Irish Mental Health Lawyers Association
Submission on Review of the Mental Health Act 2001
April 2021

1. Introduction

This submission was prepared in response to the public consultation on the review of the Mental Health Act 2001.

We welcome the Report of the Expert Group on the Review of the Mental Health Act (2015) and we are disappointed that there has been significant delay in implementing the report. The Mental Health Act 2001 was progressive when enacted but requires amendment to take account of developments since it was passed. The rights of persons in mental health units continue to be infringed as time goes by and the 2015 report is not implemented.

In 2003, further effect was given to the European Convention on Human Rights through the European Convention on Human Rights Act 2003. In 2006, the United Nations adopted the UN Convention on the Rights of Persons with Disabilities, which requires a paradigm shift regarding people with disabilities, emphasising rights, will and preferences. The CRPD also calls into question the legality of any deprivation of liberty based on a person's disability. In 2015, the Assisted Decision-Making (Capacity) Act was passed and its main provisions are due to be commenced in 2022. Certain provisions of the 2001 Act were declared unconstitutional in 2018, and this led to the enactment of the Mental Health (Renewal Orders) Act 2018.

There have been significant developments in case-law at Irish and European level. In *P.L. v. Clinical Director of St. Patrick's University Hospital* [2018] I.E.C.A. 29, it was held that a voluntary patient may not be restrained except in accordance with the detention power in s.23 of the Mental Health Act. The court stated that voluntarism remains a cornerstone of our system of medical treatment and compulsory medical treatment and detention must be attended by appropriate safeguards. *I.F. v Mental Health Tribunal* [2019] I.E.S.C. 44 clarified the law regarding Circuit Court appeals. In *H.L. v United Kingdom* (2005) 40 E.H.R.R. 3, a broad definition of deprivation of liberty was adopted and it was held that service users who lack capacity and are deprived of their liberty must be provided with a review mechanism. In *Rooman v Belgium*, Case 18052/11, decided 31 Jan. 2020, it was held that article 5 of the ECHR requires appropriate and individualised therapy aimed at curing or alleviating a person's condition with a view to preparing the person for release.

We have organised our comments in accordance with some of the headings in the guidance document for the public consultation.

2. Definitions

Expert Group proposals:

The Expert Group report proposes a new definition of "mental illness" to mean a complex and changeable condition where the state of mind of a person affects the person's thinking, perceiving, emotion or judgment and seriously impairs the mental function of the person to the extent that he or she requires treatment. It states that treatment should include ancillary tests required for the purposes of safeguarding life, ameliorating the condition, restoring health or relieving suffering. The references to 'significant intellectual disability' and 'severe dementia' in existing legislation should be removed.

A voluntary patient should be defined as a person who has the capacity (with support if required) to make a decision regarding admission to an approved centre and who, where the person retains capacity, formally gives his/her informed consent to such admission, and subsequent continuation of voluntary inpatient status and treatment on an ongoing basis as required. The category of 'intermediate patient' will apply to a person who will not be detained but will have the review mechanisms and protections of a detained person. Such patients would not have the capacity to consent to admission and equally do not fulfil the criteria for involuntary detention.

IMHLA Submissions:

We welcome these changes to the definition of 'mental illness', including the removal of references to 'significant intellectual disability' and 'severe dementia'

We note that in *P.L. v. Clinical Director of St. Patrick's University Hospital* [2018] I.E.C.A. 29, it was held that a voluntary patient may not be restrained except in accordance with the detention power in s.23 of the Mental Health Act. The court stated that voluntarism remains a cornerstone of our system of medical treatment and compulsory medical treatment and detention must be attended by appropriate safeguards. We recommend that the statements in this case about voluntary status be taken into account in revising the definition of a voluntary patient.

As regards the creation of the category of 'intermediate patient', we recommend that recent case-law be closely examined in considering this aspect of the report. In particular, we refer to *P.L.* (cited above), *A.M. v Health Service Executive* [2019] I.E.S.C. 3 in which it was stated that "certain provisions of the 2001 Act require rethinking in order to eliminate the risk of potential mishaps" and *A.C. v Cork University Hospital* [2019] I.E.S.C. 73, in which it was stated that there is no half-way house between liberty unfettered by restraint and an arrest.

3. Guiding Principles

Expert Group Proposals:

A rights based approach should be adopted throughout any revised mental health legislation. The following list of Guiding Principles of equal importance should be specified in the new law:

a. The enjoyment of the highest attainable standard of mental health, with the person's own understanding of his or her mental health being given due respect
b. Autonomy and self determination
c. Dignity (there should be a presumption that the patient is the person best placed to determine what promotes/compromises his or her own dignity)
d. Bodily integrity
e. Least restrictive care.

IMHLA Submissions:

We agree with the recommendations of the Expert Group and welcome the move away from the "best interests" principle, which was interpreted in a paternalistic manner by the courts.

