Analysis of the Report of the Expert Group on the Review of the Mental Health Act, 2001

November 2015

Mental Health Reform (MHR) is the national mental health coalition in Ireland. It is made up of more than 50 member organisations working to promote improved mental health services and social inclusion of people with mental health conditions. A key objective of Mental Health Reform is to advocate for mental health law that protects the individual's human right to autonomy and promotes their individual recovery. As part of this objective, Mental Health Reform is campaigning for urgent revision of the Mental Health Act, 2001 in order to ensure that people engaged in inpatient mental health services are adequately protected under Irish legislation.

Mental Health Reform has prepared a number of submissions to Government regarding the Mental Health Act, 2001 and on capacity legislation. These submissions were based on consultation with Mental Health Reform's membership and advisory groups including the Grassroots Forum made up of people with self-experience of mental health services, family members and family supporters. Further information, including MHR's submission on the Mental Health Act, 2001 can be found at the following link https://www.mentalhealthreform.ie/.

Overall, Mental Health Reform is of the view that given the lengthy duration of the review to date and the seriousness of the gaps in human rights protections for people receiving inpatient mental health treatment, there is a need for the implementation of the Expert Group recommendations by the Irish Government as a matter of priority. MHR has also called for the urgent removal of 'unwilling' from the current legislation.

This document sets out Mental Health Reform's response to the Report of the Expert Group on the Review of the Mental Health Act, 2001. It is structured according to key issues of concern in the Act. For each issue, Mental Health Reform's submission recommendation is set alongside the recommendation of the Expert Group. Underneath this comparison, Mental Health Reform's follow-up position is set out.

Principle of 'best interests' (section 4)

MHR recommendation	Expert Group recommendation
The Act should be amended to reflect an autonomy- based approach to best interests using the definition of best interests, as set out in the proposed Scheme of the Capacity Bill.	The Expert Group recommends the elimination of the existing 'principal consideration' of 'best interests' and replacing the limited principles in the 2001 Act with a more human rights based list of guiding principles which would reflect the importance of the person's right to autonomy. (Section 2.1, p. 12) Such principles include: • Primary importance of autonomy • Right to make one's own choices • Elimination of 'best interests' to be replaced by 'dignity' • Interpretation of 'dignity' in line with CRPD principle of will and preferences and of supported decision-making • Inclusion of 'bodily integrity', 'least restrictive' and 'highest attainable standard of mental health'

MHR outstanding concerns: Mental Health Reform welcomes the principles recommended by the Expert Group. However, MHR is concerned about limiting the rights-based approach to 'insofar as practicable' as this appears to fundamentally misunderstand human rights as being in conflict with practicality. The human rights principle of progressive realization recognises that rights may not be fully realisable immediately but that States have an obligation to move forward over time in the fulfilment of individuals' human rights.

MHR proposal: Call for implementation of the Expert Group's recommendation on the guiding, however call for 'insofar as practicable' not to be included in the proposed legislation. It should be made clear that the right to autonomy applies to people's choice on medication.

Definition of 'voluntary patient'

MHR recommendation	Expert Group recommendation
The definition of 'voluntary patient' under the Mental Health Act, 2001 should be amended to refer solely to a person with the capacity to consent to admission and treatment.	The Expert Group recommends that "a voluntary patient be defined as a person who has capacity to make his or her own decisions (with support if required) regarding admission and treatment and who gives informed consent to that admission and treatment". The current Act regards a patient as voluntary only if that person is not the subject of an admission or renewal order. (Section 2.7, p. 29)

MHR outstanding concerns: None. The Expert Group's recommendation reflects MHR's recommendation.

MHR proposal: Call for implementation of the Expert Group's recommendation.

Criteria for detention

MHR recommendation	Expert Group recommendation
Section 3(1)(a) of the Act should be amended to include a requirement that involuntary admission or detention is only justified under this ground where the person's underlying condition is amenable to or is likely to benefit from treatment.	The Expert Group recommends revised criteria for the detention of an individual, including that an individual should be detained only where the "the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit the condition of that person to a material extent". (Section 2.4, p. 22)

MHR outstanding concerns: The Expert Group's recommendation reflects Mental Health Reform's recommendation. However, in light of the evolving understanding on the implications of the UN Convention on the Rights of Persons with Disabilities (CRPD), Mental Health Reform is concerned that allowing detention on the basis of 'risk to health' treats people with mental health difficulties differently from those with physical illness and therefore potentially contravenes the CRPD. The Expert Group has said, "Ultimately the Group were persuaded that, on balance, it is reasonable to allow for a person to be detained in circumstances where their health may deteriorate without the appropriate treatment." (Section 2,4, p. 21) However, the Expert Group has also recommended that if the person has capacity, they can refuse treatment and if they refuse all treatment options, must be discharged.

