LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

PUBLIC CONSULTATION ON DRAFT LEGISLATION TO UPDATE THE MENTAL HEALTH ACT, 2001

DEPARTMENT OF HEALTH

March 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Introduction

The Law Society of Ireland ('the **Society**') welcomes the review of the Mental Health Act 2001 ('the **Act**') by the Department of Health ('the **Department'**).

The Act provided for the care and treatment of people with mental health difficulties who need mental health inpatient care, with a particular focus on procedures for involuntary detention. It also established the Mental Health Commission (MHC) for the purpose of promoting high standards in the delivery of mental health services and implementing numerous other provisions of the Act. Section 75 provided that "The Minister shall, not later than 5 years after the establishment day, carry out a review of the operation of this Act and shall make a report to each House of the Oireachtas of his or her findings and conclusions resulting from the review."

A 'Review of the Operation of the Mental Health Act 2001 – Findings and Conclusions' was published in May 2007 (the establishment day referenced in section 75 was 5 April 2002) and the MHC produced its 'Report on the Operation of Part 2 of the Mental Health Act 2001' in April 2008 (as required by section 42(4) of the Act), following commencement of Part 2 of on 1 November 2006.

As the statutory five-year review was published a matter of months after commencement of Part 2 and was therefore quite limited in scope, it was accepted that a more substantial review should take place once Part 2 had been in operation for some years.

That review process began in 2012 and an Expert Group worked over the course of some two years prior to publication of the Report in 2015. The Report contains 165 recommendations, the majority of which relate to reform of the Act. The then government accepted the broad thrust of the recommendations and, in July 2015, called for a general scheme to be drafted to reflect same.

We note that the Department cannot publish the general scheme prior to its approval by Cabinet and that instead, the Department has requested submissions under various headings. While this submission does not purport to cover each issue which will require to be addressed in the general scheme, the Society wishes to provide comments/ recommendations in the following areas:

1. Changes to definitions in the Act;
    - 1.1. The inclusion of a definition of "voluntary patient" in the Act,
    - 1.2. The inclusion of a new category of patient to be known as 'intermediate' patient,
2. Inclusion of guiding principles;
3. Changes to the criteria for detention;
4. Enhanced role for Authorised Officers;
5. Changes to time limits;

6. Enhancing safeguards for individuals (including seclusion and restraint);
7. Mental health tribunals;
8. Change of status from voluntary to involuntary;
9. Capacity and advance healthcare directives;
10. Consent to treatment; and
11. Provisions related to children.3

1. **Changes to definitions in the Act**

The Expert Group recommended significant changes to definitions contained in the Act, such as:

- *the removal of the definition of 'mental disorder' and replacing it with a definition of 'mental illness', which is separate from criteria for detention,*
- *the removal of any reference to 'significant intellectual disability' and 'severe dementia' from the Act,*
- *an updated definition of treatment to include ancillary treatment and tests,*
- *the inclusion of a definition for voluntary patient in the Act,*
- *and the inclusion of a new category of patient.*

The Department has considered these recommendations of the Expert Group in consultation with the Mental Health Commission and the HSE and plans on including provisions to revise definitions in the general scheme.

Recommendations

Having considered the above by reference to the full Expert Report, the Society recommends implementation of the following:

1. the removal of the definition of 'mental disorder' and replacing it with a definition of 'mental illness', which is separate from criteria for detention.

2. the removal of any reference to 'significant intellectual disability' and 'severe dementia' from the Act.

3. an updated definition of treatment to include ancillary treatment and tests.

1.1 The inclusion of a definition of "voluntary patient" in the Act

With regard to inclusion of a definition of voluntary patient, the Society notes that the Expert Group made recommendations in order to meet concerns which had been raised in respect of the interpretation of a voluntary patient in the Supreme Court decision in EH v St. Vincent's Hospital & Ors. [2009] 3 I.R. 774. In that case, Kearns J noted that "It does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead, the express statutory language defines a "voluntary patient" as a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order".

