

The Irish Mental Health Lawyers Association Submissions on the publication of the Assisted Decision-Making (Capacity) Bill 2013.

The IMHLA welcome the publication of the Bill. In particular, the IMHLA welcome the focus and emphasis on the will and preferences of the person when making decisions insofar as is reasonably practicable.

The IMHLA is taking this opportunity to highlight issues which have arisen in legal practice and which do not appear to be dealt with in the Bill. Additionally issues with the Bill have been highlighted to the IMHLA at our recent seminar by Judge Anselm Eldergill arising from his role as a Judge in the UK Court of Protection. This issue is at point 3 of these submissions.

1. Position of the incapacitated patient who is detained in an approved centre.

The IMHLA has, in previous submissions to the Department, outlined its concerns regarding the position of persons who are considered to be voluntary patients Mental Health Act 2001 ("the 2001 Act") but who do not have capacity to consent to their detention or treatment. Under the 2001 Act, 'voluntary patients' do not have their admission to an approved centre independently reviewed. This is because it is commonly understood that a voluntary patient is not being detained against their will, and have given consent to their treatment and so do not require an independent mechanism to protect their right to liberty.

Section 2 of the 2001 Act defines a voluntary patient as "*a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order*". The Supreme Court considered the definition in the case of *EH v St Vincent's Hospital and Ors*[2009] IESC 46 and held that "*the terminology adopted in Section 2 of the Act of 2001 ascribes a very particular meaning to the term "voluntary patient". It does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead the express statutory language defines a "voluntary patient" as a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order...*"

The difficulty is that this definition of 'voluntary patient' includes persons who are incapacitated and who are in fact detained in an approved setting. Any detention or deprivation of liberty of that patient is not subject to independent review. Such a position leaves Ireland open to a claim of breach of the European Convention on Human Rights. In *H.L. v UK*, the United Kingdom was found to be in breach of Article 5 of the European

Convention on Human Rights when its laws permitted a person to be informally admitted to a mental health centre without periodic reviews of their detention.

The Bill does not clarify or address the position of patients who are “voluntary” patients but who lack capacity.

Recommendation

The IMHLA recommends that the positive provisions of the legislation be available to all persons suffering from a disability, including those suffering from a mental disorder or a psychiatric illness. A person who lacks capacity cannot be deemed to be a voluntary patient for the purposes of treatment in an approved centre.

2. Reviews of detention of persons who lack capacity admitted to residential centres other than approved centres.

The Bill does not fully resolve the issue of people who lack capacity and are admitted to a residential centre on a "voluntary" basis but are *de facto* detained in the centre. This is an issue which arises in residential settings such as nursing homes, social care institutions and centres for people with disabilities. Ireland is not directly tackling the problem of the "Bournewood gap" and ECHR case-law such as *H.L. v UK*; *Stanev v Bulgaria*; *D.D. v Lithuania* and other cases.

Recommendation

The IMHLA recommends that the Bill should state that if a person is being admitted to any residential centre, this can only occur on a voluntary basis, where the person has capacity to consent to such admission and does consent to such admission. Capacity to consent should be assessed appropriately.

3. Definition of Capacity

The IMHLA note that the main distinction between the Bill and the UK Mental Capacity Act 2005 in respect of the definition of capacity is that the UK legislation provides additionally:

For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

There is an additional necessary element in the definition of “**An impairment of, or a disturbance in the functioning of, the mind or brain**”. Presumably not including this in the Bill is reflective of the concerns and submissions made regarding equal treatment for persons suffering from a disability.

However, it has been pointed out to the IMHLA that in practice in the UK, the provision of this additional necessary element, is an important safeguard protecting the autonomy of a person in their decision-making, as the making of what might otherwise be considered an unwise decision must be connected to an impairment or a disturbance in the functioning of the mind or brain.

Recommendation

The IMHLA recommends that the definition of capacity be reconsidered. It should only be in circumstances where an inability to make a decision is connected to an impairment or a disturbance in the functioning of the mind or brain, that a person would be found not to have capacity.

4. Appropriate forum for applications under the Bill.

The Bill does not establish multidisciplinary tribunals for dealing with applications regarding lack of capacity, etc. The IMHLA is concerned that the present proposals do not meet the requirement for competency as articulated in Article 12 of the UN Convention for the Rights of persons with Disabilities.