MHR proposal: Call for clarification on the interplay between the admission criteria of 'risk to health' and the right to refuse all treatment and thereby be discharged

Individuals who lack capacity

MHR recommendation	Expert Group recommendation
Either the capacity or the mental health legislation 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 get the protections and review mechanism presently afforded to 'involuntary' patients under the Mental Health Act, 2001. Individuals who are unable to make a decision after all support options have been exhausted should be afforded the protections of involuntary patients while still retaining certain rights of voluntary patients such as the right to leave.	The Expert Group recommends that "if it is deemed that a person does not have capacity on admission to an inpatient service, and the person has a 'mental illness' they may only be admitted on an involuntary basis provided they satisfy all the criteria for detention. A person who lacks capacity and has a 'mental illness' but does not fulfil the criteria for detention, may in specified circumstances be admitted as an 'intermediate' patient". (Section 2.6, p.27) The Group recommends a new category of patient known as 'intermediate patients' who will not be detained but will have the review mechanisms and protections of a detained person. Such patients would not have the capacity to consent to admission and equally do not fulfil the criteria for involuntary detention. (Section 2.8, p.33)

MHR outstanding concern: The Expert Group's recommendation reflects MHR's recommendation. However, the protections for people who become incapacitated, following admission to an approved centre are not set out clearly. Such individuals should be afforded the protections and review mechanism presently afforded to involuntary patients under the Mental Health Act.

MHR proposal: Call for implementation of the Expert Group's recommendation and also ensure that when a person loses capacity to make decisions while a voluntary patient and also does not qualify to be admitted as an involuntary patient, the protections afforded 'intermediate' patients would apply.

Functional approach to capacity

MHR recommendation	Expert Group recommendation
The functional approach to capacity should apply to all determinations of capacity under the Act.	The Expert Group recommended that revised legislation should ensure that the definition of capacity should be consistent with the Assisted Decision-Making (Capacity) Bill. The Capacity Bill proposes to change the existing law on capacity from the current all or nothing status approach to a functional one, whereby 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. (Section 2.6, p. 26)

MHR outstanding concerns: The Expert Group's recommendation reflects Mental Health Reform's recommendation on the use of the functional approach to capacity. However, Mental Health Reform is concerned about the confusion between the functional approach to capacity and the idea of supported decision-making reflected in the Assisted Decision-Making Bill (2013), in that the Expert Group appears to be equating the two. P. 26

MHR proposal: Call for, that in assessing the capacity of an individual to make decisions under the Mental Health Act, the admitting Mental Health Professional must involve any existing or potential assistive or supportive decision-maker in so far as is practicable. Also call for a minimum of three mental health professionals to be involved in the assessment of an individual's 'risk to health'. The term 'risk to health' should be narrowed to 'serious risk to health' and the term material extent' should be amended to ensure that mental health professionals understand what this term means.

MHR also proposes that the revised legislation include provisions for the appointment of an adequate number of Authorised Officers and for the removal of Section 9(a) from the Act under Involuntary admission of persons to approved centres.

Responsibility for assessing capacity (sections 3, 56-60)

MHR recommendation	Expert Group recommendation
Where an assessment of decision-making capacity is implied in the Act, a formal assessment should be undertaken and the legislation should allow for an independent assessment being conducted by a range of qualified health and social care professionals including psychiatrists, psychiatric nurses, psychologists, occupational therapists and social workers and should ensure a minimum of three disciplines are involved in any assessment.	The Expert Group recommends that "if on admission of a patient, the admitting mental health professional forms the view that the person may lack capacity to understand and give his/her informed consent to the proposed admission, they must refer the person for formal capacity assessment to be completed within 24 hours." (Section 2.6, p.25) The Group also recommends that the Mental Health Commission should develop and publish guidelines in relation to the assessment of capacity. Capacity assessment can be undertaken by Mental Health Professionals with the required competencies and such competencies should be accredited by the respective professional bodies who should provide support and training where required. Capacity should be monitored on an ongoing basis by the treating clinicians.