The Society believes that the concerns regarding that interpretation have been ameliorated by the decision in PL v. Clinical Director of St. Patrick's University Hospital & Ors [2018] IECA 29, [2018] 1 ILRM 441 where Hogan J noted that:

Rather, s. 29 envisages that such persons can remain for treatment in an acute hospital if they choose to do so, but that has to be on a purely voluntary basis, [our emphasis] subject, of course, to the provisions of s. 23. It must be recalled that voluntarism remains a

cornerstone of our system of medical treatment, for all the reasons so eloquently stressed by Hardiman J. in North Western Health Board v. H.W. [2001] IESC 90, [2001] 3 I.R. 622, 746-750.

Recommendation

The Society considers that the decision in *PL v. Clinical Director of St. Patrick's University Hospital & Ors* has sufficiently clarified the issue and, as such, recommends that consideration should be given as to whether further amendment is necessary.

1.2 The inclusion of a new category of patient to be known as 'intermediate' patient

The Expert Group's Recommendations were made when it was anticipated that the Assisted Decision-Making (Capacity) Bill would be commenced without delay. While the Assisted Decision-Making (Capacity) Act 2015 has been commenced to a limited extent, the provisions referenced by the Expert Group have not yet been commenced, and there is no certainty as to commencement, which has been deferred on a number of occasions.

However, a considerable body of relevant case law has accumulated in the intervening period in respect of capacity to consent to treatment and the proper application of deprivation of liberty safeguards to a person who may lack capacity.

Notably, the decision of the Supreme Court in *AM -v- HSE [2019] IESC 3* considered the constitutionality of the detention of persons under the Court's wardship jurisdiction. This jurisdiction is now routinely utilised to provide deprivation of liberty safeguards to a person who lacks capacity but who may not meet the criteria for detention under the Act.

The decision of the Court of Appeal in *PL v. Clinical Director of St. Patrick's University Hospital & Ors [2018] IECA 29, [2018] 1 ILRM 441* also addressed the position of an incapacitated compliant patient in an approved centre. Such a patient would come within the proposed category of intermediate patient [i].

This decision and that of the Supreme Court in A.C.& Ors v Cork University Hospital and Ors & A.C. v Fitzpatrick and Ors [2019] IESC 73 are very important in the context of de facto detention, including for persons without capacity who may be compliant, as well as the necessity to provide deprivation of liberty safeguards.

Recommendation

The Society recommends that the decision of the Supreme Court in *AM -v- HSE [2019]*, the decision of the Court of Appeal in *PL v. Clinical Director of St. Patrick's University Hospital & Ors [2018]* and the decision of the Supreme Court in *A.C.& Ors v Cork University Hospital and Ors & A.C. v Fitzpatrick and Ors [2019]* should be carefully considered and taken into account in any amending legislation.

2. Inclusion of guiding principles

The Expert Group recommended that a set of guiding principles be included in a revised Act. The Mental Health (Amendment) Act 2018 sets out a series of guiding principles for adults similar to the principles set out in the Assisted Decision-Making (Capacity) Act 2015. The 2018 Act also provides for a set of guiding principles for children. The Department, following consultation with stakeholders including the Mental Health Commission and the HSE, is considering the inclusion of guiding principles for adults and for children reflecting the 2015 Expert Group report, the principles of the Assisted Decision-Making (Capacity) Act 2015 and the Mental Health (Amendment) Act 2018.

Recommendations

1. Implement the recommendation in relation to guiding principles.

2. Ensure that definitions in the Act are not dependent on other statutory definitions. This is particularly so in circumstances where the Assisted Decision-Making (Capacity) Act 2015 and the Mental Health (Amendment) Act 2018) have not yet been commenced, and may not be commenced for some considerable time.

3. Changes to criteria for detention

The Expert Group recommended that the criteria for detention be revised to ensure that the detention of a person with a mental illness cannot be permitted just by virtue of the fact that the person has an illness, or because their views or behaviour deviate from societal norms. The report further recommended that a person cannot be involuntarily detained solely on the grounds that the person is at risk of causing immediate and serious harm to themselves or others. The Expert Group recommended that the reception, detention and treatment of the individual concerned in an approved centre should be of material benefit to the individual's condition. It also recommended updating the existing grounds for exclusion from involuntary detention to exclude persons with an intellectual disability from involuntary detention by virtue of their disability. The Department is considering its position regarding criteria for detention.

Recommendation

That the above recommendations should be implemented in full.

