Submission on Deprivation of Liberty: Safeguard Proposals

March 2018

Mental Health Reform (MHR) welcomes this opportunity to participate in the Department of Health's (Department) consultation on deprivation of liberty safeguard proposals. MHR is the national coalition promoting improved mental health services and the social inclusion of people with mental health difficulties. This submission has been developed in consultation with Mental Health Reform's membership (64 organisations in total), in addition to its Grassroots Forum (made of individuals with self-experience of the mental health services, family members and carers).

MHR's understanding is that the deprivation of liberty safeguards (DOLS) will not apply to approved centres under the Mental Health Act, 2001 (i.e. inpatient mental health facilities), and our submission is made on that basis. Given the Government's prior commitment to give effect to the Report of the Expert Group on the Review of the Mental Health Act, 2001, we would expect that inpatients lacking capacity will be dealt with in accordance with the introduction of the 'intermediate' status recommended by the Group. Other facilities where DOLS might apply would include mental health service high, medium and low supported accommodation, nursing homes, and intensive care rehabilitation units (ICRUs) - our concerns about DOLS with reference to people with mental health difficulties in these facilities are outlined below.

In line with the Department's consultation document, MHR has set out specific comments (pages 4-8) in relation to each of the 13 Heads of the draft legislation. In addition, Mental Health Reform has developed some overarching feedback on the proposed deprivation of liberty safeguards.

Overarching feedback

Comment 1: **The deprivation of liberty safeguards should acknowledge that there are no circumstances in which a person will be deprived of their liberty on the basis of a mental health difficulty (where that person lacks capacity) in any "facility" other than an approved mental health inpatient unit, in accordance with mental health legislation.**

Currently there is no basis in law for detaining an individual with a mental health difficulty in any facility other than an approved centre. Mental Health Reform sees no need to alter this situation,

given that where there is cause for concern about an individual's risk of harm they can be detained under the Mental Health Act. No doubt, detention should occur only in very specific circumstances (see recommendations of the Expert Group report on review of the Mental Health Act, 2001 on criteria for detention) and the basis for detention should not be extended further. MHR's Grassroots Forum have expressed serious concerns about providing a legislative basis to deprive a person of their liberty beyond detention in an approved mental health unit to the wider community setting.

Comment 2: **The proposed safeguards are overly medically focused and require substantial amendment to fit with current policy direction which promotes multi-disciplinary input and the involvement of 'the person' as an equal partner in service delivery. The medical approach is reflected in the draft legislation through the inclusion of terms such as "medical expert" and "medical evidence" as part of the process in determining where a person may be deprived of their liberty.**

Comment 3**: The safeguard proposals should place a greater emphasis on supporting the person in the community for the purposes of avoiding practices of coercion. The current provisions within the draft legislation are focused predominantly on assessment of and subsequent practices of deprivation of liberty.**

Comment 4: **All decisions relating to the DOLS must be made in accordance with the principles of the Assisted Decision Making (Capacity) Act (ADMCA) 2015. While the provisions of the 2015 Act will apply to the safeguards, the Heads of Bill are not explicit on this point – the application of the ADMCA principles to the DOLS should be clearly recognised in the legislation to avoid the risk of ambiguity and misinterpretation in this regard.**

The deprivation of liberty safeguards should comply with human rights standards, including those enshrined in the European Convention on Human Rights (ECHR) and the UN Convention of the Rights of Persons with Disabilities (UNCRPD).

The safeguard proposals are problematic in that they are institutional in approach and language, with a greater focus on the 'facility' or service than on 'the person'. There is a fundamental requirement to amend the existing proposals to ensure that the principles of the ADMCA, in addition to human rights standards are incorporated, including:

1. the voice of the person
2. the person's will and preferences
3. presumption of capacity
4. the provision of decision making supports

There is also no acknowledgement of advance healthcare directives in decisions relating to deprivation of liberty which must be considered. In the context of mental health, there is a general consensus that advance directives must apply equally as to other areas of health - this issue is due to be addressed by the Department of Health in the context of the review of the Mental Health Act, 2001.