MHR outstanding concern: While the Expert Group recommendation reflects Mental Health Reform's recommendation to some extent, there is no requirement for the involvement of a minimum of three different disciplines in the assessment, as called for by Mental Health Reform. Furthermore, the assessment of an individual who is also already residing as an inpatient in an inpatient unit is not set out clearly.

MHR proposal: Call for implementation of the Expert Group's recommendation. Also call for the requirement that capacity assessments incorporate the perspective of at least one allied mental health professional. Formal capacity assessments should involve the input of multi-disciplinary staff.

Responsibility for assessing capacity (sections 3, 56-60)

MHR recommendation	Expert Group recommendation
Service users who are assessed as lacking capacity should have a right to request an independent second opinion.	The Expert Group recommends that where relevant, information relating to how capacity is assessed and the right of appeal against a decision on capacity to a Mental Health Review Board should be given to patients. (Section 2.6, p.27)

MHR outstanding concern: The right to appeal a capacity assessment reflects Mental Health Reform's recommendation to an adequate extent and allows for review by an independent body.

MHR proposal: Call for implementation of the Expert Group's recommendation.

Advance Directives

MHR recommendation	Expert Group recommendation
Legislation should be put in place to provide a framework for advance decisions by people with a mental health condition to refuse and consent to treatment as well as advance care, social and financial arrangements. This legal framework must be binding on clinicians to the same extent as a person's wishes would be if he/she had capacity at the time. A valid advance directive should only be departed from 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. Overriding an advance refusal in relation to mental health treatment should require a court order and that the court should be required to give due regard to expert evidence that is independent of the treating mental health professionals involved in the individual's care. 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 necessity for involuntary detention and d) all other treatment options have been exhausted.	The Expert Group recommends the introduction of legislation providing for advance healthcare directives which apply to mental health on an equal basis with general health. However, the Expert Group did not make specific recommendations on how advance directives should apply for people who are inpatients in mental health facilities. The Group recommends that when revised mental health legislation is being framed, it either amends the Assisted Decision-Making (Capacity) Bill, if necessary, or introduces provisions in mental health law to deal in a more complete and comprehensive manner with the operation of advance healthcare directives in the area of mental health in the longer term. In particular, the authority to override a treatment refusal where a person's health as opposed to life is at risk, should be re-visited again when mental health legislation is being framed. (Section 2.25, p. 78 & 79) The Group also recommends that advance health care directives: • Should state in clear and unambiguous terms the specific treatments to which it relates and also the particular situations in which the treatment decisions are intended to apply • Should be recorded in the person's recovery plan • If an advance healthcare directive is overridden, the Inspector of Mental Health Services should be notified within 3 days and it must be included in the Inspector's report on the approved centre. • Guidelines on advance healthcare directives should also be produced by the Health Information and Quality (HIQA) and the Mental Health Commission with the involvement of the appropriate professional regulatory bodies. Notwithstanding the first recommendation, there appears to be an

Any such decision to override an Advance Healthcare Directive in these very exceptional circumstances should require a court order.	acceptance by the Expert Group that when capacity legislation is passed, it will not apply to people involuntarily detained.

MHR outstanding concerns: Mental Health Reform is concerned that notwithstanding the first recommendation, there appears to be an acceptance by the Expert Group that when capacity legislation is passed, it will not apply to people involuntarily detained.

MHR proposal: Call for advance directives to apply to people who are involuntarily detained under the Mental Health Act, as per MHR's previous submissions.

Rights of Voluntary Patients (Section 16 & 23)

MHR recommendation	Expert Group recommendation
The rights of voluntary patients to leave an inpatient unit should be strengthened as recommended by Amnesty International Ireland in its review of the Act, pages 45-46.	The Expert Group recommended that provision should be made in the revised mental health legislation to ensure that voluntary patients are given an assurance that they have the right to leave an inpatient unit at any time. This provision would also emphasise that it should be the norm that voluntary patients who express a wish to leave an approved centre should have that right upheld. Furthermore, all voluntary patients on admission to an approved centre should be fully informed of their rights as voluntary patients. This would include an explanation of their rights regarding consent to or refusal of treatment and their right to leave the approved centre at any time. (Section 2.7, p. 30)

MHR outstanding concerns: The Expert Group recommendation does not go far enough in protecting the right of voluntary patients to leave an approved centre since they recommend retaining Section 23 of the Act allowing a voluntary patient to be detained for up to 24 hours before undergoing admission as an involuntary patient. However, the input of an Authorised Officer as will be required for all admissions, including in the conversion of voluntary to involuntary status, goes some way to strengthening the oversight in such transfers of status.

