

Without informed consent, tread warily to protect the person's legal rights

The number of people with dementia in New Zealand has risen by 30% in six years and, by 2050, it is projected it will reach at least 150,000. This article considers the situation of people detained in secure aged care facilities who do not have a welfare guardian or activated enduring power of attorney (EPOA). Such people may express a strong desire to go home. This article also considers the basis on which such people may be detained and in particular whether Right 7(4) of the Code of Health and Disability Services Consumers' Rights (the Code) can be the legal basis for transferring a person to a secure unit in a residential care facility and the ongoing treatment/detention of such a resident.

Right 7(4)

The fundamental premise of the Code is that services cannot be provided without a consumer's informed consent. However, Right 7(4) provides an exception to that general requirement and permits "best interests" treatment to be provided so long as the treatment is consistent with the informed choice the consumer would make if competent or, if the consumer's views are not known, the provider "takes into account" the views of suitable persons who are interested in the welfare of the consumer and available to advise the provider. In cases of urgency, none of the specified people may be available and in that case a provider may provide urgently required treatment in the consumer's best interests.

Refusal

In a situation where a person is being treated in hospital and the clinician considers that secure care is in the person's best interests but the individual refuses to be transferred to secure residential care, the clinician should assess the person's competence to make the decision. A person cannot consent to or decline services unless he or she is competent, makes a voluntary decision, is fully informed and comprehends the information, and understands the implications of the decision.

Right 7(4)

It is likely that if the person has been assessed as being incompetent and requiring secure residential care, Right 7(4) could be relied upon as a basis for transferring the person to a secure unit. However, consideration of whether it remains in the person's best interests should be ongoing throughout the period he or she resides in the secure unit, as the person's condition could change.

Right 7(4) does not contain any time limitation, but it is preferable to obtain a court order if possible rather than treat and/or detain a resident without consent on an ongoing basis. This issue was considered in a report by the Health and Disability Commissioner (08HDC20957). In that case, a 43-year-old woman complained that she was detained in a secure rest home for more than a year without legal authority. The woman had been admitted to hospital in a confused state, and her history included depression and alcohol abuse. Following a psychiatric assessment it was decided that an application should be made to the Family Court for a personal order under the Protection of Personal and Property Rights Act 1988 (PPPR

Act) for the woman to be placed in an appropriate residential facility. The application was prepared but never filed with the Court.

The woman was discharged to a secure rest home caring mostly for older people with dementia. The DHB, Needs Assessment and Co-ordination Agency (NASC), and rest home all believed that a court order had been made and she was legally required to stay there. The woman was reassessed by a NASC twice during the following ten months. Subsequently, the rest home GP referred the woman to the DHB's mental health service and a community alcohol and drug service. The woman was assessed as being competent in relation to her personal care and welfare, and it was then discovered that the PPPR Act application had never been filed so there had been no legal requirement for the woman to remain in the rest home. Fourteen months after admission, she left the rest home.

The Commissioner stated that it may have been appropriate to rely on Right 7(4) to treat the woman for the first few days after her admission while clarifying the position with regard to a court order or the existence of an EPOA, but thereafter the rest home had a responsibility to verify the woman's legal status and be clear about the legal basis on which it was to provide services.

Fluctuating Capacity

Elderly people may at times have fluctuating capacity, for example if they are suffering from delirium. In an HDC case (13HDC01252), a woman had some capacity in relation to decisions about her care and treatment but she had dementia and on admission she was agitated, suffering from short-term memory loss and, at times, delirium. She had previously appointed her daughter as her EPOA but it had not been activated by medical certification. The woman was administered haloperidol. In the decision, I stated that the clinicians should have had a legal basis to administer the medication either through the application of Right 7(4) of the Code or through the activation of the woman's EPOA. With regard to Right 7(4), the woman's daughter was available to advise the clinicians, and so she should have been consulted. Alternatively, during the period where the woman was competent, her consent to the administration of haloperidol should have been sought.

Conclusions

Right 7(4) does not state the length of time for which a provider may rely on that right to continue to treat a person without informed consent. However, the Commissioner has indicated that providers have a responsibility to verify the person's legal status and be clear about the legal basis on which services are being provided.

The best practice if the person does not have an activated EPOA is to obtain an order under the PPPR Act or the Mental Health (Compulsory Assessment and Treatment) Act 1992. A person being detained and treated with reliance on Right 7(4) has limited protections, particularly should his or her condition improve. Some people in secure aged care facilities do not have family members or other interested people to advocate for them or to complain to HDC on their behalf. Although HDC does receive protected disclosures from staff, it is of

concern that people may be detained in secure units without sufficient checks and balances. It is pleasing that the Ombudsman now has jurisdiction to monitor the treatment of residents in privately run aged care facilities. The people concerned are among the most vulnerable of our community, and it is important that they are adequately protected.

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Office of the Health and Disability Commissioner

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