

CORONER'S COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	Inquest into death of KAITLIN O'KEEFE MCGILL
Citation:	[2020] ACTCD 7
Findings Date:	10 December 2020
Before:	Coroner Morrison
Decision:	See [15]-[16], [37]
Catchwords:	CORONIAL LAW – cause and manner of death – whether information should be available to family members about person subject to psychiatric treatment order - recommendation for review made
File Number:	CD 70 of 2016

Corrigendum

21 December 2020

Paragraph 1 of the below decision has been amended to reflect Ms McGill's age at the time of her death as 34 years old and to include some further background information about her.

CORONER MORRISON:

1. Kaitlin O'Keefe McGill was a 34 year old woman who was found deceased on 23 March 2016 at her residence in Garran. Ms McGill had suffered with mental health issues for several years and since 2002 had been subject to a number of Psychiatric Treatment Orders. At the time of her death, Ms McGill was subject to a Psychiatric Treatment Order (PTO) made by the ACT Civil and Administrative Tribunal under the *Mental Health (Treatment and Care) Act 1994* (as it then was) on 12 November 2015, for a period of 6 months. Under the law as it then stood, as Ms McGill died while subject to an order under mental health legislation, her death is to be treated as a death in custody for the purposes of the *Coroners Act 1997*.

2. Under section 34A of the *Coroners Act 1997*, I cannot dispense with the holding of a hearing as part of the inquest into Ms McGill's death.
3. A hearing was held for that purpose on 29 November 2018. The ACT Government Solicitor sought and was granted leave to appear on behalf of the Territory. Ms Baker-Goldsmith, Counsel Assisting me, tendered the brief and called no witnesses. There was no factual dispute about the manner and cause of Ms McGill's death.
4. Counsel Assisting noted that in addition to the formal findings of fact I must make under section 52(1) of the *Coroners Act 1997*, I was obliged to:
 - a. under section 52(4), make findings about whether a matter of public safety was found to arise; and
 - b. under section 74, include findings about quality of care, treatment and supervision of Ms McGill if in my opinion, they contributed to the cause of Ms McGill's death.
5. Counsel Assisting submitted that no matter of public safety arose, that there was no evidentiary basis for the making of a finding that the quality of care, treatment and supervision provided to Ms McGill contributed to the cause of her death and that no adverse comment was warranted against ACT Mental Health or any of its clinicians.
6. Counsel Assisting nevertheless submitted that I consider making a recommendation in this case. The recommendation proposed by Counsel Assisting is, in effect, about the desirability of dissemination of information to the family of persons subject to a PTO.
7. The recommendation from Counsel Assisting was made against the background of concerns expressed by Ms McGill's family that they were not given key information which might have allowed them to help Kaitlin, assist in facilitating proper treatment and address her risk factors.
8. Counsel Assisting referred me to a recommendation along similar lines made by Coroner Dingwall in the *Inquest into the death of Mark Rodney Jolliffe* [2015] ACTCD 2.
9. Counsel for the Territory sought an adjournment of the hearing to allow the Territory to make submissions about the recommendation pressed by Counsel Assisting. Initial submissions were filed at the Court in December 2018.

