

**Mental Health Act Review Submission**

**by**

**Safeguarding Ireland.**

*April, 2021.*

## **INTRODUCTION.**

Safeguarding Ireland is a not-for-profit organisation incorporated as a company limited by guarantee and registered with both the Companies Registration Office and the Charities Regulatory Authority. Its aims are to promote safeguarding of adults who may be vulnerable, protect them from all forms of abuse by persons, organisations and institutions and develop a national plan for promoting their welfare. This is achieved by promoting inter-sectoral collaboration, developing public and professional awareness and education, and undertaking research to inform policy, practice and legislation in the Republic of Ireland.

Safeguarding Ireland has made many submission and recommendations to government departments, individual ministers, public bodies and private agencies on protecting and promoting the human rights of all vulnerable adults. Safeguarding Ireland is of the view that the protection and promotion of human rights for all will ensure people are enabled to participate in their communities, maximise their independence and help prevent them from being abused, exploited and/or neglected. Many people with mental illnesses can be quite vulnerable as a result of their illness and/or their circumstances.

In making this submission, Safeguarding Ireland is primarily concerned with issues relating to adult abuse, exploitation and neglect and in promoting the rights and independence of adults with mental illness.

For more information on Safeguarding Ireland, please visit our website - <https://www.safeguardingireland.org/>

## **MENTAL ILLNESS AND VULNERABILITY.**

Good mental health is vital for people to live active, productive and satisfying lives. Living with a mental illness can significantly impact a person's life, contributing to worse educational outcomes, higher rates of unemployment and poorer physical health<sup>1</sup>. It is widely accepted that the COVID-19 pandemic is having a negative impact on peoples' mental health and well-being.

Aside from the difficulties posed by any mental illness, people with mental health problems are more likely to have increased vulnerabilities that they also must try to cope with. These increased vulnerabilities can exacerbate their mental health problems and lead to an increased likelihood of experiencing disability and premature mortality, stigma and discrimination, social exclusion and impoverishment<sup>2</sup>. Moreover, mental health problems can make people more vulnerable to abuse and exploitation.

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<sup>1</sup> [https://ec.europa.eu/health/sites/health/files/state/docs/2020\\_healthatglance\\_rep\\_en.pdf](https://ec.europa.eu/health/sites/health/files/state/docs/2020_healthatglance_rep_en.pdf)

<sup>2</sup> [https://www.who.int/mental\\_health/mhgap/risks\\_to\\_mental\\_health\\_EN\\_27\\_08\\_12.pdf](https://www.who.int/mental_health/mhgap/risks_to_mental_health_EN_27_08_12.pdf)

Some of the factors that may threaten mental health include low self-esteem, neglect, loneliness, injustice, discrimination, medical illness and substance use<sup>3</sup>. These factors can also leave people more vulnerable to abuse, exploitation and neglect.

Mental health can be viewed as a continuum, with two extremes. Those with the greatest mental health challenges tend to be hospitalized for treatment. In Ireland, there were 16,710 admissions to psychiatric units in 2019<sup>4</sup>. There was no significant gender difference in the admissions and the median age of those admitted was 43 years. However, the 20-24 age group had the highest overall rate of admissions. Of those people admitted for in-patient treatment, they were more likely to be single, unemployed and diagnosed with a depressive disorder. Schizophrenia, mania and neuroses were the second, third and fourth most common diagnoses, respectively<sup>5</sup>.

In making this submission, Safeguarding Ireland strongly believes that full commencement of the Assisted Decision Making (Capacity) Act, 2015 and commencement of the Mental Health (Amendment) Act, 2018, would offer very significant protections for many people with mental illnesses and reference is specifically made to those two Acts in answers to some of the questions posed as part of this submission. In addition to full commencement of the above Acts, Safeguarding Ireland is convinced of the need for adult safeguarding legislation which would provide protection for all vulnerable adults, including those with mental illness.

**Definitions.** *Question: what changes to definitions do you want to see in the new Mental Health Act?*

Part 1, Section 3 of the Act states that *“mental disorder means mental illness severe dementia or significant intellectual disability where -*

*a) because of the illness, disability, or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or*

*b) (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and*

*(ii) the reception detention and treatment of the person concerned in an approved center would be likely to benefit or alleviate the condition of that person to a material extent”.*

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<sup>3</sup> Ibid.

<sup>4</sup> <https://www.irishpsychiatry.ie/blog/hrb-releases-report-on-psychiatric-in-patient-admissions/>

<sup>5</sup> Ibid.

