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Paramedics and ACT Mental Health Legislation

Ellen J Bradley
Australian National University, Canberra, ACT

Ruth Townsend
Australian National University, Canberra, ACT

Michael Eburn
Australian National University, Canberra, ACT

Research

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Ellen J Bradley BA, LLB(Hons) was a law student at the time of writing, now a solicitor¹, Ruth Townsend BN, LLB, LLM, DipParaSc, Lecturer, School of Humanities and Social Sciences² and PhD candidate¹, Michael Eburn BCom, LLB, BA(Hons), LLM, MPET, PhD is an Associate Professor, College of Law¹

Affiliations:

¹Australian National University, Canberra, ACT

²Charles Sturt University, Canberra, ACT

Abstract

Introduction

On 15 May 2014, the Minister for Health, The Hon Katy Gallagher presented the Mental Health (Treatment and Care) Amendment Bill 2014 ('the Bill') to the Australian Capital Territory Legislative Assembly (1). The Bill was subsequently passed on 30 October 2014. One recommendation contained in the proposed Bill was to extend powers of apprehension, which are currently only held by police officers, to approved ACT paramedics. The power may be exercised without regard to the patient's decision making capacity. This paper explores some of the legal and ethical issues associated with the proposed legislation.

Methods

This paper reviews the Bill in light of underlying legal and ethical principles that are relevant to the treatment of the mentally ill and paramedic practice.

Results

It is demonstrated that there are arguments both in favour of, and against the proposal to grant paramedics powers of apprehension.

Conclusion

Whether allowing paramedics to detain a person who is mentally ill will work in the best interests of the patient remains to be seen but caution must be exercised to protect the paramedic/patient relationship.

Keywords

mental health; jurisprudence; mental competency; informed consent; criminal law

Corresponding Author: Ellen J Bradley, ellen.bradley@bradleyallenlove.com.au

Introduction

On 15 May 2014, the Minister for Health, The Hon Katy Gallagher presented the Mental Health (Treatment and Care) Amendment Bill 2014 ('the Bill') to the Australian Capital Territory Legislative Assembly (1). The Bill was subsequently passed on 30 October 2014. The Mental Health (Treatment and Care) Amendment Act 2014 (ACT) ('the Amending Act') will introduce a suite of changes to the Mental Health (Treatment and Care) Act 1994 (ACT) ('the Act'). At the time of writing, the Amending Act had not yet commenced operation. One significant change is that ambulance paramedics, in certain circumstances, will have the power to apprehend a person and take him or her to an approved mental health facility (2). The Act currently gives police officers this power (3).

Paramedics currently have a similar power under mental health legislation in New South Wales (4), the Northern Territory (5), Queensland (6) and South Australia (7). The implications of granting paramedics the power to apprehend has been commented on by others (8,9), but there has been little questioning of whether or not this power is in the best interests of paramedics or, more importantly, their patients. Once the Act is amended it will authorise paramedics to apprehend a person even when that person has decision-making capacity and, therefore, the capacity to refuse treatment. This paper will explore some of the legal and ethical issues associated with the Amending Act.

The upcoming change

Section 37(1) of the Act currently provides as follows:

If a police officer has reasonable grounds for believing that a person is mentally dysfunctional or mentally ill and has attempted or is likely to attempt –

- (a) to commit suicide; or
- (b) to inflict serious harm on himself or herself or another person;

the police officer may apprehend the person and take him or her to an approved health facility (3).

Once the Amending Act comes into effect, the power to apprehend will be held by both authorised ambulance paramedics and police officers.

The Act currently contains two criteria that govern when the power to apprehend can be used. These criteria will remain unchanged. The first criterion is that the decision-maker, whether a police officer or an ambulance paramedic, must believe on reasonable grounds that a person has a mental disorder or mental illness (2). These terms will replace the terms 'mentally dysfunctional' or 'mentally ill' to reflect current thinking about mental illness. The second criterion is that the decision-maker must believe on reasonable grounds that the person has attempted, or is likely to attempt, to inflict serious harm on him

or herself or another person. 'Reasonable grounds' requires more than mere suspicion but less than empirical evidence or conclusive proof (10,11). Apprehension is only authorised if both criteria are satisfied (12).

Following the amendments, authorised ambulance paramedics will also have the power to enter any premises and remove a person, with force if necessary, in order to transport him or her to a mental health facility (2 s139F). In addition, paramedics will have the power to search a person in certain circumstances, and seize an object found during that search (2 s140).

The driving force behind reforms to the Act has been the need to give greater weight to the decision-making capacity of people with a mental illness (13). A revised set of objects and principles applying to the Act has been designed to give people with a mental illness a more active role in determining the care they receive (2 ss5-6).

