preferences.[10] However, the purpose of 'supported decision-making' and 'best interpretations' of will and preferences is to ensure insofar it is possible that the genuine wishes of the individual is heard even in crisis and emergency situations. In the same way, the fact that rights must be enjoyed equally by all means that from time to time these 'will and preferences' may legitimately be overridden.

5. The CRPD and the European Convention on Human Rights (ECHR): conflicting messages?

Scottish Parliament legislation and state policy and practice in Scotland must comply with our ECHR rights and we can enforce our ECHR rights directly through our courts and tribunal.[11] Indeed, the Mental Health (Care and Treatment) (Scotland) Act 2003, as well as the Adults with Incapacity (Scotland) Act 2000 and Adult Support and Protection (Scotland) Act 2007, were enacted with ECHR principles firmly in mind.

Whilst ECHR case law has increasingly interpreted ECHR rights to protect the autonomy of persons with mental disorder it does tend to follow the traditional, more limited approach to human rights mentioned above. On the face of it, ECHR and CRPD approaches therefore appear to conflict. However, we need to be clear that the ECHR provides a minimum level of protection of human rights. There is no reason why CRPD rights cannot be used to enhance and expand this protection for persons with mental disorder. Indeed, it should do so given that the CRPD represents a higher source of international law. It also carries the additional weight of being a treaty specifically relating to the rights of persons with mental disabilities and the CRPD Committee's interpretations should therefore be regarded as authoritative.

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[10] A certain amount of debate also exists as to whether it is actually a person's "will" or their "preferences" that signify their most authentic wishes!

[11] Ss 29(2)(d) and 57(20 Scotland Act 1998; Ss 2, 3 and 6 Human Rights Act 1998.

The principle that the CRPD rights can enhance and expand existing human rights may similarly be said to apply to other international treaties.

8. Conclusion

8.1 Addressing CRPD requirements

In terms of psychiatric care and treatment, the CRPD does provide a framework which can be applied to both civil and forensic settings. We appreciate that this does require addressing some difficult issues and concepts, including challenging some long-held beliefs and practices, and we do not have all the answers as yet. With your help, we have been having some interesting discussions about these. This is essential if we are serious about giving effect to CRPD rights.

8.2 What the CRPD requires us to do

The CRPD has been described as representing a 'paradigm shift' in human rights law. It requires a fundamental rethinking and refocusing of how we regard the human rights of persons with mental disorder. Serious consideration needs to be given to how policy, law and practice may be, often inadvertently, discriminating against and increasing the feelings of disempowerment and isolation of persons with mental disorder.

If CRPD compliance is to be achieved there must be careful consideration of:

(a) The basis upon which mental capacity and risk assessments are made and whether these can ever be made to meet CRPD requirements;

(b) The extent to which a person with mental disorder's authentic voice is genuinely heard and how this authentic voice is best ascertained;

(c) The support available to ensure that all the rights of persons with mental disorder are given equal effect; and

(d) Where polices, laws and practices are currently not working to achieve equal and non-discriminatory rights enjoyment what can be done to achieve this.

I am keen to encourage everyone to embrace the language of human rights to help to create shared understanding – empowering individuals and practitioners in a new way. I hope that it does not become a new Tower of Babel, although that is a risk as the language of human rights in the hands of lawyers can be extremely exclusionary, as well as prompting defensive reactions from practitioners. My concern is that, for some, where we are just now is just such a Tower, with individuals unable to understand or be assisted to understand important things done to them.