

BRIEFING NOTE

Reform of the Mental Health Act, 2001

(Updated February 2021)

What is the Mental Health Act, 2001?

The Mental Health Act, 2001 (the Act) is the law in Ireland that must be followed when people go into hospital for mental health care and treatment.

The Mental Health Act, 2001 Act sets out:

- why (or in what circumstances) a person can be admitted against their will to hospital
- how a person should be treated when they are admitted for mental health treatment
- what people's rights are under the Act and
- what responsibilities their mental health team has towards them

One of the key functions of the Mental Health Act, 2001 is to provide people the right to have their involuntary detention automatically reviewed. This means that a person's case will be reviewed by an independent group of people called a Mental Health Tribunal. This happens within 21 days of the person's admission.

What has happened so far on review of the Act?

In 2012, an Expert Group was appointed to review the Mental Health Act, 2001 by then Minister for Mental Health, Kathleen Lynch. The report of the Expert Group was published in 2015 and set out a series of recommendations (165 in total) to update the Act in full. The aim of this review was to bring Irish mental health law in line with best international standards and to better protect people who go into hospital for mental health care and treatment.

To date, just two of the Expert Group's recommendations have come into effect. The first change occurred at the end of 2015 when it was made unlawful to provide Electro Convulsive Therapy (ECT) or ongoing medication (beyond three months) to a person with decision making capacity without the person's consent.

In 2018, another change was made to the mental health law which means that the involuntary detention of a person under a 'renewal order' cannot exceed a period of 6 months at any given time. In addition, a person who is detained against their will, under a renewal order can now apply for a review of their detention at or after three months from the date the renewal order was made.

The Irish Government has accepted the recommendations of the Expert Group report on review of the Mental Health Act, 2001 and acknowledges that there is a fundamental need to reform Ireland's mental health law. The Government has made a number of public commitments to update the Act, including in its own Programme for Partnership, which sets out detailed actions and commitments which will be implemented over the lifetime of the Government. The Government has also recognised that it is necessary to update the Act in order for Ireland to be compliant with the UN Convention on the Rights of Persons with Disabilities (UNCRPD). The UNCRPD was ratified by the Irish Government in 2018.¹

Notwithstanding this, the Government has repeatedly failed to meet its own timetable for updating our mental health law. In June 2016, then Minister for Mental Health, Helen McEntee publicly stated that the draft legislation to reform the Act would be completed by the end of that year. Since then, numerous dates have been given for publication of the draft legislation and none of them have been met. These delays are hugely problematic given the lengthy duration of the review of the Act to date and the seriousness of the gaps in human rights protections for adults and children receiving inpatient mental health treatment.

Draft Heads of the new Bill were sent to the Mental Health Commission for comment in March 2020. They responded by summer of 2020, with the Department of Health then seeking comment from the HSE in August 2020. The HSE made its submission in late February 2021, with a public consultation being announced on 01 March 2021.

What is the problem with the Act?

Despite national mental health policy (A Vision for Change (2006) and most recently, Sharing the Vision (2020)) which promotes a rights-based and partnership approach to mental health service delivery, individuals continue to experience dis-empowering mental health care and a lack of autonomy in decisions about their own admission and treatment.

It could be argued that these experiences often occur because of inappropriate mental health law. The Mental Health Act, 2001 is outdated, does not comply with international human rights standards, and does not adequately protect people's rights.

The full reform of the Act would contribute to the Irish Government's fulfillment of international human rights law, including the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities. Currently, the Mental Health Act, 2001 is not compliant with either Convention.

¹ In its roadmap to ratification, published in November 2015, the Department of Justice and Equality recognised that the 2001 Act requires amendment prior to ratification of the UN Convention on the Rights of Persons with Disabilities. (Note: There are a number of sections of the Act, beyond those identified in the roadmap, which clearly do not meet the standards of the Convention and require amendment).

It is crucial that enhanced protections and the human rights of adults and children who go into hospital for mental health care and treatment are provided for in updated legislation.

What are some of the key gaps in the Act?

Individuals do not yet have a statutory right to individual care/ recovery planning

An individual care plan includes a set of individual goals that is developed and regularly reviewed between an individual and their community mental health team. The care/recovery plan should include the treatment and care required by the individual, the necessary resources to deliver such care and appropriate goals for the individual e.g. getting a job, going back to school, starting to cook for themselves.

People with mental health difficulties currently have no legal right to an individual care/ recovery plan. They do not have a right to make plans about their care and recovery with the support of their mental health team. This includes making plans for their lives when they leave hospital.

The result is that many people do not receive an individual care/ recovery plan, they view their plan as tokenistic and/or their care ends once they leave hospital. In a survey published by Mental Health Reform in 2018, two-thirds of participants (66.2%) reported that they did not have a written recovery/care plan developed with their mental health team. Furthermore, the Mental Health Commission has recently reported that compliance among mental health inpatient services on individual care/recovery planning is at just 50%.

Mental Health Reform recommends that individual care/ recovery planning be placed on a statutory footing so that all individuals using the mental health services have a legal right to a recovery plan. A discharge plan should form part of a person's individual care/recovery plan.

Voluntary patients still do not have basic rights to information and advocacy

As the Mental Health (Amendment) Act, 2018, which addresses this issue, has not yet been commenced it remains a key problem.

People who are in hospital for mental health treatment on a voluntary basis have no right to basic information, including information about their treatment. Currently, under the Mental Health Act, 2001, it is not clear that all individuals are entitled to information about their rights as a voluntary or involuntary patient, their rights about consent or refusal of treatment, the range of services available in the centre, and any complaints processes available to them.

