Mental Health **Reform**

Promoting Improved Mental Health Services

Submission to the Joint Oireachtas Committee on Justice, Defence and Equality on the Assisted Decision-Making (Capacity) Bill 2013

4th April 2014

Introduction

1. Mental Health Reform (MHR), the national coalition of 40 organisations promoting improved mental health services and implementation of the Government's mental health policy *A Vision for Change,* welcomes this opportunity to make a submission to the Joint Oireachtas Committee on Justice, Defence and Equality on the Assisted Decision-Making (Capacity) Bill (hereinafter "the Bill"). MHR has previously welcomed the publication of the Bill. However in order to achieve its stated objective, Mental Health Reform considers that the Bill requires amendment.

2. MHR's submission addresses the following issues in particular:
    (i) Ensuring that individuals with a mental health condition can avail of the provisions in the Bill, and the interaction between the Mental Health Act and the Bill;
    (ii) The position of persons presently subject to Wardship;
    (iii) Informal decision-making;
    (iv) Use of Restraint; and
    (v) The position of incapacitated but compliant patients.

    This submission is informed by MHR's previous submission to the Oireachtas Committee on Justice, Defence and Equality on Mental Capacity Law in Ireland which contains the more detailed rationale for our recommendations.

3. In particular, MHR recommends that the Bill be amended in order to:

1. **Ensure that all individuals in approved centres as defined by the Mental Health Act, 2001 can avail of the provisions in the Bill;**
2. **Ensure timely review and transition of all persons presently subject to wardship;**
3. **Ensure that the legislation protects people who are incapacitated and compliant;**

4. **Restrict the scope of informal decision-making in particular in respect of restraint, persons who are in mental health services and to address concerns regarding potential overuse of medication; and**
5. **Introduce advance directives and ensure that these are binding on decisions about mental health treatment except in life-saving emergencies.**

The following sections contain specific wording for amendments to give effect to these recommendations.

4. Mental Health Reform has been an active participant of the civil society group that prepared the document Essential Principles: Irish Legal Capacity Law and has endorsed this group's submission of 4th October 2013 to the Department of Justice and Equality. While MHR's submission focuses on specific proposed amendments to the Bill, we reassert the need to ensure that the legislation as enacted provides a statutory framework for assisted decision-making that is compliant with the Convention on the Rights of Persons with Disabilities (CRPD).

Interaction with the Mental Health Act

5. Mental Health Reform welcomes the provisions regarding co-decision making and decision-making representatives in the Bill. In order to protect the independence and integrity of the position of co-decision makers and decision-making representatives, it is important that the list of persons who cannot act as co-decision makers or decision-making representatives be extended to include staff of approved centres (as designated under the Mental Health Act, 2001) at which a person is a patient.

6. **To address the foregoing, it is proposed that the following amendments be made to Sections 20 and 21 of the Bill:**

Insertion of the following as section 20(1)(h) :

"*the proposed appointee is an employee or agent of an approved centre in which the relevant person resides or is receiving treatment, unless the proposed appointee is a spouse or civil partner, parent, child or sibling of the relevant person".*

Insertion of the following as section 20(2)(f)

"*the co-decision maker becomes an employee or agent of an approved centre in which the relevant person resides or is receiving treatment, where the co-decision maker is not a spouse or civil partner, parent, child or sibling of the relevant person".*

7. **Section 104** of the Bill addresses the position of patients whose treatment is regulated by Part 4 of the Mental Health Act. The section provides that nothing in the Bill authorises a person to give a patient treatment for mental disorder, or to consent to a patient's being given treatment for mental disorder if, at the time when it is proposed to treat the patient, his or her treatment is regulated by Part 4 of the Mental Health Act. However there is nothing in the current Bill that specifically enables patients in approved centres to avail of the assisted decision-making provisions of the Bill. MHR considers that patients in approved centres should have the same rights as others to avail of assisted decision-making with respect to day-to-day decisions.

8. Mental Health Reform considers that the Bill should contain a clear statement that the Bill applies in full to all patients in approved centres, save in so far as Section 104 applies to any such patient. The inclusion of an express statement to this effect will ensure that the benefits of the legislation are available to people in approved centres. This recommendation is not intended to be taken as an endorsement of the current provisions in Part 4 and MHR's previous submissions to the Department of Health regarding the review of the Mental Health Act should be read in conjunction with this recommendation.

9. **To address the foregoing, it is proposed that the following provision be inserted as Section 104(3)**

   "Save as provided in Section 104 (1) and (2) or otherwise expressly provided by any other provision of the Act, the Act applies to patients receiving treatment in an approved centre".

