Discussion Paper for Counsel/Solicitors Regarding Joint Application for Confidentiality/Non-Publication Orders

Introduction

1. The applicants[1] seek orders wholly preserving the confidentiality of the records relevant to the care of patients of the Barrett Adolescent Centre (BAC) such that they are not made accessible publicly.[2] The applicants also seek an order preventing media publication of matters relevant to the care of patients, and an order that all the inquiry hearings in relation to these matters be conducted in closed session.

2. The object of this paper is to identify the issues and to identify some preliminary views of counsel assisting.

Legitimate Concerns

3. The Commission's obligation is to conduct the inquiry "*in an open and independent manner*".[3] However, the Commission has power to both make non-publication orders[4] and to conduct closed hearings.[5]

4. In support of their applications for non-publication orders and closed hearings the applicants rely on a number of reports. Those reports are from:
    a. Associate Professor John Allan, Chief Psychiatrist, Mental Health, Alcohol and other Drugs Branch;
    b. Dr William Kingswell, Executive Director, Mental Health, Alcohol and Other Drugs Branch;
    c. Dr Andrew Aboud, Clinical Director, Prison Mental Health Services;
    d. Dr Sean Hatherill, Clinical Director, Metro South Child and Youth Academic Clinical Unit;
    e. Associate Professor James Scott, Child and Adolescent Psychiatrist, RBWH.

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1 State of Queensland, West Moreton Hospital and Health Board, Metro South Hospital and Health Service Board, and Metro North Hospital and Health Service Board.
2 See paragraph 3 (a) of the joint submissions.
3 *Commission of Inquiry Order (No.4)* 2015.
4 Section 16 of the *Commission of Inquiry Act 1950*.
5 Ibid, section 16A

5. The applicants have also provided a medical journal article by Abrutyn and Mueller entitled '*Are Suicidal Behaviours Contagious in Adolescents*?' [6]

6. That material raises legitimate concerns about the publicity that may result from this Commission's hearings. Essentially, the concerns of these medical experts are that:
    a. Public exposure of a young person's medical and personal record and information provided by family carers and staff of a clinical or personal nature will be potentially highly embarrassing and stressful and worsen their already poor mental state and place the young person at risk of deliberate self-harm or suicide;[7]
    b. Press coverage of the inquiry and suicides increase the risk of 'copycat' behaviour amongst vulnerable young people, particularly if the reporting is insensitive or sensationalised;[8]
    c. The former patients and families have the opportunity to access dedicated and on-going psychiatric support.[9]

7. Each of those concerns is considered below.

Confidential Patient Records

8. Plainly, the confidentiality of patient records should be maintained. Patients and their families are entitled to keep their patient records confidential. Legislation, the general law, and medicine ethical guidelines all make some effort to require confidentiality to be kept.[10] There are, of course, exceptions to confidentiality provided for in legislation[11] and often involving consent. Nevertheless it is true to say that patients

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6 (2014) 79 (2) American Sociological Review 211-227.

7 See Dr Kingswell's report; the same concern is raised by Dr Aboud (page 1), Dr Hatherill (para 10) and Professor Scott (para 6).

8 Professor Allan's report; Dr Kingswell's report; Dr Aboud (page 2); Dr Hatherill (para 9).

9 Professor Allan at page 2; Dr Aboud (last page); Professor Scott (para 7).

10 See, for example, s 63 of the Health Services Act 1991, the equitable duty owed by health care providers to keep patient information confidential, and the Australian Medical Association's Code of Ethics.

11 *Coroner's Act* 2003 (Q), *Health Ombudsman Act* 2013 (Q), *Health Insurance Act* 1973 (C'th), *Transplantation and Anatomy Act* 1979 (Q), *Mental Health Act* 2000 (Q), *Health Act* 1937 (Q); *Hospital and Health Boards Act* 2011 (Q), *Information Privacy Act 2009* (Q).

have a legitimate right to confidentiality over their patient records.