In addition, there is no right to advocacy under the Mental Health Act 2001, to ensure that any person, voluntary or involuntary, who needs advocacy support has the legal right to avail of it. It is crucial that children and adults who are in hospital for mental health

treatment have direct access to independent professionals to seek information about their rights when in hospital, to get advice on their current situation, to get help to make decisions or to voice any concerns they may have. Currently, there are significant gaps in advocacy supports for people with mental health difficulties, including those in hospital. For example, people who are detained in hospital against their will do not have a legal right to have an advocate present at a review of their detention.

Mental Health Reform recommends that all individuals in inpatient mental health services are provided with information (on admission) on the treatment that they will receive, the reason why they are in hospital, how long they can expect to be in hospital and who they can contact for advocacy support.

Mental Health Reform recommends that the Mental Health Act, 2001 be updated to include a right to advocacy for all individuals (voluntary or involuntary) accessing mental health services. In addition, a statutory advocacy service for adults and children accessing the mental health services should be established.

Currently people aged 16 and 17 can consent or refuse to physical healthcare decisions, but this right does not apply to mental healthcare decisions

Under Irish law (i.e. the Non-Fatal Offences Against the Person Act, 1997) 16 and 17 year olds can consent to treatment for physical health care. This includes any surgical, medical or dental issues, including for example, treatment for cancer. However, 16 and 17 year olds do not have any right to consent or refuse mental health treatment. This includes consent or refusal of admission to hospital.

This means that 16 and 17 years olds accessing mental health services cannot make decisions about their own mental health care and treatment. For example, a 16 or 17 year old cannot refuse a particular course of treatment such as electro-convulsive therapy, even if they wish to refuse.

This situation is made worse by the fact there is no national advocacy service for people under the age of 18 who are accessing mental health services. In the absence of an advocacy service, there is a risk that young people are not having their voices heard about their mental health care and treatment. In addition, there is no review of 16 and 17 year olds who have been admitted to inpatient mental health services on a voluntary basis. This is a big concern given that 16 and 17 years do not have a legal right to refuse or consent to admission. Their admission is categorised as voluntary based on their parent's or guardian's consent.

Mental Health Reform recommends that the Mental Health Act, 2001 be updated so that 16 and 17 years have a legal right to consent or refuse admission and treatment in inpatient mental health services.

Involuntary patients do not have the right to have their advance wishes about treatment respected

An Advance Healthcare Directive (AHDs) is a statement set out by someone when they have capacity to make decisions, about their will and preferences for care and treatment in the future. The Directive comes into effect, if, and when, the person becomes unwell, and no longer has decision making capacity. People can make AHDs about a broad range of issues such as the type of medication they prefer, the type of therapies that work best for them, in addition to treatment refusals (e.g. ECT).

Under Irish law (i.e. the Assisted Decision-Making Capacity Act, 2015) people who are detained in hospital for mental health treatment are specifically excluded from legally binding advance healthcare directives. They have no legal right to have their advance wishes respected, even though they had capacity to make decisions about their mental health care and treatment at the time of making their directive. There is no other group of individuals that are specifically excluded from this legal right. This exclusion is contrary to international human rights standards, including the UN Convention on the Rights of Persons with Disabilities.

This gap in the law is of greater concern given reports by people who use the services that they are not sufficiently involved in their mental health care and treatment. For example, in MHR's My Voice Matters survey almost 40% of participants who use mental health services felt that they were not involved as much as they would like in decisions about the medicines they take. Research shows that advance healthcare directives can reduce involuntary admissions, promote recovery and be cost effective.

Mental Health Reform recommends that advance healthcare directives should apply equally to people with a mental health difficulty as to others. Advance directives should apply to both people who are voluntarily admitted and people who are involuntarily detained in the mental health services.

There are currently no specific guiding principles for children under the Mental Health Act, 2001

The Mental Health Act, 2001 applies to both adults and children. The sections relating to children are spread out across different parts of the Act and because of this there has been 1) confusion about whether certain sections of the Act apply to children and 2) a lack of detail on protections for children when they go into hospital for mental health treatment. Currently, the Act contains no child-specific principles to ensure children's rights are adequately protected when in hospital for mental health care and treatment.

The Expert Group on Review of the Mental Health Act, 2001 recommended that the law be updated so that all parts of the existing Act that relate to children are included in a separate standalone section. The Expert Group also recommended that the standalone section set

out child-specific guiding principles, that are in line with international human rights standards. These principles include

- The right of the child to the highest attainable standard of mental health
- The autonomy and self-determination of the child should be respected
- The child should be consulted by their community mental health team on their care and treatment, be
- The child should be given opportunities to be heard and express their views and have such views given due weight
- Mental health services should be provided in an age appropriate environment
- Mental health services should be provided in close proximity to family and/or carers
- The child must receive the least intrusive treatment in the least restrictive environment
- The child's best interests must be taken into account and be defined in a way that is informed by the views of the child

Mental Health Reform recommends that the sections of the Mental Health Act, 2001 that relate to children be included in a standalone part of the Act. This section should also include child-specific guiding principles, in line with international human rights standards.

What needs to happen next to reform the legislation?

Mental Health Reform has consistently advocated for reform of Ireland's Mental Health Act 2001, in line with the Expert Group recommendations on review of the Act, to ensure that adults and children have their rights adequately protected when they go into hospital for mental health care. The Minister for Mental Health has recently announced that draft legislation on reform of the 2001 Act will be complete in June 2021 for the Mental Health Commission's consideration. Given the lengthy delay so far, we are asking for a date for publication of the full reforming legislation before the end of 2021.

It is also of fundamental importance that the Mental Health (Amendment) Act 2018, signed into law by our President in May 2018 is commenced as a matter of priority to ensure that some small but significant changes can be immediately made to the Mental Health Act, 2001. This includes that people are encouraged and supported to make their own decisions about their mental health care when in hospital.

ENDS.