10. In part, those submissions directed my attention to review processes (then underway) into the *Mental Health Act 2015* (the successor to the *Mental Health (Treatment and Care) Act 1994*) and went on to say that, in those circumstances, any recommendation by the Coroner was unnecessary.
11. In March 2020 I directed that Counsel for the Territory be contacted to ascertain the outcome of those review processes. Further submissions on that point by the Territory were filed in July 2020.
12. The submissions are to the effect that the review processes which took place did not touch on the subject matter of the recommendation proposed by Counsel Assisting.
13. The Territory did however maintain its original position that comments and recommendations in relation to the *Mental Health Act 2005* were unnecessary.
14. When I adjourned the hearing I said that it was uncertain whether it would be necessary to reconvene for further evidence or submissions or if I would be in a position to deliver my decision without needing to do so. I have determined on the basis of the submissions made that I am able to finalise my decision without a further hearing. I have done so and I deliver my decision and written reasons in this document.
15. I find formally that Kaitlin O'Keefe McGill died at 6/5 Garran Place, Garran in the Australian Capital Territory between 21 and 22 March 2016. The manner and cause of death was morphine toxicity (the morphine probably ingested as heroin), and her death was accidental.
16. I accept the submissions that a matter of public safety is not found to arise in connection with the inquest and I find accordingly. I accept also that there is no evidentiary basis for the making of a finding that the quality of care, treatment and supervision provided to Ms McGill contributed to the cause of her death and I find accordingly.
17. Section 3BA(1)(d)(ii) of the *Coroners Act 1997* provides that one of the objects of the legislation is to allow a Coroner to make recommendations about the promotion of general public health and safety. A Coroner's power to make recommendations is not limited to cases where a matter of public safety is found to arise.

18. At the time of her death Ms McGill was subject to a PTO made by the ACAT on 12 November 2015 (by way of a 6 month extension of the pre-existing order under *Mental Health (Treatment and Care) Act 1994*. That Act specified that certain conditions must be satisfied before such an order may be made.
19. Those conditions are along the lines of but not identical to the conditions which apply under the current legislative scheme for the making of such orders.
20. The current legislative scheme for the making of psychiatric treatment orders appears in s58 of the *Mental Health Act 2015*.
21. The pre-conditions appearing there for the making of a PTO are, in summary:
 - a. The person has a mental illness; (s 58(2)(a))
 - b. The person does not have decision-making capacity about treatment; or does have that capacity but refuses treatment; (s 58(2)(b))
 - c. There are reasonable grounds to believe that, because of the person's mental illness:
 - i. the person is likely to do serious harm to themselves or someone else; or
 - ii. is likely to suffer serious mental or physical deterioration; (s 58(2)(c))
 - d. The proposed treatment is likely to reduce the harm or deterioration referred to or improve the person's psychiatric condition; (s 58(2)(e))
 - e. The proposed treatment under the PTO cannot be adequately provided in a way involving less restriction of the persons freedom of choice and movement. (s 58(2)(g))
22. In addition, where there is decision-making capacity but a refusal to consent to treatment, the ACAT must be satisfied that likely harm to the person, or deterioration of their condition, is of such a serious nature that it outweighs the person's right to refuse to give consent. (s 58)(2)(d))
23. It is apparent from the structure of the legislative schemes (both past and present) that, in the circumstances prescribed in the legislation, a person's right to receive treatment is treated as paramount. It is given priority over, for example, a right to refuse treatment, and rights of freedom of choice and movement.

24. It can be seen that the statutory criteria recognise that these other rights should not be permitted to stand in the way of the delivery of what is determined to be appropriate treatment.
25. The recommendation pressed for by Counsel Assisting is based upon reasoning that, a fortiori, what would otherwise be the right of a person with a mental illness to decide about giving information to others (in particular close family members) about their treatment ought not to stand in the way of the delivery of appropriate treatment.
26. It is important to note that the submissions of Counsel Assisting do not press that there needs to be some balancing of the right of privacy of a person with a mental illness against the wishes of family members to be informed about treatment.
27. Rather the submissions is expressed as requiring that, in appropriate cases, the right of a person with a mental illness to receive the most effective treatment under a PTO must take priority over that person's right of privacy.
28. The evidence in this case discloses that members of the McGill family were engaged by ACT mental health workers to assist in treatment by bringing Ms McGill to appointments and reinforcing treatment instructions of clinicians, yet were not given key information about Ms McGill's condition and treatment. There is not in this case any evidence about the difference which the involvement of Ms McGill's family may have made to the cause of her ultimate death by illicit drug overdose. Of necessity such evidence would be difficult to obtain and would deal with problematic hypotheticals.
29. The Territory did not support the proposed recommendation by Counsel Assisting on several bases.
30. The first is that I could not be satisfied that Ms McGill's death was directly connected to the lack of her family's involvement in the case. I agree. However, Counsel Assisting submitted there is at least a possibility that Ms McGill's treatment outcomes and ultimate death may have been avoided had more information been provided to her family, to enable them to assist in the provision of treatment to her. I accept that there is at least such a possibility and that it is not fanciful.
31. The second basis for the Territory's objection was that Ms McGill's PTO was made pursuant to the *Mental Health (Treatment and Care) Act 1994*, which has