Section 37 though, will give authorised ambulance paramedics the power to apprehend a person regardless of whether that person has the capacity to make their own decisions. While paramedics will have to take a person's decision-making capacity into account (2 s8(2)), they will not necessarily be required to honour the wishes of a person who has decision-making capacity.

Who is a paramedic?

The term 'paramedic' has no nationally recognised definition (14). In the Amending Act, an authorised ambulance paramedic is 'a member of the ambulance service employed as a paramedic and authorised by the Chief Officer (ambulance service) to apprehend people with a mental disorder or mental illness' (2 s137). Given that the Amending Act refers to 'the', rather than 'an' ambulance service, the inference must be that 'the ambulance service' refers to the Australian Capital Territory Ambulance Service (ACTAS) (15). It follows that the Amending Act will not extend powers of apprehension to any qualified paramedic; it will only apply to paramedics employed by ACTAS. Furthermore, the power will extend only to 'authorised' ambulance paramedics. The use of the word 'authorised' will enable the chief officer (ambulance service) to ensure that paramedics have an appropriate level of skill and training before exercising the power (16).

Impact on mental health practice

Care in the least restrictive way

The Act provides that treatment for people with a mental illness should be provided in the least restrictive and intrusive environment possible (3 s7(d)) and in a way that preserves their human rights, dignity and self-respect to the greatest extent possible (3 s7).

Decision-making capacity in an emergency

The principle of respect for autonomy provides that every person has the right to elect what happens to his or her own body (17). This principle underpins the Australian legal system and is given meaning through the laws of assault (14). In the health care setting, the principle of respect for autonomy means that a person has the right to decide what medical treatment to receive, if any. This right includes the freedom to refuse treatment, even if it will result in the death of the person (14). However, a decision to consent to, or refuse, treatment is only valid if the person making the decision has decision-making capacity (18).

A person has decision-making capacity if they are able to understand the nature of the suggested treatment, weigh up the consequences of consenting to or refusing the treatment, and communicate their decision (19,20). Decision-making capacity is not determined by a patient's medical diagnosis. Just because a person has an intellectual disability does not mean that he or she does not have the capacity to make valid decisions (17). Equally, the existence of a mental illness alone cannot form the basis of a conclusion that the person lacks the capacity to make valid decisions (19).

The Amending Act includes a test for decision-making capacity.

A person will have decision-making capacity if they:

... can, with assistance if needed –

- (a) understand when a decision about treatment, care or support for the person needs to be made; and
- (b) understand the facts that relate to the decision; and
- (c) understand the main choices available to the person in relation to the decision; and
- (d) weigh up the consequences of the main choices; and
- (e) understand how the consequences affect the person; and
- (f) on the basis of paragraphs (a) to (e), make the decision; and
- (g) communicate the decision (2 s7).

Equally, a person will not have decision-making capacity if they cannot meet all of the above criteria. The Amending Act recognises that a person with a mental illness may still have decision-making capacity; in fact, they will be assumed to have decision-making capacity (2 s8(1)(b)). If it is found that a person does not have decision-making capacity, the person must still be assisted to contribute to health care decisions to the greatest extent possible. This is consistent with the human rights principles underpinning the legislation.

The exposure draft of the Bill, presented to the Australian Capital Territory Legislative Assembly in May 2013, provided that in an emergency, a person's decision-making capacity did not have to be taken into account (21). This would have meant that an authorised ambulance paramedic would not have been required to consider whether or not a person with a mental disorder or mental illness, who posed a risk to him or herself or others, had decision-making capacity. By implication, it would have meant that the paramedic would have been legally entitled to disregard the person's wishes with respect to their care. The Amending Act, as passed by the Australian Capital Territory

Legislative Assembly, provides that a person's decision-making capacity must always be taken into account in deciding treatment, care and support unless the Act expressly provides otherwise (2 s8(2)). There is no longer any provision that will permit authorised ambulance paramedics to not consider a person's decision-making capacity. In theory, a paramedic will be required to have regard to the person's decision-making capacity before using their power to apprehend. However, having made an assessment that the person has decision-making capacity, there is nothing in the Act that will require the paramedic to honour the wishes of that person with respect to their care. What justifies this measure is the public interest in ensuring that risk can (and should) be efficiently managed in the community. It may also be a pragmatic response to the high pressure, time critical conditions in which both paramedics and police officers work.