MHR proposal: Call for the implementation of the Expert Group's recommendation. Also call for the introduction of review boards to review all conversions of inpatient status; every time a section is used, it should be reviewed by the Review Board. MHR recommend the development of guidelines for staff on how a section should be used. The wording 'given an assurance' as recommended by the Expert Group is not strong enough and should be amended.

Rights of Voluntary Patients (Section 16 & 23)

MHR recommendation	Expert Group recommendation
Voluntary patients receiving treatment in an inpatient setting should be provided with information on the proposed treatment they will receive, the rationale for their hospitalisation, its likely duration and who they can contact for advocacy support.	The Expert Group recommends that on admission to an approved centre, every patient should have a right to information which would include their rights as a voluntary or involuntary patient, their rights regarding consent to or refusal of treatment, the range of services available in the centre, and any additional information as outlined in the Mental Health Code of Practice. In addition, the Expert Group stated that it is imperative to ensure that the patient is made aware of the complaints mechanism in place at the centre and any general complaints mechanisms that exist within the broader mental health service. (Section 2.21, p. 64)

MHR outstanding concerns: The Expert Group does not specify that voluntary patients be given information on the rationale for their hospitalisation and likely duration of their hospitalization.

MHR proposal: Call for implementation of the Expert Group's recommendation but also ensure that the Mental Health Code of Practice includes a requirement that voluntary patients be made aware of the rationale for their hospitalization and its likely duration. Individuals should also be provided information on a broad range of supports.

Definition of Treatment

MHR recommendation	Expert Group recommendation
The treatment provisions of the Act should apply equally to voluntary and involuntary patients.	The Expert Group recommends that the definition of treatment should be expanded to include treatment to all patients admitted to or detained in an approved centre. The Group states that revised legislation should explicitly provide that "all patients (voluntary and involuntary) must give informed consent to treatment and be advised about the support available to them (under proposed capacity legislation) to make informed decisions regarding their treatment". 'Consent' as defined in section 56 should be amended to acknowledge that consent can also include consent given by a patient with the support of a family member, friend or an appointed 'carer', 'advocate' or support decision maker appointed under the proposed capacity legislation. (Section 2.3, p. 18)

MHR outstanding concern: None. The Expert Group's recommendation reflects Mental Health Reform's recommendation.

MHR proposal: Call for implementation of the Expert Group's recommendation.

Right to advocacy and supported decision-making (Part 3)

MHR recommendation	Expert Group recommendation
The legislation should provide a statutory framework for supported decision making and the right to advocacy to assist in decisions for all inpatients regardless of status. Regulations should require communication between the tribunal and the individual's chosen advocate or representative in advance of the tribunal. The legislation should provide for regulation of supported decision making and for consultation with people with experience of a mental health condition on the regulations. The legislation should provide for the right of the involuntary detained person to have an advocate present in all hearings.	The Expert Group makes certain recommendations relating to the role of the advocate, including: • An individual has the right to have an advocate attend a tribunal • All patients should be supported to make informed decisions regarding their treatment, and 'consent' as defined in Section 56 relating to consent to treatment should include consent given by a patient with the support of a family member, friend or an appointed 'carer', 'advocate' or a support decision maker appointed under the proposed capacity legislation • Discharge planning meetings must take place with family members, carers or chosen advocate (with the consent of the patient) and • Where it is deemed appropriate, there should be proactive encouragement for the patient at all stages to involve his/her family/carer and/or chosen advocate in the admission process and in the development of the care and treatment plan with the patient's consent. The Expert Group recommended that a person subject to detention has the right to nominate another person, who may be a peer advocate, family member, carer or friend, to support them in all matters concerned with the review of their detention, including review meetings. This is in addition to the attendance of a person's legal representative.

MHR outstanding concerns: The Expert Group did not recommend that all patients have the legal right to support for making decisions (right to an advocate).

MHR proposal: Call for implementation of the Expert Group's recommendations on the role of the advocate. Also call for legislation to provide for the right to advocacy support and, alongside the legislation, for adequate funding for a range of advocacy services.