4. Enhanced role for Authorised Officers

The Expert Group recommended an expanded role for Authorised Officers in the process of involuntary detention, specifically in making the decision whether or not an application to involuntarily detain a person should be made. Furthermore, the Expert Group recommended that, in cases where a person is taken into Garda custody under section 12 of the Mental Health Act, an initial assessment by an Authorised Officer should take place as soon as possible. A commitment on increasing the numbers of Authorised Officers is included in the Programme for Government. The Department is considering expanding the role of Authorised Officers to reflect these recommendations.

The Expert Group recommends that Authorised Officers would sign **all** applications for involuntary admissions. This significantly narrows the current cohort of people who can sign the initial application. While its intent was to assist family members, the recommendation also has the effect of taking the decision to have a seriously ill person admitted, out of the hands of those family members who are most likely to be centrally involved in the matter. There are also significant questions around the resources which would have to available in terms of suitably trained Authorised Officers to meet the increased workload.

The recommendation would also appear to allow for a possible difference of opinion between family members and an Authorised Officer which would require a second opinion being sought prior to an application proceeding.

If it is intended that the Authorised Officer would become the applicant for the purposes of Section 12 Admissions, this could increase the time a patient spends in custody. The proposal in relation to an Authorised Officer signing Section 12 Applications is also of concern given the evidence required to justify the initial arrest of a patient by Gardai. It seems likely that, if a person is detained by Gardai and brought to a station, once the Authorised Officer signs the application, any potential frailties in the process up to that point could be overlooked.

There are also concerns where an Authorised Officer may not have been trained in mental health. Instead, they could make an application perhaps without knowing the patient, the circumstances of the application and without the medical expertise required to make a robust assessment.

Recommendation

The Society believes that the area requires further careful consideration and, as such, does not recommend implementation of the above recommendations in full in this regard.

5. **Changes to time limits**

The Expert Group recommended shortening timeframes at a number of points in the involuntarily detention process, including reducing the length of renewal orders, shortening tribunal hearings from 21 days to 14 days after the making of an admission order, limiting Section 26 leave to 14 days[1], and shortening the length of administration of medicine to involuntarily detained individuals who lack decision-making capacity under Section 60 from three months to 21 days. The issue of renewal orders was addressed in the Mental Health (Renewal Orders) Act 2018. The Department is considering revising timeframes elsewhere in the Act as part of efforts to enhance protections for the individual.

Recommendation

Noting that the recommendations were informed by ECtHR caselaw and decisions, the Society recommends that they be implemented in full.

6. Enhancing safeguards for individuals (including seclusion and restraint)

The Expert Group recommended changes to the Act to enhance and improve safeguards for individuals. In addition to the improvements to care and treatment set out in other headings, the Expert Group recommended updating provisions related to seclusion and restraint, including provisions on emergency treatment for individuals in need prior to their admission to an approved centre, and repeal of the existing Section 73[2] on leave to institute civil proceedings at the High Court. The Department recognises the importance of safeguards for individuals, particularly those who are involuntarily detained, and is considering amendments to enhance safeguards in line with the Expert Group recommendations and following consultation with key stakeholders.

Recommendation

That the above recommendations should be implemented in full.

[1] Section 26 leave means that the consultant psychiatrist responsible for the care and treatment of an involuntarily detained individual can grant permission to the individual to be absent from the approved centre for a specified period of time.

[2] Section 73 requires that an individual must receive permission of the High Court prior to instituting civil proceedings under the Mental Health Act.

7. Mental Health Tribunals

The Expert Group recommended changes to the operation of mental health tribunals, including the renaming of tribunals to review boards, extending length of membership of tribunal members from three to five years and shortening the timeframe for the holding of a tribunal from 21 to 14 days. It also recommended that a psychosocial report should be carried out by a member of the multidisciplinary care team and provided to the tribunal. In addition, the attendance of the consultant psychiatrist responsible for the care and treatment of the individual subject to the tribunal should be required at the tribunal. The Expert Group did not recommend any fundamental changes to the operation of tribunals, nor any changes to the make-up of the three-person tribunal. The Department has considered the recommendations of the Expert Group and has consulted with the Mental Health Commission and the HSE on this matter.

Recommendations

1. The above recommendations should be implemented in full, subject to a review within 12 months of implementation.

2. Consider extending the grounds of appeal to allow for an appeal on all issues raised at first instance. The current situation (where a detained person can only appeal on one ground) is overly restrictive.