Comment 5: **The draft safeguards should be amended to ensure the involvement of multi-disciplinary teams in decisions made under the legislation, as opposed to autonomy remaining predominantly with one (medical) professional.**

Comment 6: **The safeguard proposals place too great an emphasis on the role of the Decision Making Representative (DMR), the Attorney and the Courts in determining decisions of deprivation of liberty.**

If the Courts system is to be used in determining decisions related to deprivation of liberty, it must be accessible to allow for the participation of the person whos liberty is at stake.

The strong emphasis on the above mentioned representatives/bodies in making decisions about deprivation of liberty is hugely problematic in that it bypasses 'the person' and their involvement in the decision making process. As set out above, principles of 'presumption of capacity', the provision of decision making supports and consideration of the 'will and preferences' of individuals are not adequately recognised throughout the proposed safeguards.

A number of key stakeholders are of the view that the Decision Making Representative is not the appropriate person to make a decision about deprivation of liberty, nor is the Courts system a sufficient remedy to assess and/or review such a decision. There also is a real concern that the use of the Courts system will serve as a barrier to individuals attending or participating in hearings. If the Courts are to be used in decisions relating to deprivation of liberty, significant measures will need to be taken to ensure the process is accessible to the person whos liberty is in question. MHR's GRF suggests that the Courts system is not a positive experience for someone when they are unwell and being subjected to this process may serve to further exacerbate the individual's situation. Similarly, the GRF have voiced concern about the level of autonomy that is afforded to the 'person in charge' in terms of making decisions relating to a deprivation of liberty. Such decisions should require the input of the multi-disciplinary team, as opposed to one professional.

Comment 7: **The deprivation of liberty safeguards should include provisions on immediate access to an independent advocate for any person who falls under the legislation.**

Currently, the draft safeguards include no reference to advocacy supports. There is a fundamental requirement for individuals to be provided the opportunity to both participate in decisions related to deprivation of liberty and to challenge such decisions through the provision of advocacy supports. In this context there is a need to expand the availability of existing advocacy services to ensure that any person deprived of their liberty can get access to an independent advocate.

Comment 8: **The draft legislation raises questions about the lack of regulation in community residences for people with mental health difficulties. Under the draft safeguards it is proposed that people with mental health difficulties can be deprived of their liberty in residences that are 1) unregulated and 2) not subject to statutory inspection. Provisions to**

regulate and inspect mental health service community residences should be brought forward immediately.

Nevertheless, there are no circumstances in which a person should be deprived of their liberty on the basis of a mental health difficulty (where that person lacks capacity) in community residences, as outlined on page 1-2.

Under the current Mental Health Act, 2001, community (mental health) residences are not subject to inspection or regulation by the Mental Health Commission (MHC). This means that the Commission has no statutory powers over these residences, unlike inpatient units which can be closed down by the MHC if they breach certain standards of care. The Expert Group established to review the Mental Health Act, 2001, recommended that revised legislation should give the Mental Health Commission "specific powers to make standards in respect of all mental health services and to inspect against those standards". Three years on and this recommendation is yet to be implemented.

Comment 9: **In order to effectively protect individuals under the deprivation of liberty safeguards the legislation must be complemented with the required resources, with a particular emphasis on advocacy supports. There is no doubt that the provision of advocacy supports will be less costly and timely than the Courts system and may result in a reduction in Court time and expenses. A detailed cost analysis of the resources required should be carried out by the Department.**

Specific feedback on the Heads

In addition to the above overarching feedback, Mental Health Reform has developed specific comments on each of the 13 Heads, which is set out below.

Head 1 - Definitions

- The reference to "medical evidence" as a basis for deprivation of liberty, in accordance with the European Convention on Human Rights appears to have been misinterpreted. This provision applies only in the context of mental health and does not allow for use in other areas of the disability sector. This reference should be amended by the Department as a matter of priority.
- The term 'medical expert' should be replaced with 'health or social care professional'. This latter term means any expert from a recognised medical discipline, to include but not limited to psychologists, psychotherapists, social workers, social care workers, occupational therapists, and speech and language therapists on decisions relating to deprivation of liberty. This amendment is necessary to ensure multi-disciplinary involvement in decisions where a person's liberty is at stake and to promote a further shift in legislation from a historically over-medicalised approach to care.