10. MHR further considers that the Bill must be amended to make provision for **Advance Healthcare Directives** that apply to people with mental health difficulties. Mental Health Reform is of the view that in principle an Advance Healthcare Directive should be valid and binding for individuals receiving treatment under Part 4 of the Mental Health Act 2001, including with reference to their mental health treatment, except in situations of life-threatening emergency to the individual concerned. The provisions of Section 104 and by extension Part 4 of the Mental Health Act should be amended to require that clinicians be bound by advance directives to the same extent as a person's wishes would be if he/she had capacity at the time.

    The Bill should provide that a valid Advance Healthcare Directive should only be departed from, even in circumstances where the individual is receiving treatment under Part 4 of the Mental Health Act 2001, where treatment is necessary on a life-saving emergency basis or in exceptional circumstances to be defined by law. Such a provision should also require that any treatment given in contravention of an Advance Healthcare Directive must be of established benefit to the recipient.

    Mental Health Reform recognises that there may be exceptional circumstances where adhering to an individual's Advance Healthcare Directive, particularly a treatment refusal, could result in an individual being indefinitely involuntarily detained. In this context the law must balance the individual's right to legal capacity with their right to liberty. It may be necessary to make provision in law that in such exceptional circumstances, an Advance Healthcare Directive could be overridden where

a) it is necessary in order to prevent further detention,
b) the treatment is likely to remove the necessity for involuntary detention,
c) treatment according to the individual's Advance Healthcare Directive has been exhausted, and
d) all other treatment options have been exhausted.

Any such decision to override an Advance Healthcare Directive in these very exceptional circumstances should require a court order.

Wardship Provisions

11. The position of persons who are Wards of Court and who are detained in approved centres is a matter of particular concern to MHR.

12. MHR considers it unacceptable that any person presently subject to wardship would remain subjected to that regime following the introduction of the capacity legislation. Rather, following the introduction of the legislation, all wards should, as a matter of right have immediate access to the range of decision-making supports including an automatic right to a decision-making representative or co-decision maker, where the conditions for same are satisfied. Further, on review, as provided for by Section 35(2) of the Bill, the Court should be required to make what orders are necessary to ensure that each person presently subject to wardship is discharged from wardship with the appropriate orders and/or directions put in place to ensure that the person previously subject to wardship has the benefit of the provisions of the legislation whether by means of a co-decision maker or decision-making representative where appropriate.

13. MHR believes that the three year time period for review of capacity of wards who have attained the age of 18 years, as provided for by Section 35(2) of the Bill is unacceptably long. MHR considers that a shorter time frame for review of the capacity of wards should apply and certainly within a period not exceeding 6 months from the commencement of the Act. There is precedent for this timeframe which

applied in the case of certain individuals detained under the Mental Treatment Act 1945 upon the bringing into force of the Mental Health Act, 2001.

14. Section 35(3)(c)(ii) of the Bill provides that where a ward lacks capacity, the wardship court *may* make orders/take actions under Part 4 as if it were a Court under that part, and pursuant to section 35(3)(c)(iii) "shall discharge the ward from wardship upon such date, or the occurrence of such event, as may be specified by the wardship court."

15. Mental Health Reform is concerned that as the Bill is presently drafted, if the wardship court declines to make an order or take action pursuant to section 35(3)(c)(ii) and/or in the absence of the occurrence of a specified event, as envisaged by section 35(3)(c)(ii) of the Bill, the risk remains that some persons would remain subject to the outdated ward of courts system notwithstanding the introduction of the Assisted Decisions Making legislation.

16. To address the forgoing concerns, the following is required:

Amendment of Part 5 of the Bill to ensure timely review of all wards of court and transition of persons from wardship to the decision-making structures of the bill or full discharge from wardship as appropriate.

17. Section 68 of the Bill addresses the review of detention orders of persons who are detained in an approved centre on the order of a wardship court before the commencement of the section and continues to be so detained. Section 69 of the Bill addresses the review of detention orders of persons who are detained in an institution other than a detained centre before the commencement of the section and continues to be so detained.

18. MHR considers that the provision in Sections 68 and 69 of the Bill that the order for detention be reviewed "as soon as possible" is insufficient. MHR considers that

persons who are subject to detention pursuant to an Order of the wardship court, should expect a review as soon as possible but certainly within 6 months of the Commencement of the Act.

19. In order to achieve the foregoing the following amendment is proposed

Amendment to Section 68 (1) to replace the term "as soon as possible" to read "*as soon as possible but not later than 6 months from the commencement of the Act".*

Amendment to Section 69 (1) to replace the term "as soon as possible" to read "*as soon as possible but not later than 6 months from the commencement of the Act".*

20. It may further be noted that in light of the submissions and amendments proposed in respect of the review of all persons subject to warship, the provisions of Section 68 and 69 should be regarded as transitional only, pending the review of all wards of court.

Informal Decision-making

21. MHR consider that the provisions in respect of informal decision-making in the Bill (which includes decision-making in respect of healthcare decision-making) offer insufficient protection for persons lacking capacity.