3. Provide a legislative basis for an improved structure which would allow appeal hearings to get-on in a timely manner.

4. Make statutory provision for the establishment of a panel of consultant psychiatrists to facilitate independent psychiatric evaluations for appeal hearings. Currently, it is difficult to obtain independent psychiatric assessment for the purposes of a patient's appeal.

5. Statutory provision should also be made for the release of a patient's medical records for the purpose of hearings/appeals, consistent with other jurisdictions.

8. Change of status from voluntary to involuntary

The Expert Group recommended that the existing powers to allow for a change of status from voluntary to involuntary patient remain in the Act. The Group further recommended that an individual should not have to request to leave an approved centre before the change of status process can begin. It also recommended that the process for involuntary admission should mirror the existing procedures in Sections 9, 10, 11 and 14[3], and that there should be a role for independent consultant psychiatrists and Authorised Officers in the change of status process. The Department has reflected on these recommendations and has consulted with the Mental Health Commission and the HSE on revising these provisions.

Recommendation

That the above recommendations should be implemented in full.

9. Capacity and advance healthcare directives

The Expert Group recommended that the issue of capacity be considered in the operation of the Mental Health Act. The Expert Group published its recommendations when the Assisted Decision-Making (Capacity) Act 2015 was still in bill form, and the Group notes that the recommendations related to capacity should be revisited following the enactment of the 2015 Act. The Expert Group recommended that provisions be made for capacity assessments to be carried out in cases where a treating mental health care worker is of the view that the person may lack capacity. The Group recommended that the Mental Health Commission make rules related to the carrying out of capacity assessments, that the process of involuntary detention should include provisions related to capacity and that provisions related to capacity be included in sections on consent to treatment. The Department has reviewed the Group's recommendations on capacity, particularly in light of the principles and provisions of the Assisted Decision-Making (Capacity) Act 2015. It has also taken account of the presumption of capacity set out in the 2015 Act.

Recommendations

1. While agreeing with the broad thrust and principles behind the recommendations, the Society believes that capacity assessments under the Act should not be dependent on other legislative provisions such as those under the Assisted Decision-Making (Capacity) Act 2015, which have not yet been commenced.

[3] Sections 9, 10, 11 and 14 relate to the making of an admission order for involuntarily detention, specifically setting out who can make an application for involuntary detention, who can make a recommendation for involuntary detention, rules on disclosure of previous applications for involuntary detention and the making of an admission order by a consultant psychiatrist.

2. Further consideration should be given to recent judgments in the areas of capacity and treatment in general e.g. Court of Appeal in *PL v. Clinical Director of St. Patrick's Institution [2018]* and the Supreme Court in *A.C.& Ors v Cork University Hospital and Ors & A.C. v Fitzpatrick and Ors [2019].*

3. An advance healthcare directive, made by a patient, should be respected in any subsequent involuntary admission, save where there is a risk to life.

10. Consent to treatment

The Expert Group recommended that changes be made to existing provisions on consent to treatment. The Group recommended that the right of voluntary patients to refuse treatment be restated, that involuntary patients who have capacity should be able to refuse treatment and states that decision-making supports should be available to all those who need them. The Expert Group further set out the scenarios in which treatment refusal by an individual can be overridden, namely in circumstances where the treating consultant psychiatrist believes the treatment is immediately necessary for the protection of life of the person, for the protection from a serious and imminent threat to the health of the person, or for the protection of other persons. The Group recommended that Advance Healthcare Directives, which are defined in the Assisted Decision-Making (Capacity) Act 2015, be extended to persons receiving mental health treatment on an equal basis with physical health.

The Expert Group also stated that consent from the individual should be given prior to the administration of electro-convulsive therapy, and recommended numerous changes to the administration of medicine, including shortening the length of time of treatment without consent from the individual from three months to 21 days. The Mental Health (Amendment) Act 2015 addressed some of the Expert Group's recommendations, removing the word 'unwilling' from sections 59 and 60, so that individuals with capacity cannot be given ECT treatment, or have medicines administered to them after an initial period of three months without giving their consent. Other recommendations have subsequently been overtaken by the Assisted Decision-Making (Capacity) Act 2015. The Department is considering its position regarding the Expert Group recommendations on capacity and consent to treatment, and on the applicability of the Assisted Decision-Making (Capacity) Act 2015 to people receiving treatment under the Mental Health Act 2001.