Arguments in favour of the upcoming change

More appropriate treatment options

Paramedics frequently interact with those experiencing mental illness (9,22). The National Mental Health Strategy aims to assimilate mental health facilities into the broader health system. Amending the Act to permit authorised ambulance paramedics to apprehend a person and transport him or her directly to a mental health facility is consistent with this policy objective.

ACTAS paramedics are better qualified than police to assess mental illness

Patients in the Australian Capital Territory have had, until recently, the benefit of access to a single tiered ambulance service. That is, only the most advanced ambulance skill level – the intensive care paramedic – has been employed by ACTAS (23). A 2010 review of ACTAS reported that '[t]his very high level of clinical service provision for virtually every ambulance response in a city is unique and unmatched in any city in Australia, New Zealand, the United Kingdom and Canada' (24). A study by Roberts and Henderson reported a perception among paramedics that they are well equipped to make initial health assessments (25). Importantly, given the impending introduction of this legislation in the Australian Capital Territory, ACTAS is actively engaged in providing its paramedics with mental health training (26). This training is geared towards dealing with mental illness in the emergency setting (26), which is the type of training that is pertinent for the purposes of emergency apprehension (27). It is reasonable to expect that authorised ACTAS advanced life support paramedics, who have received appropriate training and who have satisfied the chief officer (ambulance service) that they are competent to perform this function, will be more accurate than police in their assessment of whether a person has a mental illness (8). The existence of a mental illness or a mental disorder is one of the two criteria that must be satisfied before the power to apprehend is used.

Arguments against the upcoming change

Achieving the policy objective set out in the National Mental Health Strategy is desirable, but before changes to the law are made, it is important to consider whether those changes will in fact meet the policy objective. In the context of this paper, the question that needs to be considered is: 'Does merely expanding the power to apprehend to paramedics assist in achieving the policy objective, without creating some unintended risk?' That risk may include harm to the patient-paramedic relationship and may hinder future care for the individual who is apprehended.

The potential to encourage defensive practices

The power to impose unwanted treatment upon a person with a mental illness who has decision-making capacity may encourage defensive practices among ACTAS paramedics. Defensive practices occur when the interests of the decision-maker, or those other than the patient, guide professional decision-making (28).

Irrespective of the training and skills of the paramedics, Roberts and Henderson have reported a perception among paramedics that transport is the only treatment they can provide to a person with mental illness (25). A paramedic may be concerned that to leave a patient with a mental illness at the scene is to further risk the patient's, or someone else's, health, or risk the paramedic's career. In those circumstances, a paramedic may experience distress and conflict when a person with a mental illness does not want ambulance transport (29). A paramedic may take comfort from a statutory power to apprehend and may feel they are legally and morally safer to transport a person against his or her will rather than to leave them on the street. If the paramedic claims to rely on the Act in circumstances where the necessary criteria have not been met, he or she will have committed an assault. However, the literature has documented a view among paramedics that they would prefer to be accused of assault rather than negligence (18). This is worrying for three reasons. The first is that paramedics have a responsibility to manage the way in which scarce public health resources are allocated via their decision-making. Taking patients to a mental health facility when it is not clinically indicated is an example of an inappropriate allocation of those resources. The second reason is that paramedics may act to protect their own interests rather than those of their patients – protect themselves from harm. The third is that they may believe they are acting in their patient's best interest, but may harm their patient's interests by not upholding the patient's right to self-determination and to decide what treatment they do and do not receive.

Conflict with health care principles

It has been said that the reforms will formalise what paramedics already do in practice (30), but this is not, or at least should not, be the case. Paramedics, like all health professionals, must respect patient autonomy. A paramedic has no authority (subject to the anticipated legislation) to treat a person unless the patient

has consented, or the treatment is justified by the common law doctrine of necessity. The doctrine of necessity justifies the treatment of the unconscious and can also justify treatment of a person who has a mental illness, provided he or she lacks decision-making capacity (31). The doctrine would not, however, justify the treatment of a person who, although suffering from a mental illness, retains decision-making capacity. The Amending Act will represent a departure from the common law in that it authorise ambulance paramedics, in certain circumstances, to act in a way that is inconsistent with the wishes of a person who has decision-making capacity. This is at odds with the overall objective of the legislative reforms to give greater weight to the decision-making capacity of people with a mental illness. It is also inconsistent with what should be accepted paramedic practice, upholding patients' rights and advancing patient autonomy.

Role conflict between police and paramedics

The Amending Act fails to distinguish between the duties of police and paramedics. Paramedics owe a legal duty of care to their patients (32-34). Police officers, on the other hand, do not generally owe a duty of care to those who they are required to investigate or apprehend (35-37). The duty that the police owe is a duty to the broader community, and their duty to enforce the law and take action to protect community safety could be in conflict with a duty owed to individuals. In this context, where a person is threatening to harm others, the duty of the police to contain that threat allows them to take action that is not in the individual's best interests. Rather, it is in the interests of the collective – the greater good.