Our experience in applications dealing with vulnerable persons in the Circuit Court

1. Since the commencement of the Mental Health Tribunal Process in 2006 there have been several hundred appeals filed before the Circuit Court. These appeals were in respect of decisions of Mental Health Tribunals (MHTs). The Circuit Court having exclusive jurisdiction in dealing with such appeals. To-date there has not been one single decision of the Circuit Court to allow any one of these appeals. It appears that the Circuit Court has adopted a strictly paternalistic interpretation in these cases.
2. If this process takes place in the Circuit Court there is a risk that there could be a flood of cases by way of simple appeals to the High Court. If there were a quasi-judicial body dealing with the cases then the Circuit Court could be the court of appeal.
3. A court hearing is formal and procedural. It does not lend itself to being an environment that will assist individuals appearing before it to feel they can easily partake in the process.
4. Courts are adversarial by their very nature. An inquisitorial approach will have to be adopted in dealing with issues pertaining to applications under the proposed legislation.

The following is our suggestion for an Alternative to the Circuit Court – Quasi-Judicial Hearings/Assisted Decision Making Reviews (ADMRs)

1. The provision of this type of a decision making process will allow there to be a composition on such a review of experts from a number of healthcare professions.
2. It would allow for a more detailed consideration of each particular application. There would not be the time constraints at such a review as exist with Circuit Courts.
3. If the system of Circuit Court listings of Applications as exists currently for civil or family law cases applies, there will be a situation whereby huge numbers of Healthcare professionals waiting in courthouses for days on end for a case to be reached at a huge cost to the state and to the detriment of other individuals under the care of these professionals.
4. From a practical point of view it would allow ADMRs to be held in community settings close to where the necessary healthcare professionals operate from.
5. MHTs under the 2001 Act are held in the approved centres and this allows the minimal disturbance for the medical professionals to attend at the MHT hearings. It further allows for the minimal of disruption to the staffing at the approved centres and the service users.
6. There would be no likely time delays in setting up an Assisted Decision Making Review if you had a panel similar to that as operated by the Mental Health Commission for Mental Health Tribunals.

It would also be helpful if the Bill included a requirement that the forum provide written reasons for all of their decisions, and that these reasons be published on an anonymised basis. This would provide real transparency for the public, legal practitioners and civil society.

The Bill states that court proceedings shall take place “otherwise than in public” (s.14(10)). We submit that it should be clarified that, with appropriate confidentiality agreements, researchers may access the courts to conduct research on the courts’ activities.

Recommendation

A three-person tribunal similar to the Mental Health Tribunals would be a more suitable forum than the Circuit Court for resolution of these issues and decisions should be available on an anonymised basis.

5. Substitute Decision Making

The Bill creates forms of substitute decision-making, most clearly with the court appointment of a Decision-Making Representative (ss.23-27).

Recommendation

Because of Article 12 of the CRPD, regimes of substitute decision-making should be avoided as much as possible and this Bill may not go far enough to comply properly with the CRPD.

6. Informal decision making

The rules on informal decision-making (ss.53-54) need to be much tighter as there is a real danger that these will be abused in practice. We are concerned that the wording of ss.53-54 will be interpreted literally and the courts will permit actions as “informal decision-making” which are not envisaged at the time of drafting. People who lack legal capacity are vulnerable and others may take advantage of that vulnerability. The Bill may also be vulnerable to challenge under the European Convention on Human Rights if the sections on informal decision-making are not amended.

Recommendation

The IMHLA recommends that the provisions of these sections either be deleted or only apply in the most limited of circumstances, after other avenues of decision-making have been exhausted and also any such process must also be subject to appropriate safeguards.

7. Title of the Office of the Public Guardian

The Public Guardian will be appointed by the Courts Service (s.55). The Minister for Justice and Equality will need to approve the Office of Public Guardian's codes of practice (s.63(5)).

Recommendation

Replace the paternalistic word "guardian" with Assisted Decision-Making Office.