4. Criteria for Detention

Expert Group Proposals:

The recommended new criteria for detention are:

a. the individual is suffering from mental illness of a nature or degree of severity which makes it necessary for him or her to receive treatment in an approved centre which cannot be given in the community; and
a. it is immediately necessary for the protection of life of the person, for protection from a serious and imminent threat to the health of the person, or for the protection of other persons that he or she should receive such treatment and it cannot be provided unless he or she is detained in an approved centre under the Act; and
b. the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit the condition of that person to a material extent.

If a person with capacity refuses every treatment option, the basis for detaining such a person can no longer be held to be valid and he/she should be discharged.

IMHLA Submissions:

We recommend the implementation of the Expert Group report. We welcome the reciprocal element of the new definition: if a person's liberty is taken away, there is a duty on the health services to provide appropriate treatment for the person's mental illness.

We note that the group stated that if a person with capacity refuses every treatment option, he/she should be discharged. We recommend that this provision be amended to state that the person may leave if they wish. We also recommend that the wording be clarified, for example regarding the exact process which is undertaken in such cases regarding treatment options and how the views of the person are taken into account.

5. Authorised Officers

Expert Group Proposals:

The Group recommends that there should be a more expanded and active role for Authorised Officers where involuntary admissions to an approved centre are being considered. This new role can lead to more appropriate and least restrictive treatment for individuals in community or other mental health settings and bring a greater focus on involuntary admission being a treatment of last resort. The Group recommends that an Authorised Officer should be the person to sign all applications for involuntary admission to an approved centre (this also includes change of patient status in an approved centre from voluntary to involuntary).

IMHLA Submissions:

We are concerned that it would be unduly restrictive to require that an authorised officer be involved in all admissions. We believe that the Act should continue to permit applications from various categories of persons.

6. Changing Timeframes

Expert Group Proposals:

The Expert Group recommended shortening timeframes at a number of points in the involuntarily detention process, including reducing the length of renewal orders, shortening the period before tribunal hearings from 21 days to 14 days, limiting s.26 leave to 14 days, and shortening the length of administration of medicine to involuntarily detained individuals who lack decision-making capacity under s.60 from three months to 21 days. The issue of renewal orders was addressed in the Mental Health (Renewal Orders) Act 2018.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals. Reducing these timeframes is an important means of enhancing human rights, by ensuring that hearings take place speedily.

7. Enhancing safeguards for individuals

Expert Group Proposals:

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 s. 73 on leave to institute civil proceedings at the High Court.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals.

We would also recommend the introduction of a "slip rule", where clerical errors in statutory forms could be amended. In England and Wales, s.15 of the Mental Health Act 1983 as amended permits rectification of errors within 14 days of admission.

8. Mental Health Tribunals

Expert Group Proposals:

Mental Health Tribunals should in future be renamed 'Mental Health Review Boards'. Review Boards should have the authority to establish whether there is an individual care plan in place and if it is compliant with the law. The 'other person' appointed to the Review Board should be known as the 'community member' and the person appointed to this role should not be or never have been a Medical Practitioner, Nurse or Mental Health Professional, Barrister or Solicitor in the State or in another jurisdiction.

Members of Review Boards should be appointed for a five year term and no member may serve more than two consecutive terms.

There should be a mechanism to allow information in relation to decisions of Review Boards to be published in anonymised form which will ensure patient confidentiality. This will allow such decisions to be available for the Mental Health Commission and/or the public to view.

The purpose of Review Board hearings for discharged patients where they take place pursuant to s.28(5) should be clearly set out in any revised legislation to ensure that the admission process was followed correctly and that the order was made on a bona fide belief that the person was at that time suffering from a mental illness.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals and note that it is of great importance that Review Board decisions be published.

In addition, the new Act should include the following:

- a statutory provision for access by the legal representative to the medical records. This is important as patients need to have effective legal assistance from the commencement of the admission.
- a statutory provision stating that, once the Review Board has been appointed for a case, a patient may contact the Board to request attendance of a certain witness at the hearing. At present, a person's detention may be unnecessarily extended as a hearing needs to be adjourned after a witness has been called by the tribunal, to allow time for the witness to attend.
- a change of term of office for Review Board members. As these are quasi-judicial appointments, to ensure independence, the term of office should be similar to judicial appointments, i.e. until retirement. We note that s.48(9) of the 2001 Act contains powers to remove tribunal members for misbehaviour.
- a time limit regarding the disqualification of community members who have been medical practitioners, etc., in the past. For example, it could be stated that a person appointed as a community member should not be or have been *within the previous ten years* a medical practitioner, etc.
- an amendment of the grounds for appeal to the Circuit Court, to allow a patient to appeal both on substantive and procedural grounds

9. Change of Status from Voluntary to Involuntary

Expert Group Proposals:

The Group recommends that during the initial detention period of 24 hours, an Authorised Officer should be called to attend the approved centre to consult with the patient and staff and make a determination as to whether or not to make an application for involuntary admission. The Authorised Officer must consider the alternatives available, offer advice and mobilise support for the service user and the family where necessary. It should no longer be a requirement that a patient must first indicate a wish to leave the approved centre before the involuntary admission process is initiated. The Act should be amended to specifically allow that process to be initiated in such cases in the approved centre. Every time s.23 is used to initially detain a patient (even if s.24 is not subsequently used to detain the person) the Mental Health Commission should be notified.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals. These reforms will enhance patients' rights.

