

20 January 2020

Mental Health Inquiry

Productivity Commission

GPO Box 1428

Canberra City ACT 2601

Via email : [mentalhealth@pc.gov.au](mailto:mentalhealth@pc.gov.au)

Dear Sir/ Madam

Re: Productivity Commission Inquiry into Mental Health.

A personal submission from Ms. Rosalyn Havard.

This submission contains two issues which are interrelated.

**Issue 1.**

Submission from Ms. Rosalyn Havard to suggest an amendment of the Mental Health Act 2009 (SA) to allow all carers, family and persons with a proper interest access to free legal advice and assistance in cases where they wish to request an internal review of decisions made by South Australian Civil and Administration Tribunal.

My comment on the current situation that applies when seeking a review of an Order made by SACAT and the lack of provision of procedural fairness for carers , family and other interested parties.

**Key Points**

- Mental illness is the only health condition which has an accompanying legal framework. The legislation is often confusing and daunting to interested parties and legal process often not understood by those that have the most emotional investment in the safety and well- being of their friend or relative.
- I believe that in many cases relatives, guardians, carers and friends of the person to whom an Order applies do not have an appropriate skill set through either a legal background, professional experience , the confidence or in some cases they lack the level of education to understand the process required to prepare and successfully undertake the request for a review process themselves. It is a confronting process even for those with many years experience in caring for their loved one. There are also those in this demographic for whom English is not their first language.
- Carers and family are often also exhausted or in shock from dealing with events that have led to their loved one being subject to Orders by SACAT. Some Orders have much more complexity than usually encountered.
- It should not be assumed that parties who may wish to request a review can either qualify for assistance through legal aid as the asset threshold is very low or alternatively afford to pay themselves to employ a legal representative to assist them with an appeal.

- Families and carers are in most cases not wealthy and very commonly have already contributed often significantly, financially by paying for food, rent, clothing, fines and other costs for the consumer. The financial burden that family and friends already carry in picking up the pieces is often not identified or openly discussed. To expect them to pay for legal costs is unfair and unrealistic. I do not believe that carers and family are in many circumstances, feel that they are able to apply for a review of decisions even if they wish to do so due to the cost of gaining professional legal assistance.
- SACAT also require a lodgement fee of \$545.00 when submitting a request for a review. Whilst information states that applicants who don't think that they can afford to pay this fee may apply for the fee to be waived, the decision still rests with the SACAT Registrar.
- The current situation allows those persons the right to appeal a decision that they are unhappy with however a right that no one can ever afford to use can hardly be considered a right. Such circumstances do not afford procedural fairness to carers friends guardians and relatives.
- I am not suggesting that carers family and people with an interest in the wellbeing of a person subject to a SACAT Order be granted greater advantages than the subject person, rather I ask for equal access to free legal assistance . This right would also have the same relevant restrictions to guard against frivolous or vexatious applications. It is procedural fairness that I request. I do not believe that the cost to the State will be so great that it would be considered burdensome. I suggest that in many circumstances by assisting interested parties with the application process it would allow reconsideration by SACAT of relevant information and may result in preventing adverse events occurring.

**Additional information in suggesting amendment to Mental Health Act 2009 (SA) / Internal reviews of SACAT decisions.**

Qualifying for assistance through Legal Aid in South Australia.

It is not my intention here to fully set out the criteria for eligibility of carers and persons with an interest in the wellbeing of a loved one to qualify for assistance from Legal Aid in South Australia to assist with applications for internal reviews to decisions made by SACAT.

However a precis of some of the issues that will be considered in applications to obtain Legal Aid assistance are: means Test, assets/ property, If applicant is working ,ability to pay, and prospect of success

As things stand currently those individuals who have invested the most interest through blood relationship or emotional ties to the person subject to an Order have no access to free legal assistance when it comes to preparation and submission of a request for internal review to decisions made by SACAT.

There is a financial and emotional burden of care which is significant to many carers, families and persons with an interest in the wellbeing of a person subject to an Order. This burden is not often spoken of due to shame that their loved ones have got into difficult circumstances the nature of which is many and varied and often embarrassing to their families who try to silently pick up the pieces. The stigma of mental illness attached to issues that families try to quietly resolve is very much a factor in the burden that families carry financially.

The need to pick up the pieces and bail their loved one out of trouble is all too common and unfortunately very often repetitive.

The types of situations that families are silently solving are unpaid rents and or threats of homelessness, fines, lack of food and clothing loan repayments, various fines, cost of travel interstate to assist the consumer when they have travel away without adequate funds or have been hospitalised ,threats of legal action to loved one over unpaid bills are just a few examples.

These payments are often met time and time again by families and carers irrespective of whether their caring role is direct or indirect.

The law needs to ensure that it protects everyone against basic human injustices it especially needs to protect the less powerful in society.

## **Issue 2.**

### **Submission suggesting an amendment of Mental Health Act 2009 (SA) to provide procedural fairness to family and carers and greater transparency in circumstances where clinicians decide information regarding the consumer is to be withheld.**

I would like to raise the issue of family and carers in South Australia being advised by clinicians that they are not to be involved or provided with information related to their loved one who is receiving treatment under the Mental Health Act 2009 (SA)

#### **What is wrong with the current Act in South Australia?**

Currently clinicians in South Australia can make decisions that family, carers or persons with a proper interest in the wellbeing of a person subject to the provisions of the SA Mental Health Act 2009, are not to be provided with information related to their loved one. Furthermore there is no legal requirement for clinicians to provide carers and others with a genuine interest in the consumer's wellbeing, with any reason for their decision or to lodge supporting documents at the Tribunal (SACAT) recording the rationale for their decision.

There is certainly no legal requirement for clinicians to advise carers and others with a bona fide interest that they have a right to seek a review of such a decision at the Tribunal.