In *Commonwealth v Crowley* (2012) 7 ACTLR 142, Mr Crowley sued the Australian Federal Police and named police officers over their response to his psychotic episode. In 2001, Mr Crowley wandered the streets of the Australian Capital Territory in the depths of a psychotic episode. He had harmed or threatened to harm various members of the public. He was approached by police, who ordered him to drop a 'kendo stick' that he was carrying. Mr Crowley did not comply with that order and approached the police who used capsicum spray and a baton to try and protect themselves and to detain Mr Crowley. Ultimately, Senior Constable Pitkethly used his service-issued firearm to shoot Mr Crowley, rendering him a quadriplegic.

In the Australian Capital Territory Supreme Court, Justice Penfold found the Commonwealth – as the entity ultimately responsible for the Australian Federal Police (38) negligent (39). This decision was quashed in December 2012, when the Australian Capital Territory Court of Appeal held that the Australian Federal Police did not owe Mr Crowley a duty of care.

The Court of Appeal held that the duties owed by police officers are owed to the public at large. They must be discharged even if it means that an individual is injured in the process (36). Mr Crowley created a danger to the public, a danger the police were obliged to remove. This is the end to which the actions of Senior Constable Pitkethly were directed. The Court stated

that police would be subject to inconsistent obligations if they simultaneously owed a duty of care to the public and to Mr Crowley, an individual whose behaviour threatened the safety of others in the vicinity (36).

This broader duty, for police to apprehend a person and take them, against their will, to a place where they are no longer a threat to the community, is, in the majority of cases, contrary to a paramedic's duty to act in their patient's best interests. While it may be in the best interests of a person who is suffering from a mental illness and who lacks decision-making capacity to be taken somewhere for treatment, this issue is not so clear where the person with a mental illness retains decision-making capacity and refuses treatment.

Assessing whether or not a person has decision-making capacity can be a time-consuming process. Despite this, a paramedic, acting in the patient's best interests and in accordance with the duty to the individual patient, would take the time necessary to make the best assessment possible. Police officers prioritising community safety may be justified in bypassing that consideration and taking steps to take into their custody a person who is posing a threat to community safety, regardless of that person's best interests or wishes.

Recommendation: Registration for paramedics

Whether there should be a system of professional registration for paramedics has been the subject of debate (40,41). This debate has been sparked by the role expansion paramedics have experienced and more recently the introduction of an Australia-wide registration system for certain health professions in the Health Practitioner Regulation National Law, which by 2010 had been applied as a law in each state and territory. Currently, paramedicine is not one of the 14 health professions to which the Health Practitioner Regulation National Law applies (42).

Professional registration would provide safeguards for the interests of people with a mental illness (and other patients). ACTAS has been criticised for its lack of a consistent system for the review of adverse events (24). A professional Paramedic Registration Board could actively supervise paramedics in the exercise of their new powers under the Act. Maintenance of professional registration will require ongoing professional development, which could be a vehicle to ensure further training in recognising and responding appropriately to mental health crises. An independent registration panel would also give a person who feels that they were inappropriately apprehended an independent body, beyond the mental health tribunal, to which they can raise their concerns.

Conclusion

The anticipated amendments to the Mental Health (Treatment and Care) Act 1994 (ACT) will give authorised ambulance paramedics the power to apprehend a person who they believe

has a mental disorder or a mental illness, and who is posing a threat to himself, herself or someone else, and take that person to a mental health facility for assessment. To that extent, the power is not unusual and, prima facie, will advance the interests of those in need of urgent mental health care.

The power to apprehend will be available for use even in circumstances where the person has decision-making capacity and does not want to be transported for assessment. The Act will allow treatment to be imposed contrary to the person's known and competent choices. In this way, the Amending Act is a significant departure from the common law and fundamental legal and ethical principles.

In this paper, the authors have set out some arguments both in favour of and against incoming legislation that will grant paramedics powers of apprehension. Whether, on balance, the reform will work in the best interests of people with a mental illness and paramedics remains to be seen.

As the Bill has been passed, the move to professional registration may be a useful vehicle to ensure that paramedics are given appropriate professional development in this complex area and that there is an independent means to review the use of these coercive powers. This will ensure that such legislative powers are not used inappropriately and that the interests of patients are protected.

Conflict of interest

The authors declare they have no competing interests. Each author of this paper has completed the ICJME conflict of interest statement.

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