now been replaced by the *Mental Health Act 2015*. Counsel for the Territory submitted in their initial submissions that the new legislation made a number of changes such as advance agreements and advance consent directives; that these options were not readily available to Ms McGill given her death shortly after the commencement of the new legislation; and that the legislation should be given time in a real world setting for the operation of the legislation to be tested. However, Counsel also agreed that disclosure of information against the wishes of a consumer is generally unlawful, and the new legislation does not change the situation that a consumer can decide to prevent information sharing with others including family who care for or support them.

32. Thirdly, Counsel for the Territory submitted in their initial submissions that two reviews of the operation of the *Mental Health Act 2015* were already underway or scheduled, and that the matters intended to be canvassed by the proposed recommendation would, “to a great extent”, be addressed in those processes without the need for a further process at added expense. Counsel provided further detail about the procedures for and outcome of those review processes in their most recent submissions. It is clear that these reviews did not consider the issue of information disclosure to carers, apparently because the issue was not raised with the reviewers.
33. In the context of persons with a mental illness, the question of disclosure of patient and treatment information requires the weighing of competing interests. As indicated earlier, they are not however the competing interests of different persons.
34. Rather, the balancing exercise required is properly approached as weighing:
 - a. the patient’s right to privacy; and
 - b. the patient’s right to receive optimal treatment where doing so calls for involving family members or others, despite the way in which the patient’s mental illness might compromise their own decision-making around disclosure of their condition and/or treatment.
35. Where, such as in this case, family members are engaged by ACT mental health workers to assist in providing treatment despite the patient’s directions to withhold information from others, I consider that a more nuanced approach to information disclosure is likely to be beneficial to the patient. Given the strong regulatory privacy protections and other prohibitions against disclosure of patient

information without lawful authority or consent, a new approach might well require law reform.

36. The decision-making around when, and to whom, disclosure contrary to a patient's wishes should be made would not be straightforward. The same could be said of much of the decision making around the treatment of persons with a mental illness. Where however there are family members willing and able to assist, and whose assistance is likely to be useful in achieving the best outcomes for the person, such difficulties should not stand in the way of the design of a legislative scheme which would permit disclosure to enable that assistance.
37. In those circumstances, while no matter of public safety arises, I consider it is appropriate to make a recommendation, albeit in a slightly altered form than that proposed by Counsel Assisting. I recommend that the ACT Government consult families and carers of persons subject to PTOs, as well as those subject to such orders, to explore the desirability of legislative or procedural reform about information dissemination to family and carers to support the care and treatment of persons subject to such orders.
38. I place on record that the recommendation I make is consistent with the recommendations made in the Productivity Commission's *Mental Health Inquiry Report*, Volume 1, No. 95 (30 June 2020) and in particular:
 - (a) the expressed aim for a person-centred mental health system the features of which include "[p]articipation of the consumer's family or carer actively sought to add to the value and effectiveness of the clinical or support service;"¹ and
 - (b) embracing the concept of the personal recovery of an individual within their family, carer, community and cultural context, rather than a narrow focus on clinical recovery — as endorsed by Australian health ministers.²
39. I direct that these findings be published on the Coroner's Court website.
40. I extend my condolences to Ms McGill's family and friends.

DATED 10 December 2020

¹ Productivity Commission, *Mental Health Inquiry Report*, (Final Report No 95, 30 June 2020) vol 1, 6.

² *Ibid* 37.

**P J MORRISON
CORONER**