



Précis Paper

The Least Restrictive Alternative under the Mental Health Act

Introduction

In this edition of BenchTV, Yega Muthu (Solicitor, YM Lawyers, Sydney) and Rohan Squirchuk (Principal Lawyer, Rohan Squirchuk and Associates, Sydney) engage in a detailed and insightful discussion on the topic of the least restrictive alternative under the Mental Health Act 2007 (NSW), examined in the context of the role and functions of the Mental Health Review Tribunal.

Key areas of presenters' discussion

- 1.** Role and functions of the Mental Health Review Tribunal
- 2.** Civil aspects of the Mental Health Review Tribunal
- 3.** The least restrictive alternative test
- 4.** The safe discharge process
- 5.** Community treatment orders
- 6.** The problem of the 'revolving door'

Role and functions of the Mental Health Review Tribunal

It is explained that the role of the Tribunal is to ensure that people with a mental health condition are dealt with by a review process under its jurisdiction. .The

Tribunal has the power to keep a person in hospital or discharge a person from hospital and the test used is to ensure that whatever form of care is given to the patient is seen in the least restrictive sense. It is noted that the Tribunal has quasi-judicial powers. It ensures the rules of natural justice are observed, and the importance of ensuring that the voice of the patient is heard. It is explained that the Tribunal operates under the *Mental Health Act 2007* (NSW) and that there are two divisions: 1. The forensic division, which deals with matters under the criminal law, and 2. The civil division, which deals with matters that are mental health issues. It is explained that people brought before the Tribunal are initially heard by mental health inquiry before a member, and, if necessary, heard by a full panel comprised of a presiding legal member, psychiatrist and an allied professional such as a psychologist, mental health nurse or social worker. Hearings generally take about 30 minutes but if there is an interpreter an additional 15 minutes is allocated to the hearing. It is noted that the principal role of the Tribunal is that of review. A patient is presented to the Tribunal with an application from the treating team at the hospital. The application will usually be for involuntary care, or alternatively for compulsory care in the community under a community treatment order.

Civil aspects of the Mental Health Review Tribunal and the least restrictive alternative test.

It is explained that the Tribunal's role is to ensure that treatment meets therapeutic guidelines and that the person is treated in the appropriate way for their symptoms and illness. The test that is adopted as to whether someone should remain in hospital or not is the least restrictive alternative consistent with safe and effective care. There are multiple options before the Tribunal when considering an application for involuntary care. The Tribunal can also decide to discharge the patient. In respect of involuntary patient orders. As soon as the person in care is well enough the hospital has a legal obligation to discharge the person. It is noted that there is also the capacity to adjourn a matter where the patient isn't well enough to attend inquiry or where the treatment plan hasn't been put together. An adjournment would generally be for a maximum of two weeks. With an involuntary patient order the person is detained within the hospital under an order which requires them to have treatment by the treating team. One of the challenges is a

move towards involving the patient much more in the kind of the treatment they receive.

Options for patients to have control and input in context of the involuntary patient criteria

It is explained that for a person to be found mentally ill the requirements of s4 of the Mental Health Act must be met, and that the focus is on symptoms, not labels. It is explained that one of the things that consumers of mental health services object to, is that because their status in hospital is involuntary, once they feel better they want to get out. When the matter goes to the Tribunal it will need to add weight to the person's information, balanced against the treating team's recommendation. It is further noted that one problem arises from the fact that because consumers of mental health services can lack insight into their illness they are unable to make appropriate judgments for themselves. Thus the Tribunal must step in and make decisions concerning safe and effective treatment.

The safe discharge process and interpreting the least restrictive alternative test

When a person is discharged they will be discharged with a treatment plan. One of the tests used by the Tribunal in relation to safe discharge is the least restrictive alternative consistent with safe and effective care. The case of *S v South Eastern Sydney & Illawarra Area Health Service and anor* [2010] NSWSC 178 is mentioned. In this case the consumer wasn't opposed to taking antipsychotic medication but was against taking depot medication. The consumer wished to take oral medication. Justice Brereton found in favour of the consumer, that the least restrictive option would be to take oral medication as opposed to intramuscular medication, which may be viewed as invasive. It is noted that the issue of whether to use intramuscular as opposed to oral medication is a frequent dispute between the team and community, and the consumer. Frequently patients will have discussed changing from intramuscular to oral medication and in some treatment teams they are very collaborative. It There is an approach of working with the patient to try a transition from intramuscular to oral medication.