10. Capacity

Expert Group Proposals:

If on admission of a patient, the admitting Mental Health Professional forms the view that the person may lack capacity to understand and give his/her informed consent to the proposed admission, they must refer the person for formal capacity assessment to be completed within 24 hours. The Mental Health Commission should develop and publish guidelines in relation to the assessment of capacity. Capacity should be monitored on an ongoing basis by the treating clinicians. If, following the capacity assessment, it is deemed that a person has capacity to admit themselves, a voluntary admission may proceed. If it is deemed that they need support to understand, to make, or to convey their decision, that support must be provided to assist in the voluntary admission process. If it is deemed that they do not have capacity in relation to this decision, and the person has a mental illness, they may only be admitted on an involuntary basis provided they satisfy all the criteria for detention. A person who lacks capacity and has a mental illness but does not fulfil the criteria for detention, may in specified circumstances be admitted as an 'intermediate' patient.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals. We recommend that the definition of capacity should be contained within the Mental Health Act and that cross-reference to the Assisted Decision-Making (Capacity) Act 2015 should not be required.

11. Consent to Treatment

Expert Group Proposals:

The right of voluntary patients to refuse treatment should be explicitly stated. All patients should be supported to make informed decisions regarding their treatment and 'consent' as defined in s.56 relating to consent to treatment should include consent given by a patient with the support of a family member, friend or an appointed 'carer', 'advocate' or a support decision maker appointed under the capacity legislation. S.57 should be amended so that the informed consent of a voluntary patient is required for all treatment. Informed consent is also required from involuntary patients who are deemed capable of giving such consent. The Group emphasises the ongoing need for services to ensure that seclusion and restraint are used only as a last resort, only where there is no other alternative and always in accordance with the rules drawn up by the Commission. The report recommends changes to sections 59 and 60 regarding ECT and administration of medicine.

Advance healthcare directives are now provided for in Part 8 of the Assisted Decision-Making (Capacity) Act 2015. S.85(7) of the 2015 Act states that a directive does not need to be complied with, as regards mental health matters, when a person is detained under the Mental Health Act.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals. As regards advance healthcare directives, we believe that such a directive should be respected in the case of persons detained under the Mental Health Act, unless there is a risk to life.

12. Information and individual care/recovery planning

Expert Group Proposals:

On admission to an approved centre, every patient should have a right to information which would include their rights as a voluntary or involuntary patient, their rights regarding consent to or refusal of treatment, the range of services available in the centre, and any additional information as outlined in the Mental Health Commission Code of Practice. There is also an obligation to ensure that the patient is made aware of the complaints mechanisms in place at the centre and any general complaints mechanisms that exist within the service generally. Care planning function should be strengthened and extended to all persons in receipt of mental health services and provide a seamless recovery based approach towards discharge and support in the community. Recovery plans should be reviewed on a regular basis and the timing of the reviews should be decided based on the patient's individual needs. Patients must be offered the opportunity to sign off on their recovery plans and this must be recorded. Wording of the legislation should be amended to ensure that it is the multidisciplinary team that has responsibility for the clinical content of recovery plans rather than the proprietor. Care plans should be renamed as recovery plans and should refer to the person rather than the patient. Discharge plans must form part of a person's individual recovery plan.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals.

13. Provisions related to children

Expert Group Proposals:

Provisions relating to children should be included in a standalone Part of the Act and any provisions of the Child Care Act 1991 which apply should be expressly included rather than cross-referenced. Child should be defined as a person under 18. The Act should stipulate guiding principles, including: Every child should have access to health services that aim to deliver the highest attainable standard of child mental health. The autonomy and self-

determination of the child should be respected insofar as practicable in conjunction with parents or persons as required acting in loco parentis.

Children aged 16 or 17 should be presumed to have capacity to consent / refuse admission and treatment. For an admission of a 16 or 17 year old to proceed on a voluntary basis, the child therefore must also consent or at least must not object to his/her voluntary admission.

Where a 16 or 17 year old objects, the case should then be referred to a child friendly District Family Law Court which can determine whether the child has the necessary maturity or capacity to make an informed decision. If the Court determines that the child has the necessary maturity and capacity, admission may only proceed on an involuntary basis by order of the Court. In the case of a child under the age of 16, voluntary admission should only take place where the parents or person as required acting in loco parentis consents, however the views of the child must be heard by parents and service providers and given due weight in accordance with the child's evolving capacity and maturity.

IMHLA Submissions:

We recommend implementation of the Expert Group's proposals. We note the increasing importance of the rights of children in light of Article 42A of the Constitution.

About the Irish Mental Health Lawyers Association

The Irish Mental Health Lawyers Association is a non-profit-making organisation run by a committee elected by its membership. Membership is open to all lawyers involved in mental health law. The Association was founded in 2007 and has held a number of conferences and seminars on mental health law. Members of the Association have been involved in consultations on mental health law, and relevant Law Society committees. For further information, see www.imhla.ie.