- The term “relevant facility” should be removed and replaced with “relevant place of residence/care” to acknowledge that the services subject to the DOLS are places in which people live, often for long periods of time.
- The terms “admission” and “admission decision” should be extended to explicitly state that “supervision and control” can include multiple individuals who engage in a supervisory role and not just one professional.
- The “person in charge”, with responsibility for decisions relating to deprivation of liberty should include professionals from a range of different mental health disciplines and not solely medical professionals. This should be set out in the definition of ‘person in charge’ under this Head.
- The definition of ‘restraint’ should be broadened to explicitly state that restraint practices include all forms of manual or other forms of restraint (see Expert Group Report on Review of the Mental Health Act, 2001) and will be subject to appropriate guidelines developed by a relevant body. Consideration should be given to existing guidelines produced by the Mental Health Commission on seclusion and restraint practices.

Head 2 - Application and Purpose of this Part

- As set out on page 1-2, Head 2 should be amended to acknowledge that there are no circumstances in which a person will be deprived of their liberty on the basis of a mental health difficulty (where that person lacks capacity) in any “facility” other than an approved mental health inpatient unit, in accordance with mental health legislation.
- It should be made explicit that the deprivation of liberty safeguards will not apply to approved centres under the Mental Health Act, 2001 (i.e. inpatient mental health facilities). It is MHR’s understanding that inpatients lacking capacity will be dealt with in accordance with the introduction of the ‘intermediate’ status recommended by the Expert Group on Review of the Mental Health Act, 2001.

Head 3 - Person’s Capacity to Make a Decision to Live in a Relevant Facility in Advance of an Application to Enter the Relevant Facility

- Multi-disciplinary input should be required in identifying a concern about a person’s capacity (or lack thereof). The current provision in the safeguards that one professional is responsible for raising such a concern is problematic in that it relies too heavily on the opinion of just one professional.
- This Head should include under section (1b) reference to ‘presumption of capacity’ of the person, in addition to the provision of decision making supports, where necessary, prior to a decision being made about a person’s deprivation of liberty.

Head 4 - Procedure for Routine Admission of a Relevant Person to a Relevant Facility

- There is a requirement to clearly define the powers of 'Attorneys' (under the enduring power of attorney system) as they relate to this legislation so that 'Attorneys' are not automatically afforded decision making authority on matters that the person did not agree to. As set out above, Mental Health Reform is concerned about the extensive powers afforded to "Attorneys" (in addition to the "person in charge", "decision making representative" and the Courts) on decisions relating to a person's deprivation of liberty.

Head 5 - Procedure for Admission of a Relevant Person to a Relevant Facility in Urgent Circumstances

- A provision on immediate access to an independent advocate should be included under this Head.
- The timelines set out under this Head are problematic, in that they are too lengthy and should be reconsidered as a matter of priority.
- The term "urgent admission" needs to be more clearly defined so as to ascertain what circumstances are considered urgent in the context of deprivation of liberty and for who these circumstances apply. An "urgent admission" should require the input of a multi-disciplinary team, as opposed to the opinion of just one professional, which is currently the situation under the draft proposals.

Head 6 - Procedure for Making an Admission Decision

- The criteria for deprivation of liberty should be narrowed – this may involve for example introducing an additional criteria such as "benefit of treatment" for the person (see Expert Group report on review of the Mental Health Act, 2001). Overall, it is imperative that a proportionate response is made in relation to any deprivation of liberty decision, which takes account of the benefits and risks of deprivation of liberty to the person, in addition to their will and preferences. This should be reflected under Heads 5 and 6 also.
- With respect to the draft text in Head 6 (1) (b) (i) the criteria "significant harm" for deprivation of liberty needs to be clarified and be of a significantly high bar. The Department should take account of legal precedent on the definition of harm to self and harm to others, as defined by the Courts. As set our previously, this criteria needs to be balanced in accordance with the potential benefits and risks of deprivation of liberty for the person, in addition to their will and preferences.
- As set out previously "medical expert" should be amended to "medical and health and social care professional". Health and social care professional should be considered in the widest sense and should include but not limited to psychologists, psychotherapists, occupational therapists and social workers, social care workers and speech and language therapists. (see (1)(b))

- There is a concern that the 'least restrictive' principle does not feature in the draft legislation until Head 6. In accordance with MHR's general feedback, there is a requirement for the principles of the ADMCA to be knitted in throughout the legislation.