Seclusion and restraint

MHR recommendation	Expert Group recommendation
The definition of restraint under the Mental Health Act, 2001 should be extended to include chemical restraint. The use of chemical restraint should be governed by clear rules and subjected to the same oversight as other means of restraint. The circumstances in which seclusion and/or restraint can be used for 'the purposes of treatment' should be narrowed to instances where such treatment is necessary in an emergency in order to save the life of the person concerned. The Act should require that all mental health services develop and provide a programme (including appropriate staff training, policies and procedures) to minimise and where possible phase out the use of seclusion and restraint. The Mental Health Commission's Rules and Codes of Practice on seclusion and restraint should clarify that where a 'voluntary patient' is subjected to seclusion or restraint, this raises questions about whether the patient is in fact voluntary and steps should be taken to assess the person's status as a voluntary patient.	The Expert Group recommends that the legislation should be broadened to include all forms of manual or other forms of seclusion or restraint and appropriate guidelines should be developed by the Mental Health Commission. (Section 2.18, p. 59) The Group recommends the ongoing need for services to ensure that manual or other forms of seclusion and restraint are used only as a last resort, only where there is no other alternative and always in accordance with the rules drawn down by the Commission. (Section 2.18, p. 60)

MHR outstanding concerns: The Expert Group did not recommend that the use of restraint should give rise to an assessment of the person's status as a voluntary patient.

MHR proposal: Call for the revised legislation to prohibit the use of seclusion or restraint except in life saving/emergency situations.
Also call for the Mental Health Commission to ensure that its Code of Practice reflects that the use of restraint should give rise to an assessment of the person's status as a voluntary patient.

Medication Review

MHR recommendation	Expert Group recommendation
The legislation should include oversight mechanisms for treatment/medication decisions for incapacitated patients in approved centres. Although the second opinion model in the Mental Health Act 2001, ss 59-60 is flawed in that it does not provide for an independent review of treatment decisions, as a first step, the model should be extended to incapacitated patients. Any amendments of the Act to extend the scope and independence of the oversight/treatment review mechanism should be extended in the same way to patients lacking capacity.	The Expert Group recommends that "all patients should be supported to make informed decisions regarding their treatment, and 'consent' as defined in Section 56 relating to consent to treatment should include consent given by a patient with the support of a family member, friend or an appointed 'carer', 'advocate' or a support decision maker appointed under the proposed capacity legislation". (Section, 2.18, p. 59) A Consultant Psychiatrist, after consultation (to be officially recorded) with at least one other Mental Health Professional of a different discipline involved in the treatment of the patient, may administer treatment to a detained patient who lacks capacity where the patient does not have a Decision-Making Representative (DMR) and the Consultant Psychiatrist considers it immediately necessary for the protection of life of the person, for protection from a serious and imminent threat to the health of the person, or for the protection of other persons that he or she should receive such treatment and there is no safe and effective alternative available. Where apatient lacks capacity but has a DMR appointed under the capacity legislation, the DMR may accept or refuse treatment for the patient. A Consultant Psychiatrist can override the decision of a DMR to refuse treatment on behalf of an involuntary patient in emergency circumstances where the treatment is deemed necessary, the patient is injurious to self or others and no other safe option is available. A Mental Health Review Board must meet within 3 days to determine that the treatment was given in the appropriate emergency circumstances. If the Review Board agrees that the circumstances were of an emergency nature, then the treatment authorised by the Consultant Psychiatrist may continue for as long as the emergency circumstances prevail subject to other provisions relating to second opinions etc.

MHR outstanding concerns: None. These recommendations reflect MHR's recommendation.

MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation

Individual Care (Recovery) Planning	
MHR recommendation	**Expert Group recommendation**
The requirement for an 'individual care plan' for each resident currently set out in regulations should be incorporated into the Act in order to provide this requirement with a stronger statutory footing.	The Expert Group recommends that Individual Care Planning should be placed on a Statutory footing and extended to all persons in receipt of mental health services. Specifically, it recommends that: (Section 2.22, p.99) • Recovery plans should be reviewed on a regular basis and the timing of the reviews should be decided based on the patient's individual needs • Patients must be offered the opportunity to sign off on their recovery plans and this must be recorded • Evaluation and feedback should form part of the review of a recovery plan and there should be a need to show evidence of the undertaking of a review • Wording of the legislation should be amended to ensure that it is the multi- disciplinary team that has responsibility for the clinical content of recovery plans rather than the proprietor • Care plans should be renamed as recovery plans and should refer to the person rather than the patient • Discharge plans must form part of a person's individual recovery plan. In addition the Group recommends that each child should have an individual care plan and all necessary information relating to admission, detention and treatment should be provided as appropriate.
MHR outstanding concern: None. These recommendations reflect MHR's recommendation.	
MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation.	

