COMULSORY MENTAL HEALTH TREATMENT IN HONG KONG: WHICH WAY FORWARD?

Conference Report

Daisy Cheung

Introduction

On 25-26 August 2017, the Centre for Medical Ethics and Law (CMEL) of the University of Hong Kong, in collaboration with the Centre of Law, Medicine and Life Sciences of the University of Cambridge, Ethox Centre of the University of Oxford and the Hong Kong College of Psychiatrists, hosted a two-day conference on the topic of compulsory mental health treatment in Hong Kong and the way forward. Below is a brief summary of what was covered during this conference.

Day 1 – Theoretical Perspectives

Day 1 of the conference covered issues from a theoretical perspective. Professor John McMillan from the University of Otago began our conference with a presentation from a philosophical perspective, entitled ‘Key ethical concepts in the justification of compulsory detention and treatment’. In his presentation, he provided a framework of six ethical concepts: (i) maximise liberty, (ii) first of all, do no harm, (iii) nurture autonomy and recovery, (iv) prevent harm to self, (v) prevent harm to others and (vi) consistency and fairness. Using several case studies, Professor McMillan explored the content of each of these ethical concepts, and how they manifested in several pieces of mental health legislation. In doing so, he raised a number of key questions. For example, in the context of prevention of harm to self, he highlighted the need to strike an appropriate balance between the involuntariness of the individual’s behavior and the probability of improving the individual’s autonomy and wellbeing (factoring in the harms associated with coercion and compulsion). These key concepts that Professor McMillan identified gave us an ethical foundation upon which the rest of the discussions throughout the conference were based.

The next section of the conference was on the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Professor Peter Bartlett from the University of Nottingham gave us a presentation on ‘The UN CRPD and Mental Health Law’. In the presentation, Professor Bartlett introduced the philosophy behind the UNCRPD, as well as the key articles that protect the rights of individuals with mental impairments and what these articles mean for our mental health legislation. In particular, he focused on Article 12 (which has implications for our mental capacity law), Articles 17 and 25 (which have implications for our compulsory treatment laws) and Article 14 (which has Committee Guidance stating specifically that compulsory detention on the basis of actual or perceived impairments should be abolished). The key take-home message was that, because our current view of mental health law is mired in a vision where compulsion is the core, it is difficult to see how we can achieve the goals of the UNCRPD.
Professor Carole Petersen from the University of Hawaii followed with a presentation on the UNCRPD and mental health law in Hong Kong, entitled ‘Unfinished Business: Reforming Hong Kong’s Mental Health Ordinance to Comply with International Norms’. In the presentation, Professor Petersen discussed some of the background of Hong Kong’s Mental Health Ordinance, including reasons why Hong Kong has not yet reformed the Ordinance. She then discussed the articles in the UNCRPD that are particularly relevant to individuals with mental impairments, and what implications these articles may have for mental health legislation in Hong Kong. In particular, she provided examples from the Mental Health Ordinance that demonstrate the need for reform. For example, she pointed out that even the stated purpose of the Mental Health Ordinance contains objectionable terminology which violates the letter and spirit of the UNCRPD.

The last section of Day 1 was on specific issues arising from mental health legislation in Hong Kong and other jurisdictions. Professor John Dawson from the University of Otago began with a presentation entitled ‘Mental Health Acts in the Commonwealth: Criteria and Powers’. In the presentation, Professor Dawson explored the usual contents of mental health acts in the Commonwealth, including some of the common characteristics they share and issues of continuing controversy. For example, in relation to standards for compulsion, the common elements include: (i) severe ‘mental disorder’ or ‘mental illness’, (ii) danger to self or others, or gravely disabled, (iii) no less restrictive alternative, and sometimes (iv) lack of capacity to refuse psychiatric treatment. Continuing controversies in this area include whether ‘mental disorder’ or ‘mental illness’ should be defined more fully, and whether an incapacity requirement (i.e. (iv) above) should be included.

Ms Daisy Cheung from the University of Hong Kong then gave a presentation entitled ‘The Compulsory Psychiatric Regime in Hong Kong: Constitutional Perspectives’. In the presentation, Ms Cheung discussed several problematic areas with the civil compulsory admission and treatment regime in Hong Kong. Apart from the lack of safeguards in relation to treatment and duration of stay, she argued in particular that the provision for long-term detention in the Mental Health Ordinance was unconstitutional due to the restricted role of the District Judge in the process. In light of this, she put forward two types of solutions to rectify the situation, quick-fix solutions and an overhaul of the regime.

