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Advance statements in the new Victorian Mental Health Act

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Abstract

Objective: There is growing recognition of the utility of advance statements in the area of mental health. The definition of advance statements and procedure for making and varying advance statements under the Victorian legislation is described. The implications for psychiatrists, mental health tribunals and the process should the psychiatrist vary their decision from that made in the advance statement are discussed.

Conclusion: Advance statements being enshrined in legislation is another step in the direction of recovery-oriented service provision for persons with mental illness. The challenge for services will be to develop systems and processes that promote increased uptake of these instruments to empower persons with mental illness to participate in their treatment.

Keywords: advance statements, recovery-oriented service delivery, involuntary consumers

An advance directive specifies a person's treatment preferences, should they lose decision-making capacity in the future. From their initial use in guiding treatment decisions in end of life care setting, they are now being increasingly considered in other areas of health care. Psychiatric Advance Directives (PADs) are legal documents that allow persons with mental illness to indicate preferences for future treatment should they lose decision-making capacity during an episode of mental illness.[1]

Mental illness and human rights

The push for recognition of rights of persons with disabilities comes from international conventions. The *Victorian Charter of Human Rights and Responsibilities Act 2006* charter enumerates a series of human rights that have been developed from the *International Covenant on Civil and Political Rights* (adopted 16 December 1966). It requires all statutory provisions whenever enacted to be interpreted so far as possible in a way that is compatible with human rights. The *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006) places further emphasis on the protection of human rights of people with disabilities, such as the importance of autonomy, independence, self-determination, social inclusion, and supported decision making.

Supported decision making sits somewhere in between autonomous decision making on one end and substitute decision making on the other end. Traditionally, legislation regulating the detention and treatment of people with mental illness in Australia has been underpinned by a substitute decision-making paradigm keeping in mind the best interest principle. The newly enacted Victorian *Mental Health Act 2014* (Act) is the first mental health legislation in Australia that clearly marks a shift towards a supported decision-making paradigm. Within this paradigm it is envisaged that people with mental illness are assisted to understand, consider, and communicate their choices to treatment providers.

The Act promotes recovery-oriented practices and supported decision making through a series of measures. This includes the presumption that all people with mental illness have the capacity to make decisions, including people subject to compulsory treatment, provision for advance statements, introduction of nominated persons, and access to second opinions and the mental health commissioner.

Advance statements

PADs have been in use in several jurisdictions within the United States and in countries such as the United Kingdom, Scotland, and New Zealand.[2] The Victorian Act is the first mental health legislation in Australia that specifically legislates PADs. They are referred to as *advance statements*.

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For most people, experience of mental illness is episodic in nature with periods of impaired capacity alternating with periods of intact capacity. Following resolution or remission of symptoms and attainment of capacity, most people are able to reflect and make informed decisions about their preferences should they relapse into another episode of their mental illness. Advance statements aim to capture this rationale reflection into a document that allows maximum participation in treatment when it is desperately needed.

The shift towards supported decision making has several clinical benefits. Prior research suggests that, in general, choice and control over important life decisions, such as treatment and housing, are critical to physical and psychological well-being.[3] The perception in person that authorities are concerned about their welfare, want to treat them fairly, and are willing to allow them to participate in the process of decision making leads to a greater degree of trust between the person and the service provider.[4] Participation in the decision-making process enhanced feelings of independence in patients. This feeling was attributed to the patient perception that they had increased knowledge of options should they become unwell, leading to an improvement in motivation to adhere to a treatment plan. Participation in the decision-making process significantly decreases patients perception that they were coerced in the admission process, can be significantly empowering to the person receiving care, improve patient participation[5] in the treatment process, and have a significant positive impact on treatment outcomes.[6] At the service level such advance agreements lead to clarification of roles and responsibilities and improved integration of care for patients.[7]

Advance statements under the Victorian Act

Advance statement is defined in section 19 of the Act as a "document that sets out a person's preferences in relation to treatment in the event that the person becomes a patient." A person becomes a *patient* when they are subject to an order that allows compulsory assessment or treatment (s3).