8. Access to justice for relevant persons – Article 13 of the CRPD and the provision of legal services

The Bill provides for legal aid pursuant to the Civil Legal Aid Act 1995 as follows in relation to the Bill:

- a. Legal advice may be applied for by a party to an application under Part 4 of the Bill
- b. Legal aid (legal representation by a lawyer) may be granted for an application relating to a Declaration as to Capacity under Section 15 and presumably consequent orders following the making of the Declaration

Problems with the application of the Civil Legal Aid Act to the Assisted Decision-making (Capacity) Bill 2013:

1. The system of civil legal aid in Ireland is already under resourced and waiting lists in some law centres exceed 9 months. The persons applying and in particular the

relevant person who will be the subject of the court application applications under the Bill cannot wait that long.

2. The importance of the Declaration of Capacity or Incapacity is so significant for the relevant person that it is essential the applicant obtains mandatory legal advice and representation. The process of applying for civil legal aid through a law centre is highly bureaucratic and off putting.
3. The expertise of the Legal Aid Board is in primarily, but not exclusively, dealing with matters of family law such as child law, separation & divorce which can demand immediate attention. It will be difficult to add a further essential and urgent area of law to the already overworked staff of the Legal Aid Board without further resources being invested.

Why does the relevant person require legal assistance?

- The seriousness of the application being made, it will determine whether or not the relevant person is deemed to have or not have capacity and may result in consequential orders, all of which will have very far reaching consequences for the relevant person.
- If the legal assistance is not automatically granted then the relevant person may not realise or be aware that they are entitled to legal representation. They may also not be in a position to access legal aid through the normal channels. It is an important safeguard to ensure every person with a disability has sufficient access to justice.

Why is the scheme proposed i.e. under the Civil Legal Aid Act 1995 not appropriate?

1. The relevant person must apply for legal aid according to the 1995 Act. If someone's capacity is in issue, it is placing a further barrier in their way if they must apply for legal aid and complete the bureaucratic nightmare associated currently with legal aid.
2. The relevant person must take action and seek legal advice under the proposed system. There is no justification for this and in reality their access to justice and their access to a legal representative is severely compromised unless a legal representative is automatically assigned to them.
3. A panel of suitably qualified and experienced legal practitioners is required who are properly trained and vetted in order to properly advise and represent the relevant person who may also be very vulnerable. Starting this system by integrating it immediately with the already under resourced legal aid board staff

is a recipe for disaster. This panel could be simply provided for in a similar manner to the panels to be established by the Public Guardian under section 61 or by the Courts Service under Section 66.

Note on the legal aid scheme set up under the Mental Health Act, 2001

The operation of the legal aid scheme set up by the Minister pursuant to Section 33(1) of the Mental Health Act, 2001 has been a success. Patients are granted legal advice and aid within days of their being detained in an approved centre under the 2001 Act. The scheme is administered by the Legal Aid Board but was set up and developed by the Mental Health Commission. This type of scheme has the following advantages:

1. Lawyers are selected by interview for the panel and must demonstrate aptitude, interest and expertise in the area of mental health law. This improves the quality of legal aid and representation for the client.
2. Rigorous standards were developed by the Mental Health Commission to ensure that lawyers provide the best service to the patients
3. The client is assigned on a mandatory basis a lawyer to look after their interests and safeguard their rights while they are initially involuntarily detained. This has resulted in an increase in the safeguarding of rights.
4. A relatively small number of solicitors operate the panel and are dedicated to improving their own knowledge and expertise in order to better serve their clients and also to remain part of the panel.
5. There is a consistency of representation based on the increasing level of expertise contained in the legal panel which increases year by year.
6. Education and training is given to the legal panel.

The Mental Health Commission has the expertise and the experience of developing and working a legal aid panel. They should be given the opportunity to develop a specialised panel of lawyers to act for parties to applications under Part 4 of the Act and also to represent those applying under section 15 of the Act. The Mental Health Commission model should be used in preference to the Civil Legal Aid model which is more suited to dealing with non-vulnerable adults.

Recommendation

That the relevant person be automatically granted the services of a member of the legal aid panel (perhaps to be set up by the Mental Health Commission in consultation with the Minister and/or the Public Guardian and/or the Courts Service) where an application is made in relation to them under Part 4 of the Assisted Decision Making (Capacity) Bill and or under any other section including a review of declaration as respects capacity under section 29.