Head 7 - Persons Living in a Relevant Facility

- Provisions need to be included to ensure that persons who are de-facto detained (i.e. individuals who are unwilling to remain in their current place of residence, but are nevertheless compelled to stay without the imposition of formal legal detention) are enabled through decision making and advocacy supports to 1) make an informed decision about where they wish to reside and 2) to leave their current place of residence. This includes individuals being informed, where the legislation applies to them. Currently, under the draft provisions this group of individuals are not adequately protected.
- There is a concern that where a person once chose (with capacity) to live in a particular 'facility' and now lacks capacity, they must go through the Courts system to seek approval to continue to live in their place of residence. Many key stakeholders are of the view that this process overrides the will and preferences of the person with respect to the decision that they made when they had capacity.
- Head 7 is problematic in that a number of provisions do not apply to people with fluctuating capacity (i.e. a person whose decision making capacity fluctuates dependent on the matter at hand and/or over time). MHR is of the view that despite the recognised limitations of the 'functional approach' (as defined below) the deprivation of liberty safeguards should comply with the principles of the ADMCA in this regard i.e. that there is a presumption of capacity and therefore capacity is assessed only in relation to the matter in question and only at the time in question. Therefore, there should be no provision in the legislation that does not recognise that because a person does not have capacity at a certain point in time, does not mean that they will not have capacity in the future (whether later that day, week, month, or year).
- As set out previously, there is a concern about the lack of a multi-disciplinary approach in making decisions about deprivation of liberty which must be amended.

Head 8 - Transitional Arrangements for Existing Residents on Commencement of this Part

- There is a requirement to develop this Head so that there is a distinction between those individuals who enter residences with capacity and those who do not.
- The reliance on the 'specified person' to initiate the process for transitional arrangements is problematic. The legislation must be developed to be more proactive in enabling people to make decisions about where they wish to live.
- As set out under Head 5, the timelines included under this Head are problematic in that they are too lengthy and should be reconsidered.

Head 9 - Review of Admission Decisions

- The right to review by the Court is problematic in that it is the same Court that made the decision about deprivation of liberty that will be responsible for its review. The safeguards must be developed to include a right of appeal to a higher Court. This is imperative if individuals are to avail of the opportunity to repeal a deprivation of liberty decision.
- In addition, the review and repeal system provided through the Courts must be accessible. Proposals must be made for Courts to sit in nursing homes and other residences.
- Timeframes for review of a deprivation of liberty decision should be set out under the safeguards. It is not sufficient, that the Courts can determine such timeframes at their own discretion.

Head 10 - Chemical Restraint and Restraint Practices

- The circumstances in which restraint is allowed under the draft safeguards should be narrowed from “exceptional circumstances” to “in an emergency to save the life of the person in line with the recommendation of the Expert Group report on review of the Mental Health Act, 2001. It should also be explicitly stated in the proposals that there is a requirement for implementation of a national programme to phase out seclusion and restraint practices.

Head 11 - Records to be Kept

- Head 11 should include a provision that where a person has capacity and expresses a wish to leave, a record of same will be kept. It is imperative that such individuals are enabled and provided with the necessary supports to leave their place of residence.
- There is a requirement for a review of all individuals who fall under the deprivation of liberty safeguard proposals. The Department should consider if it is the role of the Director of the Decision Support Service to carry out such a function.

Head 12 - Regulations

- Regulations on deprivation of liberty safeguards need to be developed in consultation with all relevant key stakeholders, including the community and voluntary sector.

Head 13 - Offences

- Head 13 should include a provision that it is an offence to bar an independent advocate from a person who falls under the deprivation of liberty safeguard legislation.

Ends

Mental Health Reform is available to discuss the above content and recommendations. Please contact Kate Mitchell, Senior Policy and Research Officer at 01 874 9468 or via email at kmitchell@mentalhealthreform.ie for further information.