Consent to treatment (sections 57-59 of the Act of 2001)

MHR recommendation	Expert Group recommendation
The sections of the current Act that concern administration of medication should be amended to provide that the free and informed consent of a patient shall be required in all circumstances before treatment can be administered unless the patient lacks capacity and either • The treatment is necessary in an emergency to save the life of the patient. Where treatment is administered in an emergency, this should be for a short period of time and only where compliance with the procedures of Section 60 would cause such delay as would lead to harm to the person; or • The application for treatment has been reviewed independently as in the recommendation on ECT below	The Expert Group recommends that the right of the capable patient to make decisions about their own treatment, under Section 57, should remain. The Group also recommends that Section 57 should be amended so that the informed consent of a voluntary patient is required for all treatment. Informed consent is also required from involuntary patients who are deemed capable of giving such consent. (Section 2.18, p.58)

MHR outstanding concern: None. These recommendations reflect MHR's recommendation.

MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation.

Additional protections relating to ECT and Psycho-Surgery (Sections 58 &59)	
MHR recommendation	**Expert Group recommendation**
In addition to the protections above, the Department of Health should consider whether all prescriptions of ECT should be subject to a tribunal review as applies for psycho-surgery. Also, in order to ensure that capable service users are not denied their right to make decisions about their own care, the term 'unwilling' should be removed from Section 59(b) of the Act so that refusals by capable service users are respected.	The Expert Group recommended that Section 59 should be amended to remove the authority to give ECT without consent in any circumstance where the patient is capable of giving consent but 'unwilling' to do so. The Group recommended that the first possible opportunity should be taken to effect this change in the context of any future miscellaneous health bill. The Expert Group recommended that where a patient does not have capacity and a decision-making representative does not give consent to ECT, such treatment may only take place where it is required as a life-saving treatment, for a patient where there is a threat to the lives of others or where the condition is otherwise treatment resistant, and such ECT may then only be administered subject to approval by a Mental Health Review Board which must convene within 3 days of the decision being taken. This is the only circumstance in which a prescription for ECT is recommended for review by the Commission. (Section 2.19, p.61)
MHR outstanding concern: Mental Health Reform is concerned that the criteria for administering ECT proposed by the Expert Group is too wide.	
MHR proposal: MHR has already called for the deletion of 'unwilling' from Section 59 as a matter of urgency. Call for draft legislation to reflect MHR's previous recommendation on a narrower scope for administering any treatment, including ECT, where a person lacks capacity to make decisions.	

Recognising the role of family members

MHR recommendation	Expert Group recommendation
The legislation should place a duty on the health service to provide information of a general nature on mental health to the family members of a person with a mental health condition upon request and with the permission of the service user. The legislation should place a duty on the health service to assess the support needs of family members of a person receiving treatment for a mental health condition upon request of the family member and with the permission of the service user. The Act should be amended to place a duty on the clinical director to involve the family in discharge planning where the individual concerned is being discharged to the family's home and the individual has given their permission. Where the family members include children or adolescents under the age of 18, there should be a duty on the health service to assess the needs of the children and provide appropriate supports.	The Expert Group made a number of recommendations with respect to the role of the family, including: (Section 2.26, p.81) • "Where it is deemed appropriate, there should be proactive encouragement for the patient at all stages to involve his/her family/carer and/or chosen advocate in the admission process and in the development of the care and treatment plan with the patient's consent" • "All relevant professional bodies involved in mental health care should write into their codes of practice guidelines for practitioners the need to involve families/carers in the development of care and treatment plans with the patient's consent especially in cases of serious and enduring mental health problems" • "The Mental Health Commission should bring the matter of family involvement before their Health Social Care and Regulatory Forum to highlight the importance of the aforementioned points and to explore how best the relevant provisions could be expressed in codes of ethics/practice and guidance in this area by each of the professional regulatory bodies" • "The Mental Health Commission should develop more detailed guidance in this area for application right across the mental health sector" However, the Expert Group did not recommend any change to the Mental Health Act, 2001 to reflect the legal rights of family members/supporters.

MHR outstanding concern: Mental Health Reform is concerned that the Expert Group decided not to make any recommendation on amending legislation to include rights for families, despite calls by Mental Health Reform.

MHR proposal: Call for draft legislation to reflect MHR's recommendations as shown above.

Preserving Tribunals	
MHR recommendation	**Expert Group recommendation**
The automatic entitlement to independent review of detention by a tribunal should be retained.	The Expert Group recommends that an individual's detention must be reviewed by a Review Board no later than 14 days after the making of the admission order or renewal order concerned. (Section 2.13, p.48)
MHR outstanding concern: None. The Expert Group's recommendation improves the current tribunal procedures by reducing the amount of time before an individual's detention is reviewed.	
MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation.	

