

Interaction between the Mental Health Act 2001 and the Assisted Decision Making Capacity Act 2015

Orla Keane, Head of Legal Services
20 November 2019

The Mental Health Commission

One Legal Entity

Two (2) Acts

Four (4) Main Functions

Mental Health Act 2001
(as amended)

1. Regulatory
2. Quality Improvement
3. Mental Health Tribunals

Assisted Decision Making Capacity
Act 2015

4. Decision Support Service

Aims of the Commission

To ensure –

1. Consistency between the two Acts – requires careful consideration - but we are well on our way with this work – active engagement with both the Departments of Health and Justice and Equality,
2. Parity for persons with capacity issues and the rest of society, and
3. Parity for persons with mental health issues and the rest of society.

Focus Today

Firstly – the Mental Health Act 2001 –

1. Mental Health Amendment Act 2018
2. Heads of Bill to amend the 2001 Act

Secondly - the Assisted Decision Making (Capacity) Act 2015 -

1. Specific provisions that relate to the 2001 Act
2. Other provisions that will impact on the 2001 Act

Mental Health (Amendment) Act 2018

Passed July 2018 but not enacted – three main changes –

1. New definition for voluntary patient
2. Adds best interest concept when dealing with children
3. Removes best interest concept when dealing with adults

No.3 above incorporates the Guiding Principles from Section 8 of the 2015 Act

Does it work? No! Why?

Continued

Conflating concepts -

2015 Act – is about capacity **and supporting persons with limited capacity or without capacity to make decisions.**

2001 Act – is about mental health and the **care and treatment provided to persons in approved centres and those who are involuntarily detained.**

Continued

IMPORTANT

Many people with mental health issues have capacity.

Do we need the guiding principles from 2015 Act in the 2001 Act?

Yes.

But they need to be amended to take account of the

1. Purpose, and
2. Functions of the 2001 Act.

Continued

Considering - No.1 above, the new definition of voluntary patient

Considered by the Supreme Court in 2009 and Court of Appeal in 2018 -
Illustrates a shift in the view of the Courts on what is a voluntary patient.

Expert Review Group Report in 2014 –
Proposed an “intermediate category of patient”

2018 Act provides that a voluntary patient –
Must have capacity, be admitted to the approved centre and consents to the admission

Continued

Consideration needs to be given to creating four (4) categories of patients under the 2001 Act –

- voluntary with capacity (as per the 2018 Act)
- voluntary without capacity – interaction with 2015 Act
- involuntary with capacity
- involuntary without capacity – interaction with the 2015 Act

The above will require a major shift in mindset – from paternalistic to patient / person centre – as was discussed this morning.

Heads of Bill to amend the 2001 Act

Draft given to the MHC by Department of Health in July 2018 (except for section 25)

Opportunity for the MHC to propose real and practical changes

A number of amendments / changes will be proposed

Key issues that are relevant relating to the 2015 Act -

- Guiding principles
- Capacity
- Decision supporters

Examples of issues that will arise -

1. Mental Health Tribunals

Section 4 – in 2007 the High Court stated that “best interests infuses the entirety of the Act”.

Now the guiding principles in 2016 Act should infuse the entirety of the Act.

In practice the reliance by MHTs on Section 4 is already changing.

Other issues to be addressed – if involuntary patient does not have capacity - who will instruct the legal representative for the MHT (cf Section 136 of the 2015 Act)?

Continued

2. Assessments of capacity

A patient in an approved centre will be presumed to have capacity. If there is a doubt, a full assessment should be carried out and clearly documented.

These assessments will require to be more detailed, comply with the provisions of the 2015 Act and shall be subject to greater scrutiny.

Continued

3. Consent and Capacity - *patient centred approach* – Part 4 of the 2001 Act

Definition of capacity shall be as per the 2015 Act but revised statutory provisions shall be required relating to consent

Patient either has capacity to give consent or not! If a patient has capacity, then he / she can consent to the decision of treatment or not and otherwise.

But what about life saving treatment? Should the patient be treated the same as a patient in general hospital? Parity!

Continued

If a patient does not have capacity, then the provisions of the 2015 Act should apply.

Section 136 of the 2015 provides that person with mental disorder are governed by the 2001 Act.

MHC believe that a patient with a mental disorder should be treated the same as all other persons to which the 2015 Act applies.

If MHC proposal is followed – implication would be that a healthcare professional would not be able to override the decision of a DMR

Assisted Decision Making (Capacity) Act 2015

1. Specific provisions that relate to the 2001 Act
1. Other provisions that will impact on the 2001 Act

Continued

There are six specific sections dedicated to “detention matters” (104-108 and 136)

The MHC’s key concern is that people who come within the 2015 Act are treated equally and that a person suffering from a mental disorder is not treated differently to another person who is not suffering from a mental disorder.

We also need to ensure compliance with the UNCRPD and that the legal challenges to the 2015 (or 2001 Act) are kept to a minimum.

Continued

Relevant key sections –

Section 106 – If there is a query as to whether a person who lacks capacity has a mental disorder, the test for “mental disorder” shall be as per the 2001 Act.

[The Heads of Bill to amend the 2001 Act is seeking a major amendment in this test which shall result in a fully treatment based approach.]

But for the above to work, a number of amendments are required to be made so that there is consistency between the two Acts and parity for all patients/persons.

Continued

Section 107 – Review of persons who are currently wards of court and cared / treated in approved centres.

- Time lines in 2001 Act very clear but they are not in these provisions
- Possible inconsistency between 2001 Act and these provisions as to who should be providing the evidence to the Court
- Confusing terminology – reference to “detention order” - means an order detaining a person who was made a ward of court and waiting for their review under Part 6 – not an admission or renewal order under the 2001 Act
- Department of Justice and Equality is proposing amendments to address the above.

Continued

Section 108 – Review of persons who are currently wards of court and not cared / treated in approved centres

Similar comments to Section 107 and as per the above, the Department of Justice and Equality is proposing amendments to address these issues.

Section 136 – Currently states - nothing in the 2015 Act authorises a person to give a patient treatment for mental disorder, or to consent to a patient being given treatment for mental disorder, if the patient's treatment at the time is regulated by Part 4 of the 2001 Act (cf above).

Current Work

2015 Act –

1. Specific provisions – MHC has reviewed and made submissions to change – Department of Justice and Equality has actively engaged with us.
2. On other provisions - MHC has reviewed and made submissions in the context of the work of the DSS and the functions under the 2001 Act – Department of Justice and Equality has engaged but more work to be done.

2001 Act –

1. Mental Health Act (Amendment) Act 2018 – principles to be incorporated into the Heads of Bill and amended.
2. Heads of Bill – work ongoing – focus on core mental health issues but also how the two Acts can work together.

To do the above, the Commission needs both the Departments to work together with us.

Thank You

Implementation of the 2015 will be a challenge

but it will serve everyone in Ireland
– services users / services / families –

in a more *person centered and respectful* way when
commenced.