The advance statement must be in writing and signed and dated by the person making it, witnessed by an authorized witness (s20(1)). The authorized witness is required to sign stating that in their opinion the person making the advance statement understands the nature of the advance statement and the consequences of making the statement and that they observed the person sign the advance statement (s20(1)(d). An authorized witness can be a medical practitioner, mental health practitioner, or a person who may witness the signing of a statutory declaration. There is no formal requirement for an assessment of capacity to make decisions about their treatment.

Once made the advance statement cannot be amended (s22). The advance statement does not expire unless a new advance statement is made. The person can change their preferences made on an advance statement by recording a new advance statement. This revokes the previously made advance statement (s21).

The person making the advance statement can record the details of their treating team, carers, and other support people important in their recovery journey. The treatment preferences in the order of importance are then to be recorded. The treatment preferences may include specific information about the treatment, including previous effective and ineffective treatments and the person's views and preferences about specific treatments, such as Electro-convulsive Therapy (ECT). The person is encouraged to record the reasons for these preferences to assist the treating team to better understand their preferences. Treatment does not include alternative therapies or non-treatment-related preferences. There is no legal obligation on the authorized psychiatrist to effect these preferences.

Once made, the person can provide this statement to their local mental health service to be placed in their clinical file. A note is then placed on the state-wide Client Management Interface (CMI) database to indicate the presence of an advance statement. This database is accessible to all area mental health services.

Implications in practice

The authorized psychiatrist should have regard to the advance statement when deciding to place a person on a temporary treatment order that leads to commencement of treatment as a compulsory patient (s46). Similarly, consideration needs to be given towards advance statement when there is variation in the treatment order to community or inpatient treatment order (s48), granting leave of absence (s64), or transferring the person to another designated mental health service to provide assessment or treatment (s71).

The Mental Health Tribunal (MHT) is an independent statutory tribunal established under the Act (s152). When determining whether the criteria for compulsory mental health treatment as set out in the Act apply to a patient, the MHT must consider the views and preferences of the patient expressed in their advance statement to the extent that is reasonable in the circumstances (s55,93,94).

The authorized psychiatrist can make treatment decisions that are not in accordance with the advance statement if it is not clinically appropriate or if the preferred treatment is not ordinarily provided by the designated mental health service (s73(1)). The authorized psychiatrist must inform the patient of the decision and include reasons for the decision. The patient is also to be advised that they have a right to request written reasons for the decision. On receipt of such a request the authorized psychiatrist must provide written reasons for their decision within 10 business days (s73(2),(3)).

Conclusion

The framework for making and implementing an advance statement adopted in this Act aims to pragmatically strike a balance between two competing priorities. On one hand, the Act protects the rights of the persons with mental illness whilst at the same time allowing flexibility within acceptable clinical reasoning on the part of the psychiatrist to manage an emergent clinical situation during an episode of mental illness. The Act protects the rights of the patient in such a situation by allowing them to ask for written reasons from the authorized psychiatrist for non-adherence to their wishes. It is not clear what remedies are available to the patient following the receipt of these written reasons. Certainly one avenue is to request a review of their status as a compulsory patient by the MHT.

The commonly encountered barriers to the implementation of advance statements in other jurisdictions include lack of ready access to the documents in a crisis, cross-system collaboration, resource constraints, and organizational culture, amongst others.[8] The indication of their presence on the CMI database should alert treating teams to the presence of advance statements.[9] Cultural changes through staff education that promotes the recognition of human rights of patients and that further steer away from previous institution-based practices will be important to allow promotion of these legislative changes in clinical practice. Establishment of working parties within each service with prominent consumer and carer representation should also facilitate an increase in uptake of these documents.[10] Staff motivation to assisting all consumers of the service in drafting these documents is also likely to improve once they realize the value of these documents as a tool to improve therapeutic engagement and dialogue on matters pertaining to medications and treatment.[11] A consistent theme from previous studies is a perception amongst persons with mental illness that PADs are tools for empowerment and self-determination.[12] Enshrinement of advance statements in legislation marks another step forward in embedding recovery-oriented care for persons with mental illness into everyday clinical practice.

Disclosure

The author reports no conflict of interest. The author alone is responsible for the content and writing of the paper.

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