22. MHR is particularly concerned in respect of the position of incapacitated but compliant patients who are subjected to informal decision-making. MHR considers it imperative that measures be included in the Bill to protect against the inappropriate and/or persistent use of informal decision-making, in particular with regard to persons who are resident in mental health facilities and/or in respect of patients in approved centres.

23. In our submission to the Oireachtas Committee on Justice, Defence and Equality, MHR also drew particular attention to the issue of over prescription of high dosage

medication and anti-psychotic medication as well as the overuse of polypharmacy for people with mental health conditions. Mental Health Reform is concerned to ensure that the legislation does not permit informal decision makers to take decisions that involve the administration or authorisation of prescription medication to persons who are not consenting or lack the capacity to consent to the administration of such medication.

24. In seeking to address these concerns, Mental Health Reform proposes the following amendment:

Amend section 54(3) to become section 54(5), amend reference in subjection 54 (2) to "*subsection (3)"* to read "*subsection (5*)" and

Insert new section 54(3) to read "*Subject to subsection (5), nothing in section 53 shall be construed as authorising an informal decision-maker to take an action or authorise the taking of an action in respect of a relevant person which involves that person being admitted to or detained in a mental health service and/or the administration of medicine for the treatment of mental illness save in accordance with the Mental Health Act, 2001",*

Use of Restraint

25. The issue of restraint of relevant persons is addressed by reference to restrictions on decision-making representatives in section 27 of the Bill.

26. MHR considers it imperative that the provisions permitting restraint of a person by a decision-making representative should be strictly construed and should explicitly require that the decision-making representative acts in a manner consistent with the principles of the Bill. The provisions should only allow restraint where this is the least restrictive measure to prevent harm.

27. MHR considers that the definition of restraint as provided for at section 27(6) of the Bill should be extended to include the use of chemical restraint.

28. MHR considers it necessary to ensure that a specific provision be included in Section 54, dealing with Informal Decision-making to specifically prohibit an informal decision maker from doing an act that is intended to restrain the relevant person.

29. To achieve the foregoing the following amendments are proposed:

Amend section 27(5) to read as follows:

"A decision-making representative for a relevant person shall not do an act that is intended to restrain the relevant person unless –

(a) the relevant person lacks capacity in relation to the matter in question or the decision-making representative reasonably believes that the relevant person lacks such capacity.

(b) the decision – making representative reasonably believes that it is necessary to do the act in order to prevent harm to the relevant person or to another person,

(c) the decision-making representative reasonably believes that the act is the least restrictive measure that may be taken in order to prevent harm to the relevant person or to another person, and

(d) the act is a proportionate response to the likelihood of the harm referred to in paragraph (b) and (c) and to the seriousness of such harm."

Amend section 27(6) to include a new subsection 27(6)(d) to read as follows:

(d) administers or causes to be administered any medication that has the purpose and/or effect of sedating or otherwise restraining or restricting the liberty of movement of the relevant person.

Insert a new Section 54(4) to read:

"Subject to subsection (5), nothing in section 53 shall be construed as authorising an informal decision-maker to restrain a relevant person, save where the informal decision maker reasonably believes that the relevant person lacks capacity in relation to the matter in question and such restraint is necessary to prevent immediate harm to the relevant person or other person and is the least restrictive measure that may be taken in order to prevent harm to the relevant person or to another person. For the purposes of this section restraint shall be construed in accordance with section 27(6)".

Incapacitated but Compliant Patients.

30. MHR is concerned that the Bill as drafted does not address the review of the detention and/or treatment of patients in approved centres or other facilities who are incapacitated but compliant. Mental Health Reform reiterates the concern set out in its submission to the Oireachtas Committee on Justice, Defence and Equality regarding the position of mental health service users in in-patient settings who lack capacity and who currently have no protection under the Mental Health Act. The position of such persons is not adequately addressed in the Bill.

31. To address these foregoing concerns the following is required:

The Bill should provide that people who lack capacity when they are admitted to an approved centre for mental health treatment or who become incapacitated following admission to an approved centre will enjoy the protections and review mechanism presently afforded to "involuntary" patients under the Mental Health Act, 2001.

Further, the Bill should include an oversight mechanism for treatment/medication decisions for incapacitated patients in approved centres and other care facilities.

Conclusion

Mental Health Reform considers that including the above amendments in the legislation will bring it closer in line with the UN Convention on the Rights of Persons with Disabilities and increase the protection for patients in approved centres as well as individuals with mental health conditions living outside of approved centres who lack capacity.

About Mental Health Reform

Mental Health Reform is the national coalition of 40 organisations working to promote improved mental health services and the implementation of *A Vision for Change*. Please contact Dr. Shari McDaid, Director at 01 874 9468 or via email at smcdaid@mentalhealthreform.ie for clarification on MHR's recommendations.