Advice to the Office of the Chief Psychiatrist - Consumer consultation in the Access and Equity Project

18th September 2023

Access and Equity Project

The Access and Equity Project aim is to identify ways of "*Increasing legal and non-legal advocacy supports for persons appearing before the Mental Health Review Tribunal and appeals before the Mental Health Court.*"

This advice to the Office of the Chief Psychiatrist is limited to the types of questions and information required for consumer consultation in relation to the Access and Equity Project. This document should not be understood to reflect and opinion or preference from the MHLEPQ relating to the provision of access and equity for consumers in the mental health system.

Background

The Statutory Clinical Support and Integration of the Legislation Unit of the Office of the Chief Psychiatrist have sought advice from the peak on phase two of their Access and Equity project consultation, to involve people with lived experience of these processes.

Collaboration between IPRA and consumers of these services will be undertaken to gather data on the needs of consumers of these services, based on lived experience expertise. MH organisations will also be consulted on their understanding of consumer and support person needs. In addition, the peak has been asked to:

- Provide feedback on the first phase consultation document (aimed toward legal and non-legal advocacy services, Justice, the Mental Health Review Tribunal and stakeholders internal to the OCP); and
- Provide advice on consultation questions suitable for the phase two consultation process, exploring consumer needs, existing supports that could be leveraged for increased impact, and reform suggestions for a more fit-for-purpose advocacy system.

The advice sought from the MHLEPQ relates to the consultation material relating to the resources available to persons receiving involuntary care under the Mental Health Act 2016 (the Act).

Key Insights

Currently, some people who are subject to a forensic treatment order will receive legal representation in Mental Health Tribunal Hearing if the Attorney General is represented, if it

is a 'fitness for trial' hearing, relating to involuntary ECG treatment or if it is relating to a minor.

Eighty percent (80%) of patients before the Mental Health Tribunal will not be legally represented. Similarly, most patients who appeal a tribunal ruling to the Mental Health Court will not be legally represented either.

Section 5(a) of the Queensland Mental Health Act 2026 (the Act) provides that a person who has or may have a mental illness have the same human rights as all persons and that this must be taken into account in applying the act.

Section 11 of the act defines an involuntary patient as a person subject to an examination authority, a recommendation for assessment, a treatment authority, a forensic order, a treatment support order or a judicial order. A person can also be an involuntary patient while being examined if there is a risk the person will leave before the examination is concluded.

Section 14 provides that a person has capacity to consent to treatment if the person is capable of understanding that the person has an illness, the nature and purpose of the treatment, the benefit and risk of the treatment and alternatives and the consequences of not receiving treatment and if the person is capable of making and communicating such decision. Capacity to consent is not dependent on agreeing with the proposed treatment.

The Chief Psychiatrist Policy on "*Treatment criteria, assessment of capacity, less restrictive way and advance health directives"* provides a Treatment Authority can only be issued if the Authorising Doctor is satisfied that there is "*no less restrictive way for the person to receive treatment and care for the mental illness*" and where the doctor is satisfied that the person does not have the capacity to consent or not to consent to be treated. In addition, the Authorising Doctor must be satisfied that the person would likely harm self or others or that the person will seriously deteriorate if not treated. The policy is explicit that it is a high bar that must be fully met before involuntary treatment can be undertaken.

The policy requires an Authorising Doctor to be satisfied that the person also do not have capacity to consent or not consent through a process of supported decision-making before issuing a Treatment Authority.

Under the policy an Authorising doctor must undertake regular assessments at least every 3 months to ensure the person still lacks capacity to consent or not consent to treatment and to ensure less restrictive ways of treatment are utilised where possible.

A person or someone on their behalf may request a review of Treatment Authorities by the Mental Health Tribunal. According to Queensland Health's Guide to Patient Rights "*this ensure independent oversight to decisions made by Authorised Doctors, to make or continue Treatment Authorities given that the individual concerned is unable to consent to treatment*".

The role of the Mental Health Tribunal is not only to decide if a Treatment Authority should be revoked. The tribunal can also decide whether a less restrictive way is possible and

whether the patient should have a greater treatment in the community.

It is important to note that capacity is more of a sliding scale than a binary yes/no situation where an overall assessment of the person is made. Hence the Mental Health Tribunal will consider if a person's capacity is impeded to such an extent that involuntary treatment or detainment is justified. Currently most requests for review of a treatment order offers no support for the consumer in preparing for and participating in the tribunal process despite the person being assessed as having at least reduced capacity.

A Human Rights Lens

Section 15 of the Human Rights Act 2019 (Qld) provide equality before the law and specifically provides for effective protection against discrimination. Section 13 provides that while human rights may be subject to limitations under law, such limitations must demonstrably be justified in a free and democratic society based on human dignity, equality, and freedom. Limitations on human rights can only be applied to the extend where any less restrictive and reasonably available ways to achieve the purpose is not available.