9. As a general proposition, no substantive reason can be found for exposing to the general public what would otherwise be confidential information about the health of the former patients of the BAC.

10. Certainly, it may be that some individual patient records may be relevant to the Commission's Terms of Reference and may need to be examined by the Commission. An example is Term of Reference 3 (d) relating to the care of transition patients. That said, there is no apparent justification for exposing the detail of the patient records to public scrutiny.

11. Consequently, it is proposed that the Commission order that, until further or other order of the Commissioner, the contents of any patient records, medical records or clinical records for any patient of the Barrett Adolescent Centre including health information under the *Information Privacy Act 2009* (Qld) and confidential information under the *Hospital and Health Boards Act 2012* (Qld) must not be published.[12]

The Width of the Non-Publication Order

12. It is noted that the applicants seek a non-publication order in respect of a wider category of documents. Although the heading of the applicant's submissions refer to "*confidentiality of the patient records*", the draft orders seek to: "*wholly preserve the confidentiality of the records relevant to the core of patients, such that they are not made accessible publicly*."[13]

13. That wide scope of documents, namely those in any way relevant to the care of patients, could conceivably cover almost all of the documents the Commission will receive. Even Ministerial discussions about policy and models of care might be comprehended by such an order.

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12 A full copy of the proposed orders is attached.

13 See paragraph 3(a) of the joint application.

14. It may be that the joint applicants do not intend their application to be so wide. As stated above, the heading of the submissions suggest an intention to confine the non-publication order to '*patient records*'. And the reports of the medical experts appear to speak of "*sensitive personal and clinical information*"[14] and "*confidential personal medical records*"[15] although Professor Scott uses the slightly wider expression "*information about individual patients*".

15. It is important that the breadth of the information subject to the non–publication order be clear. The parties and the media must know the limits of what they can and cannot publish. The Commission is obliged to make orders which, as clearly as possible, define what is comprehended by the non-publication order.

16. An order which prohibits publication of "*records relevant to the care of patients*" lacks clarity.

17. It is proposed that the non-publication orders principally apply to '*patient records'*. That is a comprehensive and well accepted expression which covers all (to use Dr Kingswell's expression) '*sensitive personal and clinical information*'.

18. The concept of '*patient records*' also seems to be accepted in cases and in journal articles[16] although similar expressions like '*medical records*' and '*clinical records*' are also used and should be included in the proposed order. Further, to avoid any doubt, the proposed order acknowledges that this category includes '*health information*' under the *Information Privacy Act 2009* (Qld) and '*confidential information*' under the *Hospital and Health Boards Act 2012* (Qld).

19. It is acknowledged that the Commission may receive evidence or documents which identify or may lead to the identification of a patient or former patient of the BAC or

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14 Dr Kingswell.

15 Dr Hatherill (page 2).

16 For example, in *Breen v Williams* (1996) 186 CLR71 a patient sought a right of access to her "*medical records*". See also the articles Magnusson. '*A Triumph for Medical Paternalism*' (1995) 3 TLJ27; McDonald and Swanton, '*Patients' right of access to Medical Records*' (1997) 71 ALJ 332; '*Accessing Patients' Records Without Individual Consent for Epidemiological Research*' (2000) 8 JLM 76.

their family, which may not be captured by the proposed order relating to patient records. Consequently, a further order prohibiting the publication of any evidence or document that identifies or is likely to lead to the identification of a patient or former patient of the BAC or their family is proposed. However, the proposed order contemplates that the prohibition on publication may be overcome by written consent provided by the relevant person/s, consistent with similar legislative regimes relating to non-disclosure of health information and confidential information.[17]

20. It should be emphasised that further documents are likely to be the subject of a non-publication order, or in fact may not be adduced in evidence at all. For example, an email which is not strictly part of a 'patient's records', but which contains information about the condition, diagnosis or treatments of one or more patients will not be published, or will be redacted, or will be the subject of a specific non-publication order. The Commission will ensure procedures are in place to maintain confidentiality.