#### **Suggested remedy:**

I would like to propose that the SA Mental Health Act 2009 be amended to be in line with existing Northern Territory legislation on this matter as set out in the Northern Territory Mental Health and Related Services Act 1998, Part 12 Sections 88-90 pages 84-84.

#### **References used to support this submission**

I refer now to the Northern Territory Mental Health and Related Services Act 1998

Part 12 Rights of patients and carers:

Section 88.

#### **Information concerning medication or treatment**

- (1) This section applies if:
  - (a) a person is admitted to an approved treatment facility; or
  - (b) a community management order is made for a person.

- (2) An authorised psychiatric practitioner must ensure information concerning the treatment (including medication) administered to the person is given to the following:
  - (a) the person;
  - (b) the person's adult guardian;
  - (c) subject to subsection (3):
    - (i) the person's representative; and
    - (ii) the person's primary carer.
- (3) The practitioner may decide not to allow the giving of the information to the person's representative or primary carer if the practitioner is of the opinion that giving the information is not in the person's best interests.
- (4) If the practitioner decides not to allow the giving of the information to the representative or primary carer because of subsection (3), the practitioner must:
  - (a) give to the Tribunal a written report of the decision and the reason for it in the approved form; and
  - (b) inform the representative or primary carer of his or her right to apply to the Tribunal for a review of the decision; and
  - (c) make a record of the decision in accordance with approved procedures.
- (5) The information:
  - (a) may be given by the authorised psychiatric practitioner, a medical practitioner or the senior nurse on duty at the facility and
  - (b) must include details of the type, dosage, expected benefits and side effects of the treatment.
- (6) A person who gives information under this section must make a record of the giving of the information in accordance with approved procedures.

**89            Discharge plan**

- (1) The person-in-charge of an approved treatment facility must ensure a discharge plan is prepared by an authorised psychiatric practitioner before the person is discharged from the facility.
- (2) The discharge plan:
  - (a) must contain arrangements for the accommodation, psychosocial well-being and ongoing psychiatric treatment of the person; and
  - (b) must be capable of being implemented.
- (3) The authorised psychiatric practitioner must:
  - (a) ensure the persons specified in subsection (4) are consulted in relation to the arrangements mentioned in subsection (2)(a) when preparing the plan; and

- (b) after the plan is prepared - inform the persons specified in subsection (4) of the details of the plan.
- (4) For subsection (3), the following are specified:
  - (a) the person;
  - (b) the person's adult guardian
  - (c) subject to subsection (5):
    - (i) the person's representative; and
    - (ii) the person's primary carer.
- (5) The practitioner may decide not to allow consultation with, or the giving of information to, the person's representative or primary carer if the practitioner decides not to allow consultation with, or the giving of information to, the representative or primary carer because of subsection (5), the practitioner must:
  - (a) give to the Tribunal a written report of the decision and the reason for it in the approved form; and
  - (b) inform the representative or primary carer of his or her right to apply to the Tribunal for a review of the decision; and
  - (c) make a record of the decision in accordance with approved procedures.
- (6) practitioner is of the opinion that the consultation or giving of the information is not in the person's best interests.
- (7) The consultation may be conducted by any of the following:
  - (a) the authorised psychiatric practitioner;
  - (b) a medical practitioner;
  - (c) the senior nurse on duty at the facility;
  - (d) the person's primary nurse;
  - (d) the person's psychiatric case manager;
  - (e) a staff member of the facility responsible for discharge planning.
- (8) The authorised psychiatric practitioner must make a record of information given by the practitioner under this section in accordance with approved procedures.
- (9) A person who conducts a consultation under this section must make a record of the consultation in accordance with approved procedures.

Section 90.

**Information on discharge**

- (10) An authorised psychiatric practitioner who refuses to admit a person as a voluntary patient or refuses to continue the person's admission:

- (a) must provide the person with the reasons for the decision; and
- (b) where the person consents, must provide the person's primary carer with the reasons for the decision; and
- (c) must ensure that the person is provided with appropriate information relating to follow-up care, community management services, community support services and advocacy services that are available

**Key points:**

- Lack of procedural fairness afforded to family, carers and person with an interest in the consumer's wellbeing is not in accordance with the principals of Common Law.
- There is currently no requirement in South Australia for clinicians to provide a reason for their decision to carers and other parties with a genuine interest in the consumer's wellbeing.
- No requirement in South Australia for clinicians to lodge any supporting documents at the Tribunal (SACAT) providing an explanation for their decision that family are not to be given relevant information related to the consumer.
- Carers and other persons with a bona fide interest are not currently advised that they have a Common Law right to apply for a review of such a decision at the Tribunal.
- The right to review these decisions is not currently set out as part of SA Mental Health legislation.

**Comments:**

In situations where a clinician is the sole decision maker without any requirement to provide documented rationale to an external agency, the process is open to incorrect or unjust decisions being made or abuse of power especially in circumstances where family disagree with the decision.

I believe that there must be changes to the current Mental Health Act 2009 (SA) to provide a right for family and carers to seek a review of any such decision at the Tribunal (SACAT) thus providing transparency to the process. In addition I suggest family, carers and persons with a genuine interest in a consumer's wellbeing be provided with access to free legal assistance to assist them with applying for a review of the decision at the Tribunal .

A right set out in legislation cannot be considered a genuine right if the majority of people to whom it applies could never afford to use it as it requires them to employ their own lawyer at their cost.

**REFERENCES:**

<https://www.legislation.sa.gov.au/LZ/C/A/MENTAL%20HEALTH%20ACT%202009/CURRENT/2009.28.AUTH.PDF>

<https://legislation.nt.gov.au/Legislation/MENTAL-HEALTH-AND-RELATED-SERVICES-ACT-1998>