Preserving the Mental Health Commission

MHR recommendation	Expert Group recommendation
The Mental Health Commission should be preserved with its existing powers. In addition, The Mental Health Act, 2001 should retain the current obligation to inspect all approved centres annually. The Act should be amended to provide for the registration of all community-based mental health services and their inspection as resources permit but with a minimum of 50 community-based services inspected annually. Registration should be required for all day hospitals, day centres, mental health service community residences and community mental health teams and should also require service user involvement in planning and monitoring services.	Under section 33(1) of the Mental Health Act 2001, the principal functions of the Mental Health Commission are to "*promote, encourage and foster the establishment and maintenance of high standards and good practices in the delivery of mental health services and to take all reasonable steps to protect the interests of persons detained in approved centres under this Act"*. (Section 2.24, p.75) The Expert Group recommended that in order to enhance the standard of care that is being provided in approved centres, the revised legislation should provide for the Mental Health Commission to make standards in respect of all mental health services and to inspect against those standards. The standards would be made by way of regulations and the regulations would be underpinned by way of primary legislation.

MHR outstanding concern: None. The Expert Group's recommendation reflects MHR's recommendation.

MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation.

Independent Complaints Mechanism

MHR recommendation	Expert Group recommendation
The legislation should provide for a complaints mechanism independent of the service provider. An independent body should be given a direct role in receiving, investigating and resolving complaints about mental health service delivery. The legislation should also provide for advocacy support in making a complaint and for a proxy decision-maker to be able to make a complaint on behalf of an incapacitated person.	The Expert Group is not recommending a separate Mental Health Ombudsman at this juncture, however it recommends that it should be re-examined as part of future reviews of any new Act. (Section 2.12, p. 65)

MHR outstanding concern: Mental Health Reform is disappointed that the Expert Group did not recommend an independent route for making a complaint, which was called for by MHR.

MHR proposal: Call for an independent body to be given a direct role in receiving, investigating and resolving complaints about mental health service delivery.

Protection from abuse

MHR recommendation	Expert Group recommendation
Specific criminal offences for the ill treatment, neglect, exploitation or abuse of mental health service users should be introduced into the Act.	This is not referred to in the Expert Group report.

MHR outstanding concern: The previous mental health legislation of 1945 included a section (253) which criminalised the ill treatment or neglect of a patient in a psychiatric institution. The current Mental Health Act repealed this section and omitted any replacement. Mental Health Reform sees no rationale for the repeal of this provision. In light of the history of abuse in various institutions in Ireland, it is important that provision is made in legislation to emphasise the unacceptability of abusive behaviour. Furthermore, given the widespread presence of users of mental health services in community-based services including day hospitals, day centres and HSE-supervised community residences, such a provision should also be extended to cover all mental health services.

MHR proposal: Call for MHR's recommendation to be introduced in draft legislation.

Reporting on detention

MHR recommendation	Expert Group recommendation
The certification of the least restrictive principle should include reporting where the person has been required to be detained due to a lack of adequate community services being available, e.g. lack of a home-based treatment team, lack of a crisis house, etc.	The Expert Group recommends that "detention….should only be considered where other less restrictive measures have been considered and found to be insufficient to provide the necessary care and/or treatment for the person in addition to providing the appropriate safeguards for the person". (Section 2.4, p. 20). The Group suggests that the appointment of Authorised Officers will "lead to more appropriate and least restrictive treatment for individuals in community or other mental health settings and also bring a greater focus on involuntary admission being a treatment of last resort" (Section 2.9, p.34). "Where, having considered the individual's needs it is decided that no alternative care and treatment options are available, then it would be the decision of the Authorised Officer……to make or not make the application for involuntary admission". (Section 2.9, p.35)

MHR outstanding concern: There is no specific recommendation made in the Expert Group's report on the reporting of a detained individual due to a lack of adequate community based services.

MHR proposal: Call for MHR's recommendation to be introduced in draft legislation. Also call for reporting on individuals who are refused access to inpatient services due to shortages in beds.