The Expert Group recommended removing *'significant intellectual disability'* and *'severe dementia'* from the Act. This recommendation by the Expert Group was made so that a person cannot be detained as a result only of having dementia or an intellectual disability. Safeguarding Ireland agrees with the principle of removing *'significant intellectual disability'* from the Act, noting that dementia *'is already captured in the classification of a mental illness'*. Detaining people with significant intellectual disabilities in psychiatric units is not appropriate and does not constitute a fitting response to such difficult presentations. In fact, the detention itself can exacerbate the behaviours as staff of psychiatric units, despite their best intentions, generally do not possess the expertise needed to care and treat such persons and the facilities are not conducive to managing the extreme behaviours associated with some of these clients.

The Expert Group states that removing the term *'severe intellectual disability'* from the Act does not *'preclude the involuntary admission of persons with intellectual disabilities or severe dementia to approved centres because of mental illness and where they also meet the criteria for detention'*. Put simply, people with severe intellectual disabilities and without a mental illness, displaying extreme behaviours that put themselves or others at grave risk will, in the future, if this recommendation is accepted, not be detained in a psychiatric facility.

Some people with severe intellectual disability can display behaviours which may be harmful to themselves or others. However, it is an unfortunate fact that, at the present time in Ireland, there is virtually no alternative immediate service for people in such situations. For this reason, the practical application of removing people with significant intellectual disability from the Act must be considered and addressed prior to amending the Act.

Specialist regional services for people with severe intellectual disabilities and associated extreme behaviours must be developed. These centres must not merely be places of detention but should have specialist trained staff, specialist facilities and a rehabilitative focus. Legislation may be required to allow such people to be detained but detention must be an option of last resort.

Safeguarding Ireland also fully endorses the recommendation of the Expert Group that *'mental disorder should no longer be defined in mental health legislation but instead the revised Act should include a definition of mental illness'*. Safeguarding Ireland further agrees with the definition suggested by the Expert Group as:

*'Mental illness means 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'*.

**Guiding Principles.** *Question: what guiding principles do you want to see in the new Mental Health Act?*

Safeguarding Ireland considers that the guiding principles in the Act are a very important element in setting the tenet of the Act, its interpretation and its practical application. The principles can further have the effect of combatting the stigma still associated with mental illness, an issue recognized by the Expert Group - *'the Group acknowledged the fundamental importance of working towards the removal of all elements of stigma in the field of mental health and this important tenet was a key part of the Group's thinking in looking at the issue of guiding principles'*.

Safeguarding Ireland would largely concur with the Report of the Expert Group and agrees with the proposition of a more human *'rights based list of guiding principles which would reflect the importance of the person's right to autonomy'*. Safeguarding Ireland would also largely concur with the specific guiding principles outlined in the Report of the Expert Review, namely -

- 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;
- Autonomy and self-determination;
- Dignity (there should be a presumption that the patient is the person best placed to determine what promotes/compromises his or her own dignity);
- Bodily integrity;
- Least restrictive care.

Safeguarding Ireland notes the Expert Group belief that the *'wording from the current Assisted Decision-Making (Capacity) Bill (now Act).....would be helpful'*. The principles contained in the Assisted Decision-Making (Capacity) Act, 2015 were given effect, in a slightly modified form, in the Mental Health (Amendment) Act, 2018.

Commencement of the Mental Health (Amendment) Act, 2018 and of the Assisted Decision Making (Capacity) Act, 2015 would ensure additional very important guiding principles underpin any revised Mental Health Act. The Mental Health (Amendment) Act, 2018 provides for capacity to be assessed on a functional basis, in accordance with the Assisted Decision Making (Capacity) Act. It also provides that Guiding Principles replace the 'best interest' principle contained in the *Mental Health Act 2001*.

The principles outlined in the Assisted Decision Making (Capacity) Act, 2015, support the ethos of the United Nations Convention on Rights of Persons with Disabilities which the Expert Group evidently wished to embrace. Therefore, Safeguarding Ireland would suggest that the recommendations be expanded to specifically include full and immediate commencement of both the Assisted Decision Making (Capacity) Act, 2015 and the Mental Health (Amendment) Act, 2018 given that Ireland has now ratified the UNCRPD. In addition, though not specific to this Review but nevertheless important in the wider scheme of protecting and promoting human rights, Safeguarding Ireland would very strongly urge the introduction of adult safeguarding legislation.