Community treatment orders

It is explained that the goal of a community treatment order is to provide care in the community so that the person doesn't need to go back to hospital. Within the community treatment order framework there is a detailed process relating to non-compliance or assumed non-compliance. There will be an oral warning, followed by a written warning, then another written warning prior to being brought back in for assessment. The case of *Bridges* [2016] NSWMHRT 1 is discussed, which addressed the issue of the least restrictive alternative consistent with effective care. The case concerned an application for revocation of a community treatment order. The Tribunal determined that the reasons for revoking the community treatment order were not sufficient to remove it. The Tribunal found that the community treatment order is the least restrictive form of safe and effective care. It is noted that trained treatment teams work hard with individuals to develop rapport and relationships which means that a further community treatment order isn't always a part of the way they keep the person well. It is also noted that a community treatment order is significantly different from being detained in a mental hospital under an involuntary patient order. It allows freedom and life choices. There is a balance between an individual's right to operate on a day to day basis and whether to take medication, against not only the individual's own rights but the rights of others. It is noted that for some patients, being without medication poses significant risks, occasionally to themselves, and also to others.

The use of illicit substances

The use of illicit substances is discussed. It is explained that the use of such drugs, is not to be taken into account by the Tribunal. What the Tribunal must look at is the impact of the behaviour on the person's mental state. An issue arising from the use of illicit drugs such as ice is that they make antipsychotics and psychotropic medication less effective.

Discharge into the care of a designated person

It is explained that the Tribunal has the power to discharge the person on the evidence, or order a deferred discharge up to 14 days. The Tribunal can also discharge the person into the care of a designated carer. It is noted that discharge into the care of a designated carer is probably the most underutilised area of the Mental Health Act 2007 (NSW). It is explained that one of the challenges is that consumers may be pressing family members to take them home even when family members aren't feeling that comfortable with it. It is noted that there is a need to weigh an application against the individual relationship of the patient with the designated carer.

The 'revolving door' problem

In relation to addressing the revolving door problem, which can occur where consumers do not comply with a community treatment order and are returned to a mental health facility, it is explained that there have been very significant changes to the *Mental Health Act 2007* (NSW), for example when a community treatment order has lapsed or expired, and the patient ceases coming for treatment or taking medication, it is not necessary for the patient to be readmitted to the hospital for an application to be made to the Tribunal for a community treatment order. In addition, it is noted that if a community treatment is not going to be renewed, then the treating team in the community are obliged to notify the Mental Health Review Tribunal as to why they are not renewing the order. The changes have been made on the basis that if we can keep the person in the community and keep them well enough not to be a risk to themselves or others, then that's the appropriate place for them to be. It is noted that there is a need to look at the money being spent on mental health and think about to get the best value for money in terms of the care and treatment people are getting. It is further noted that *Mental Health Act 2007* (NSW) in 2015 in relation to recovery, there have been significant changes in terms of community care and the involvement of clients in the development of plans.

Bibliography

Mental Health Act 2007 (NSW)

S v South Eastern Sydney & Illawarra Area Health Service and anor [2010] NSWSC 178

Bridges [2016] NSW MHRT 1

Presenters' Biographies:

Yega Muthu trained as a lawyer in England, studying law in Manchester and Staffordshire and training as a barrister in London before spending a year in Malaysia training as a legal advocate. He also obtained a PhD in law, focusing on psychiatry law from Macquarie University in 2004 before being admitted to practice as a solicitor in 2006. Yega was a legal member of the Mental Health Review Tribunal from 2007 to 2012 and has vast experience in dealing with mental health issues. Yega also has substantial experience in the areas of health, human rights, succession, personal injury and criminal law. Aside from litigating, Yega teaches Mental Health Law at Western Sydney University and is widely published in a variety of fields including mental health law and torts.

Rohan Squirchuk has over 25 years of experience in the fields of diversity, equal opportunity and affirmative action across the manufacturing, mining, retail, service and public sectors. She has expertise in workplace harassment and bullying complaints and has served as an expert witness at the NSW Equal Opportunity Tribunal and the Industrial Commission in sexual harassment and discrimination cases. Rohan was the Managing Director of the Council for Equal Opportunity in Employment Limited, a leading specialist employer organization, where she focused on promoting productivity and equitable employment practices in workplaces. She also holds a part-time statutory appointment as a legal member of the NSW Mental Health Review Tribunal and has also held positions in the field

of Equal Employment Opportunity, initially at the NSW Water Resources Commission as EEO coordinator and later at the University of NSW as Director EEO.