Renewal of admission orders

MHR recommendation	Expert Group recommendation
The Expert Group should consider whether the maximum period of renewal of an admission order could be reduced lower than 9 months.	Section 15(1) of the Mental Health Act 2001 authorises the making of an admission order for the reception, detention and treatment of a patient for a period of 21 days. The order may subsequently be extended for periods no longer than 3 months, then up to six months and there after periods of up to 12 months. A number of submissions to the original Steering Group felt that the third time period of 12 months was too long and it was subsequently recommended by the Steering Group to reduce the 12 month period to a period not exceeding 9 months. The Expert Group re-examined the time periods for renewal orders and after some deliberation, it was felt that there was merit in limiting the maximum time period for which renewal orders can be made to 6 months. (Section 2.14, p.49)

MHR outstanding concern: None. The Expert Group's recommendation reflects that of Mental Health Reform.

MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation.

Temporary release orders	
MHR recommendation	**Expert Group recommendation**
Section 26 should be amended to ensure that its temporary release provisions cannot be used to impose de facto community treatment orders by specifying a maximum time for which such leave provisions may be used and a requirement to consider whether the patient should be discharged. Section 26 should also expressly provide that any conditions imposed upon a person during a period of absence with leave must be necessary and proportionate in the circumstances and the Code of Practice should provide guidance on what that means in practice. In addition, the Act should clarify that a person may not be recalled from leave unless he or she fulfils the criteria for detention under the Act. The Expert Group should consider introducing a notification requirement, whereby the MHC would be notified of all absences with leave granted (including the length of the period of absence and the conditions imposed, if any).	The Expert Group recommended that "the provisions of Section 26 regarding permission to be absent from an approved centre for a specified period should be retained with greater clarification being provided in a Code of Practice (to be developed by the Mental Health Commission) which would outline the precise circumstances in which such provisions can be used. The time limit for such absences should be a maximum of 14 days and they should not be used as quasi-community treatment orders". (Section 2.15, p. 51).
MHR outstanding concern: The Expert Group did not make any specific recommendations relating to the following: conditions imposed upon a person during a period of absence with leave; that the Act should clarify that a person may not be recalled from leave unless he/she fulfills the criteria for detention under the Act and that the Mental Health Commission would be notified of all absences with leave granted.	
MHR proposal: Call for MHR's outstanding recommendations to be introduced in draft legislation.	

Section 73

MHR recommendation	Expert Group recommendation
Mental Health Reform recommends that Section 73 of the Mental Health Act be repealed.	Section 73 of the Act requires that an individual receive permission of the High Court before he or she can institute civil proceedings under the Act. Mindful of the fact that every person with a disability should have equal access to the law, the Group believes that this provision of the Act should now be repealed.(Section 2.28, p.85)

MHR outstanding concern: None. The Expert Group's recommendation reflects that of Mental Health Reform.

MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation.

Children and Adolescents

MHR recommendation	Expert Group recommendation
The Children's Mental Health Coalition made a number of recommendations on review of the Mental Health Act, including provision for: • A separate section on children within the Act to guarantee specific protections • No child or young person shall be admitted to an adult inpatient unit (voluntarily or involuntarily) save in exceptional circumstances • Specialist independent advocacy services for children • Young people between the age of 16 and 18 years shall be presumed to have capacity to make decisions regarding admission and treatment unless proven otherwise • Persons under 16 years may consent to, and refuse treatment or admission where it is established that he or she has the maturity and understanding to appreciate the nature and consequences of the specific treatment • An appropriate forum for the review of admissions and detention of children in addition to the development of appropriate procedures • A prohibition on the use of psycho-surgery and ECT in the case of children below the age of 18 years	The Expert Group made a number of recommendations relating to children and adolescents in inpatient settings, including: • Provisions relating to children should be included in a standalone part of the Act • Children aged 16 or 17 should be presumed to have capacity to consent / refuse admission and treatment. • There should be no automatic presumption of capacity for children under the age of 16. However the views of the child must be heard by parents and service providers and given due weight in accordance with the child's evolving capacity and maturity. • Admission and renewal orders for the involuntary detention of a child (under 18) should continue to require a Court Order and require justification that it is used as a last resort. • The requirement to notify the Mental Health Commission of information relating to admission and discharge of children should be elevated to primary legislation. • Advocacy services to children and to the families of children in the mental health service should be available.

MHR outstanding concern: The Expert Group report reflects many of the recommendations made by the Children's Mental Health Coalition/ MHR.

MHR proposal: Call for the Expert Group's recommendation to be reflected in draft legislation.

Questions regarding this analysis and further information about Mental Health Reform's advocacy on mental health law can be obtained by contacting info@mentalhealthreform.ie or via telephone at 01 874 9468.