**Criteria for Detention.** *Question: should we change the reasons for involuntary detention?*

Detention involves, quite simply, depriving an individual of his or her liberty. It is, of itself, a grave affront to human rights. Liberty is a fundamental right and is protected in both the Constitution of Ireland and in Article 5 of the European Convention on Human Rights<sup>6</sup>. Specifically, Article 14 of the UNCRPD provides that: *'State Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law...'*

Notwithstanding an individual's right to liberty, situations do arise where the health or life of an individual may be at risk due to a mental illness and as a result of their behaviours. These factors must also be considered against the background of the Guiding Principles proposed, particularly those of autonomy, dignity, self-determination and the right to make unwise decisions. The criteria for detention are critical in amending the current legislation and ensuring that people are not deprived of their liberty, save in very exceptional circumstances. In that regard, Safeguarding Ireland concurs with the recommendations contained in the Report of the Expert Review with a caveat in relation to 'Exclusions'. This caveat is a repeat of the point made under the 'Definitions', i.e., that specialist regional services for people with severe intellectual disabilities and extreme challenging behaviour, but without a mental illness, must be developed. These centres must not merely be places of detention but should have specialist trained staff, specialist facilities and a rehabilitative focus. Legislation may be required to allow such people to be detained but detention must be an option of last resort.

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<sup>6</sup> [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

**Authorised Officers.** *Question: should Authorised Officers be the only group allowed to make an application for involuntary detention?*

Safeguarding Ireland supports the suggestion for a more expanded and active role for Authorised Officers with benefits to clients likely to include a reduction in detention numbers, a reduced burden on families/carers and a reduced role for An Garda. Safeguarding Ireland supports the recommendations in the Report of the Expert Review.

**Interdisciplinary approach to care and treatment.** *Question: should other mental healthcare workers play a bigger role in the mental health care and treatment of people?*

Care and treatment of people with mental health conditions requires multi-disciplinary input and interventions and modern treatments do not rely solely on medical interventions. Many specialists have a role to play, to a greater or lesser extent, depending on the nature of the illness. Thus, treatment and care may be delivered by psychiatrists, nurses, occupational therapists, behavioural therapists, psychologists and/or many other disciplines. The Expert Group supports this view – *‘multi-disciplinary teams playing an increasingly prominent role in the delivery of all mental health services, this positive change should also be reflected more fully in mental health legislation’* and *‘treatment includes a range of psychological and other remedies and where treatment is specifically mentioned in this report, it should be interpreted in its wider sense and not viewed simply as the administration of medication’*. However, a greater role in the care and treatment of patients requires robust accountability and reviews of practice and case outcomes. The involvement of other disciplines in the care and treatment of people with mental illness should also offer further safeguards to clients who are to be detained through the recommendation that a *‘Consultant must also consult with at least one other Mental Health Professional of a different discipline who is or will be involved in the treatment of the person in the approved centre’*. In addition, as the Review states the *‘broader view of an individual’s circumstances, both medical and social, is very much in the interest of all involved’*. In addition to the recommendations in the Expert Group Review Report, Safeguarding Ireland would suggest at least two-yearly inspections of centres by the Mental Health Commission – see below.

**Changing Timeframes.** *Question: should we reduce the length of time in any of the cases above?*

Currently, a Mental Health Tribunal must review the detention of a patient and make its decision in relation to that detention not later than 21 days after the making of the admission order or renewal order. The Expert Group proposed that the timeframe should be reduced 14 days.

This is a complex area with considerations which may appear at odds with each other. On the one hand, there is a need to ensure sufficient time to allow treatment to have effect and on the other there is a need to ensure that nobody is deprived of their liberty save in exceptional circumstances. Safeguarding Ireland considers that the overriding consideration here is the protection of a person's liberty. Therefore, Safeguarding Ireland would agree with the proposed reduction in the timeframe to 14 days.

**Enhancing safeguards for individuals.** *Question: how should we improve safeguards for people receiving mental health care and treatment?*

Safeguarding Ireland reiterates the absolute need to fully commence the Assisted Decision Making (Capacity) Act, 2015 and the Mental Health (Amendment) Act, 2018. It is regrettable, given that the functional approach to the assessment of decision-making capacity has been part of the common law since 2008 and the guiding principles are giving effect to a human rights approach to decision-making, that these Acts have not yet been commenced to respect the rights of persons who are mentally ill.