Press Coverage and 'Copycat' Risk

21. The evidence about the risk of the copycat suicides is acknowledged and accepted.

22. Of course, the three deaths which preceded this inquiry have already been widely reported in the media. As Abrutyn and Mueller found,[18] the contagion effects fade over time. And, it is necessary for the inquiry to examine, for example, how the care, support service quality and safety risks were identified, planned for, managed and implemented before and after the closure of the BAC.[19]

23. It is accepted that steps must be taken to reduce the risks of 'copycat' suicides. It is proposed that the Commission adopt the following measures.

24. First, it is proposed that the Commission order that, until further or other order:

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17 See, eg, *Information Privacy Act 2009* (Q) Schedule 4, NPP 9(1)(a); *Hospital and Health Boards Act 2011* (Q) s 144.

18 (2014) 79 (2) American Sociological Review 211-227 (referred to above).

19 Term of Reference 3(d)

any evidence given before the Commission and the contents of any book, document, writing or record produced at the inquiry that:

(i) identifies, or is likely to lead to the identification of a patient or former patient of the BAC or their family (unless the relevant person/s or their legal representative/s give/s their written consent to the publication); and

(ii) contains details of the method or location of the death of any deceased patient; and

(iii) contains details of the method of any incidents of self-harm,

must not be published or made publicly accessible, except by and to the Commissioner and officers and staff of, and Counsel Assisting, the Commission for the purpose of exercising their functions and duties.

25. Second, it is proposed that the Commission publicly remind the press about the Mindframe media guidelines. The likelihood is that compliance with these guidelines will reduce the risk of sensationalised reporting. The Commissioner has already, during the opening hearing, reminded the media of the need for sensitive reporting and of the Mindframe guidelines. The Commission has published advice in similar terms on its website and a link to Mindframe resources developed specifically for media. The Commission also proposes to issue media guidelines containing advice regarding appropriate, responsible and sensitive reporting on mental illness and suicide, links to Mindframe media resources and a request for media outlets to include contact details for appropriate crisis services in their reports.

26. Third, Commission staff will ensure that each patient and family member who is involved with the Commission has available to them proper counselling, to assist during public hearings or during any engagement with the Commission.

Closed Hearings

27. The joint applicants also seek an order pursuant to s16A of the *Commission of Inquiry Act* 1950 that "*all hearings in relation to these matters be conducted in closed session*".

28. Section 16A provides:

"Power of tribunal as to exclusion of public

A Commission shall not refuse to allow the public or any portion of the public to present at any of the sittings of the Commission unless in the opinion of the Commission it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given".

29. The effect of that section is to require the inquiry hearings to be held in public unless, in the opinion of the Commissioner it is in the public interest expedient to close the sitting:
    a. for reasons connected with the subject matter of the inquiry; or
    b. for reasons connected with the nature of the evidence to be given.

30. It follows that, for the Commission to make an order under s16A, the Commissioner must form an opinion that there is a public interest in closing the sitting.

31. Such an opinion must be properly formed and identified. It is difficult to see how the Commissioner could form such an opinion on an abstract basis at this early stage - before any such proper reasons can be identified or before the relevant evidence is identified. It may be that, to give an example, a particular patient or family member wishes to give their evidence in public.

32. Nevertheless, it can be said that where former BAC patients or family members are involved, the Commissioner may well and is likely to have good grounds for forming the opinion set out in s16A. That is because the nature of their evidence may well relate to personal health issues – issues which may not be particularly relevant to the Terms of Reference and are not required to be exposed in the public interest. Indeed, as mentioned above, there is a good argument that there is a public interest in patients being able to keep their medical records confidential.

Conclusion

33. Attached is a proposed draft order.

34. The views of the parties and interested persons are sought.