A specific human right is the Freedom of Movement in section 19 "*Every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it, and has the freedom to chose where to live".* Section 29 (7) provides that "*a person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration of order regarding the lawfulness of the person's detention".*

The "*Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*" to which Australia is a party define detention or placement of a person in a custodial setting which that person is not permitted to leave at will by order of any authority as a deprivation of liberty. This includes detention under the mental health act.

Australia is also a signatory to the *United Nations Convention on the Rights of Persons with Disabilities* providing the core principles:

1. Every person can express their will and preference.
2. A person with disability as the right to make decisions.
3. A person with disability can expect to have access to appropriate support to make decisions.

Advocacy Support

Patients in the Queensland public health sector mental health services have access to an Independent Patient Rights Advisor (IPRA) who can help the consumer, carers and support persons understand their rights. They can also help in the communication with health practitioners. The IPRA can also provide information on complaints procedures applicable to a particular mental health service.

In relation to access to the Mental Health Review Tribunal the IPRA's roles are limited to advising a consumer to their rights and assist the consumer to engage a representative but

have not direct role in advocating for the consumer at the tribunal and they have no specific role in relation to appeals to the Mental Health Court.

IPRAs are part of a Statewide network and have access to a Coordinator reporting to the Chief Psychiatrist. While each IPRA are not engaged by the specific MH unit they work in, they are engaged through the local Hospital and Health Service (HHS). It should be noted that the model also allows for IPRAs to be engaged by a non-government organisation through the HHS.

We note from our initial briefing with the OCP that one of the models identified for addressing the concerns raised above is the Victorian Independent Mental Health Advocacy Service (IMHA).

The IMHA exist under the Victorian Mental Health and Wellbeing Act 2022 to provide non-legal support to consumers to understand and exercise their rights. This version of the IMHA is informed by an evaluation of the previous IMHA conducted by the RMIT in 2019. The evaluation found that:

- The IMHA must be available on an “opt-out” system rather than an “opt-in” system
- The IMHA must be adequately resourced
- The IMHA must also have an educative role around advocacy
- More effective oversight must be provided to ensure mental health services comply with legislation, recovery-orientated, least restrictive practices with a focus on supportive decision making.

The IMHA has no statutory power to ensure access to people in services. This means the IMHA relies on a relational approach for access. While a collaborative approach is highly desirable, the approach is also constructed on top of existing power relationships and, therefore, may not be able to effectively challenge these relationships where they are not beneficial to the consumer.

An important feature of the IMHA is the focus on advocating for the consumers preference without judgement and regardless of whether such preference aligns with the opinions of advocates, clinicians, carers, or family. This focus is essential in meaningful supported decision making. This approach is deliberately different to the dominant “best-interest” model often adopted in clinical practice. Supported decision making is consistent with requirements under the *Convention on the Rights of Persons with Disabilities.*

The Victorian model differs from the Qld IPRA’s roles by being coordinated as one service working across the health system which in part may help assure the consumer of the service’s independence. Many of the IMHA functions overlap with those of the IPRA except the IMHA include functions such as assisting a consumer getting a second psychiatric opinion, seek legal advice, to apply to the Mental Health Tribunal and to make a complaint. It is important to note that neither the IPRAs nor the IMHA will provide a consumer with legal advice or support.

Recommendations

We recommend that the consultation with consumers is framed from a human rights perspective:

- What would the reasonable support for a person who have been subjected to a depravation of liberty due to an assessed and assumed lack of capacity be to respect their human rights?
- Is it reasonable to expect a person who have been deemed by an Authorising Doctor to lack capacity to consent or not consent to treatment to be able to prepare a case for a tribunal without professional support?
- These rights are two-fold,
    - What is the minimum support a person subject to a treatment order should expect to have access to for appropriate support to make decisions?
    - What advocacy and/or legal support should a person who has been deprived of liberty need in order to have equitable access to the human rights afforded to the person under the Human Rights Act (Qld) 2019.
- Is it important for a Consumer to have access to legal representation where required to prepared and attend Mental Health Tribunal and Mental Health Court with them? Could a non-legal support service meet this need?
- Would a system of specialised peer workers and/or legal aid made available to any person detained under Treatment Authorities in an Authorised Mental Health Service be adequate to assure they have realistic access to external appeal as provided in the Human Rights Act?
- Should Consumer advocacy relating to Mental Health Tribunal and Mental Health Court be integrated with or separate from the current IPRAs?
- Should Independent Consumer Advocacy have a statutory power to engage and advocate on behalf of consumers?
- Will identified lived experience roles be important in effective independent consumer advocacy?
- Should an Independent Consumer Advocacy function be provided by Queensland Health directly – for example through the Office of the Chief Psychiatrist or should it be provided externally by a non-government organisation?
- Should an Independent Consumer Advocacy function be targeted to Trubunal and Court access only, or should it also include assistance in making complaints and seeking second opinions?