It should also be noted that a person who has a 'mental disorder' and is a ward of court does not have the benefit of the review process provided for in the Mental Health Acts but rather remains within the jurisdiction of the wardship court under the provisions of the *Mental Treatment Act, 1945*. Until very recent years (around 2014), such wards did not have the benefit of a review of their detention (which was in breach of their constitutional rights) but limited reviews now take place under practice direction of the wardship court. While Section 108 of the Assisted Decision Making (Capacity) Act makes statutory provision for a review of detention to those persons who are not detained in an 'approved centre', it is important that persons who lack capacity and who are detained in either an approved or non-approved centre have the benefit of timely reviews of original and/or renewal orders consistent with the reviews available to persons who do not lack decision-making capacity and in accordance with the *Mental Health (Renewal Orders) Act 2018*.

In addition to the proposals outlined above, which could be implemented very quickly, Safeguarding Ireland would make the point that the introduction of adult safeguarding legislation, properly constructed, would enhance safeguards for all vulnerable adults, including those with a mental illness. Key elements of any such legislation should include a rights-based focus, ensuring an appropriate balance between empowerment and protection; be aimed at preventing, and protecting against, all form of abuse; and actively promote, supervise and enforce a culture of high standards of behaviour and care<sup>7</sup>.

**Mental health tribunals.** *Question: what changes should we make to mental health tribunals?*

Safeguarding Ireland is of the view that the term Mental Health Tribunal is not an appropriate term in this situation and can be upsetting for the client with the term tribunal often now associated with public enquiries. The proposal of the Expert Group Review Report to change the title to Mental Health Review Board may also stigmatise the client and his/her condition. In order to mainstream the language, Safeguarding Ireland would simply use the title 'Health Review Panel'.

Safeguarding Ireland would not support extending the powers of the Mental Health Tribunals to examine issues in relation to treatment and decisions but should confine itself to the appropriateness or otherwise of detention or to approve a renewal order and ensure procedures have been followed. In arriving at its decisions, the Mental Health Review Board must be made fully aware and consider any Healthcare Directives and the decision-making capacity of the client.

In relation to the timeframes, please refer to section above on ***Changing Timeframes.***

In relation to the composition of the Review Boards, Safeguarding Ireland is of the view that the current composition is appropriate with a requirement of statutory declaration by Board members of any potential or perceived conflicts of interest relating to individual cases.

The Expert Group Review Report considered the numbers attending mental health tribunals as an issue of concern. However, it is difficult to see how attendance could be reduced without compromising the process and ensuring all parties a fair hearing.

Publication of anonymized reports on decisions of Review Boards would be supported by Safeguarding Ireland as a measure to inspire confidence and build further safeguards into the process.

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<sup>7</sup> A Regulatory Framework for Adult Safeguarding. Law Reform Commission. (2019).

**Change of status from voluntary to involuntary.** *Question: what changes should we make to change of status from voluntary to involuntary?*

Safeguarding Ireland notes and shares the concerns of the Expert Group in relation to voluntary patients not having the *'same safeguards and protections prescribed under the Act as involuntary patients'*. In order to ensure that people fully understand their rights, all voluntary patients should be fully informed of their rights, including in relation to issues of consent or otherwise to treatment and the option of leaving an approved centre. In addition, all voluntary patients should be offered independent advocacy services as a routine part of the admission process and ongoing care planning process. While many service staff may rightly see themselves as patient advocates, it is a fact that staff may sometimes experience a conflict between advocacy and their primary roles. In addition, in the interests of trust and patient perceptions, independent advocacy is necessary. Safeguarding Ireland would agree with all of the recommendations under this heading, i.e., recommendations numbered 73 – 81, with an additional recommendation in relation to independent advocacy.

**Capacity.** *Question: how should we introduce capacity to the Mental Health Act?*

The very simple and straightforward solution to this is by full commencement of both the Assisted Decision Making (Capacity) Act, 2015 and of the Mental Health (Amendment) Act, 2018. This was recognized in the Report of the Expert Group which stated that *'the Group would be in a better position to make more precise recommendations on capacity related issues specifically in the area of mental health if the Capacity Bill had been passed into law. The Group believes that when revised mental health legislation is being framed a further look at the final proposals in the Capacity Bill will be required'*.

It is also noted that the Expert Group welcomed the functional capacity approach adopted in the Assisted Decision Making (Capacity) Act, 2015. The Expert Group noted that situations might arise where this approach may not be practical, however, Deprivation of Liberty legislation will deal with such exceptional situations. Appropriate training of mental health professionals is crucial to protect client rights and the training must include comprehensive training on the Assisted Decision Making (Capacity) Act, 2015. In addition, Safeguarding Ireland agrees that *'the Mental Health Commission should develop and publish guidelines in relation to the assessment of capacity'* in line with the provisions of the Assisted Decision Making (Capacity) Act. The Expert Group states that all *'references to capacity in this report should be interpreted'* in accordance with the meaning of 'capacity' in the Assisted Decision Making (Capacity) Act, 2015.