Recommendations

1. That the above recommendations should be implemented in full, having regard to submissions made at paragraph 1.2 of this document.

2. Provisions of the amending legislation should not be dependent on other legislative provisions e.g. the Assisted Decision-Making (Capacity) Act 2015.

11. Provisions related to children

The Expert Group set out numerous recommendations in relation to the care and treatment of children. Among these recommendations, the following were included:

- *Provisions related to children should be included in a standalone Part of the Act,*
- *A child should be defined as a person under 18 years of age,*
- *There should be a set of guiding principles for children (as noted in 4.2 above),*
- *Children aged 16 and 17 years should be presumed to have capacity to consent to or refuse admission and treatment,*
- *Provisions related to voluntary and involuntary detention should be revised,*
- *Advocacy services should be available to children and their families.*

The Department is considering the above recommendations, and others included in the Expert Group report. Furthermore, the Department has consulted with the Commission and the HSE on provisions related to children and has received observations from the Ombudsman for Children and the College of Psychiatrists of Ireland.

The Society notes that Recommendation 113(g) provides that, where there is an intervention on behalf of a child, his/her best interests must be taken into account, and 'best interests' must be defined in a way that is informed by the **views** of the child, bearing in mind that those views should be given due weight in accordance with his/her age, evolving capacity and maturity and with due regard to his/her will and preferences.

Recommendation

To ensure consistency with section 24 of the Child Care Act 1991, the Society would recommend adding the words "and wishes" after "views".

Conclusion

We hope that the Department will find these comments and recommendations to be helpful.

The Society will be glad to engage further on any of the matters raised.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7

Tel: 353 1 6724800
Email: f.cullen@lawsociety.ie

[i] The Court described the circumstances of such patients as follows:

This issue was also before Peart J. in McN., another s. 23 case to which I have already made passing reference. In that case the applicants suffered from advanced dementia and had originally been detained in an approved centre as involuntary patients. Their respective admissions orders were then subsequently revoked, but both remained in a locked hospital ward, the departure from which was controlled by staff. Both applicants lacked the mental capacity to make a decision to remain in the locked unit on a voluntary basis and it was said that they were in involuntary detention.

Peart J., however, rejected the applications which were brought on their behalf for their release pursuant to Article 40.4.2 of the Constitution, saying: "In my view the mere fact that the unit in which the applicants are is locked and secure should not be seen in the context of forced restraint amounting to a false imprisonment or other unlawful detention. The respondent owes a duty of care to these vulnerable applicants. ….When considering whether keeping these patients in the same Unit 5 as before amounts of itself to an unlawful detention, one must bear in mind the overall context in which they are in that unit, and not simply the physical so the fact that Unit 5 is a secure unit cannot of itself mean that the applicants are detained in any technical sense."

Hogan J noted: "One may understand, sympathise with and appreciate the sentiments which Peart J. expressed in these passages and, indeed, in the earlier passage which I have just quoted from the judgment under appeal …. such patients are doomed to a life of de facto confinement in an approved centre as voluntary patients who, while voluntary in theory, are in fact detained involuntarily, but without the protections provided for detained patients in the 2001 Act.57. I cannot believe that the Oireachtas ever intended such a result. There is nothing at all in the 2001 Act to suggest that voluntary patients could be detained in this manner. Rather, s. 29 envisages that such persons can remain for treatment in an acute hospital if they choose to do so, but that has to be on a purely voluntary basis, subject, of course, to the provisions of s. 23. It must be recalled that voluntarism remains a cornerstone of our system of medical treatment, for all the reasons so eloquently stressed by Hardiman J. in North Western Health Board v. H.W. [2001] IESC 90, [2001] 3 I.R. 622, 746-750.

There are, of course, exceptions provided for by statute and, indeed, the 2001 Act is itself one of the principal exceptions to that rule. But the legislative quid pro quo is always that compulsory medical treatment and detention is attended by appropriate safeguards.

Any other conclusion would not only be entirely at odds with the rule of law based-democracy envisaged by Article 5 of the Constitution, it would also contradict the fundamental constitutional premise of Article 40.4.1 of the Constitution, namely, that the deprivation of personal liberty must be in accordance with law."