At the end of Day 1, the speakers engaged in a roundtable discussion with each other and members of the audience. Themes that emerged included (i) UNCRPD and rights-based principles and the competing concerns that may arise, and (ii) the importance of safeguards such as review mechanisms and independent advocacy services (including the importance of educating patients about their rights). The possibility of a voluntary Code of Practice or a Patients’ Bill of Rights was suggested, given that discussions with practitioners indicated that rights seemed to be better protected in practice than under the law.

Day 2 – Practical Perspectives

Day 2 of the conference covered issues from a practical perspective. Judge Mark Hinchliffe, Deputy Chamber President of the First-tier Tribunal ((Health Education and Social Care Chamber) began with the key-note speech, entitled ‘Compulsory Mental Health Treatment: When Should Judges Get Involved?’. In his speech, Judge Hinchliffe discussed the role of the First-Tier Tribunal in the compulsory detention and treatment process in the UK, covering various areas such as: (i) the key stages in the development of the current system of tribunals (e.g. the transition from a primarily inquisitorial to an adversarial model, which he argued
helped to clarify issues and allowed for a greater focus on due process safeguards), (ii) the differences between the UK and Hong Kong models, (iii) what the First-Tier Tribunal does when it considers a case, and (iv) how we might think to further refine judicial involvement in the future (e.g. the possible inclusion of an incapacity requirement in the compulsion criteria to achieve better parity with how physical health problems are managed).¹

The next section of the conference was on compulsory powers in the hospital setting. Dr Elizabeth Fistein of the University of Cambridge began with her presentation entitled ‘Compulsory Admission in England & Wales – Use of the Mental Health Act 1983 As Amended 2007’. In the presentation, Dr Fistein discussed her empirical research on how practitioners decide whether compulsory detention is appropriate, and what factors they thought were most relevant. In particular, she focused on the practical considerations practitioners took into account in the areas of (i) diagnosis, (ii) decision-making capacity, (iii) necessity of detention, (iv) risk and (v) availability of treatment, with qualitative data from the practitioners about previous cases they had dealt with. Dr Fistein then gave suggestions for practitioners as well as proposals for future legislation.

Dr Bonnie Siu of Castle Peak Hospital then gave a presentation entitled ‘Compulsory admission in Hong Kong: the balance between paternalism and patient liberty?’. In the presentation, Dr Siu gave a comprehensive overview of the various laws (both in the civil and criminal context) governing compulsory detention and treatment in Hong Kong, as well as statistics from Castle Peak Hospital regarding voluntary and compulsory admissions, diagnoses of active inpatients from compulsory admissions, and reasons for detention.

The following section of the conference explored the use of compulsory powers in the community setting. Dr Michael Dunn of the University of Oxford began with a presentation entitled ‘The use of Community Treatment Orders (CTOs) in England: Ethically justifiable?’ In the presentation, Dr Dunn introduced the Community Treatment Order and discussed the evidence regarding its efficacy, in particular in relation to its ability to reduce readmission rate. He then presented his empirical research on whether Community Treatment Orders were ethically justifiable, using qualitative data from patients, psychiatrists and family carers. Dr Dunn then provided some reflection on the justification for using Community Treatment Orders and whether attention might better be focused on promoting patient autonomy in other ways.

Dr Eric Cheung (formerly of Castle Peak Hospital) gave the last presentation of the conference, entitled ‘Compulsory psychiatric treatment in the community in Hong Kong’. In the presentation, Dr Cheung introduced the types of compulsory treatment in the community in Hong Kong. He focused on the conditional discharge order, providing historical context (e.g. the impetus behind the creation of this order in the 1980s) and a description of its key features. He then presented some local research and statistics regarding the order, and ended with recommendations for compulsory community treatment in Hong Kong going forward.

The end of the conference took the form of another roundtable discussion with the speakers of Day 2 and members of the audience. This roundtable discussion brought together the themes that came out of the presentations from both days and focused on suggestions and

¹ Judge Hinchliffe has kindly agreed to have his speech posted on the CMEL website, so for those who are interested, please have a look here. His speech was the subject of an article in The Telegraph published on 29 August 2017.
recommendations for reform in Hong Kong. In particular, a framework created by Dr Fistein and her collaborators was used to guide the discussion. The framework had five axes: (i) diagnosis, (ii) therapeutic aim, (iii) risk, (iv) capacity and (v) review process, and the discussion revolved around the questions of what level of each axis would be appropriate for the Hong Kong context and what the relevant concerns might be. The speakers and members of the audience also discussed next steps for reform, including reform of the conditional discharge order and the likelihood of support for the voluntary Code of Practice.