Safeguarding Ireland agrees with the proposed definition of a voluntary patient in the Review of the Expert Group which conforms to the principles relating to capacity as outlined in the Assisted Decision Making (Capacity) Act, 2015 – ‘*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. This provision should also apply equally to children and their parents or persons as required acting in loco parentis.*

**Consent to treatment.** *Question: what changes to consent to treatment should we make?*

All voluntary patients have the right to refuse or consent to treatment and this must be explicitly explained to them on admission and as part of their ongoing treatment and care (see section above on change of status). Informed consent protections for patients would be greatly enhanced if the Assisted Decision Making (Capacity) Act, 2015 was fully commenced. The protections are also outlined in Section 3 of the Mental Health (Amendment) Act 2018 which, unfortunately, also awaits commencement.

Safeguarding Ireland would recommend that these two Acts be commended in full without delay as a means to offer very significant protections in the area of informed consent.

**Information and individual care/recovery planning.** *Question: what do we need to include on care plans and access to information for people receiving treatment in approved centres?*

An individualized care plan should be developed for every patient with a mental illness who is in receipt of treatment and/or care. Care Plans should be individualized and include those elements previously outlined by the Mental Health Commission –

- A documented set of goals.
- Regular review and update of the plan by the resident’s multidisciplinary team.
- Consultation with each resident in so far as is practicable.
- Specification of treatment and care required in accordance with best practice.
- Identification of the necessary resources.
- Specification of appropriate goals.

- Records being kept in one composite set of documentation<sup>8</sup>.

In addition, Care Plans must have a number of guiding elements, including –

- A collaborative approach with the individual and all members of the treating/caring team.
- Underpinned by dignity and respect for the individual and the team members.
- A risk assessment evaluation.
- Review and flexibility
- A rehabilitative focus.

**Inspection, regulation and registration of mental health services.** *Question: what do we need to include on registering and inspecting community and residential mental health services?*

Safeguarding Ireland is broadly in agreement with the recommendations contained in the Expert Group Review Report. Inspections should have a focus on continuous service improvement and support for such improvement. In that regard, Safeguarding Ireland concurs with the suggested principles of inspection outlined in the Expert Group Review Report, i.e., inspections should be for the purpose of improvement, have a focus on mental health outcomes, have a service user perspective, risk evaluation and sharing of learning. Safeguarding Ireland would, however, be concerned with the recommendation to inspect once in every three years, notwithstanding that this recommendation includes a more frequent inspection regime where there is identified risk. Three years is quite a long time and, in order to ensure high standards and assure clients and the public at large, Safeguarding Ireland would recommend that inspections take place, at a minimum, at least once every two years. Safeguarding Ireland supports the recommendation that the *‘Mental Health Commission make standards in respect of all mental health services and to inspect against those standards. The Standards should be made by way of regulations and the regulations should be underpinned by way of primary legislation’*. Safeguarding Ireland would further suggest that these standards be very much client focused, with the primacy of the client and his or her human rights being at the forefront of the standards.

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<sup>8</sup> <https://mhcir.ie/sites/default/files/2021-01/Guidance%20Document%20on%20Individual%20Care%20Planning.pdf>

**Provisions related to the Mental Health Commission.** *Question: what changes should we make to the governance of the Mental Health Commission?*

Currently, the Mental Health Commission's remit includes mental health services, including general adult mental health services, as well as mental health services for children and adolescents, older people, people with intellectual disabilities, and forensic mental health services. It maintains a register of approved centres.

In relation to the Commission, Safeguarding Ireland notes that the membership under Section 35 of the Mental Health Act 2001 comprises 13 members, seven of which are healthcare professionals, one a HSE Chief Executive, one a barrister or solicitor, three representing voluntary bodies and one member of the general public. Safeguarding Ireland would suggest that one of the healthcare professionals be replaced by a person representing the Decision Support Service and an additional member representing a human rights organisation.

In framing any new adult safeguarding legislation, Safeguarding Ireland is of the view that such legislation should include the establishment of an independent National Safeguarding Authority providing overarching governance to a National Safeguarding Service, Mental Health Commission, Decision Support Service and to an Independent Advocacy Service.