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Legacy of Unresolved Legal Issues on Mental Health

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The hasty enactment of the Mental Health Act 2008 last week has probably resolved the legal issues caused by the recent High Court case, but there are other related issues which remain unresolved. Mr Justice Bryan McMahon issued a significant ruling in the case of a woman who has been detained in St Patrick's Hospital since August 2007. Various legal issues arose regarding her detention. Her legal team initially argued, amongst other points, that the third renewal order in her case was invalid either (a) because it ordered her continued detention in hospital even though her psychiatrist believed she would fare better in supported accommodation or (b) because the renewal form produced by the Mental Health Commission did not allow a third renewal of this type for a period shorter than 12 months, even if the individual circumstances of the patient required a shorter period of detention. The judge then questioned during the oral arguments whether a renewal order for a period "not exceeding 12 months", as the form specifies, might be inherently uncertain. This was a novel point which had not been raised directly in the submissions, but the court permitted the submissions to be amended to deal with this issue.

In his detailed ruling on the case, Mr Justice McMahon concentrated on this new issue which he himself had first raised. He noted that the Mental Health Commission submitted that when the Mental Health Act 2001 refers to a renewal for a period not exceeding 12 months, this meant that the period can only be 12 months in duration and not a shorter period. The judge ultimately rejected this line of reasoning, referring to it as "extraordinary". He decided that a renewal order for a period not exceeding 12 months was void for uncertainty. However, he put a four week stay on his order directing the patient's discharge, to allow time for the relevant parties to comply with the provisions of the legislation before determining what is the appropriate order in the circumstances.

Last Thursday, on the eve of the High Court judgment, the Oireachtas passed the Mental Health Act 2008, which provides that a renewal order shall be deemed to be valid notwithstanding either (a) that the consultant psychiatrist failed to consider that he or she had the discretion to extend the period for a lesser period than the maximum period concerned or (b) that the order did not specify a period during which the order was to remain in force or a date on which the order was to expire. The Commission has also issued a new form on its website, for use in renewals of detention from now on.

This whole affair raises questions as to the wording of the Mental Health Act 2001, and of the forms specified by the Mental Health Commission. As Mr Justice McMahon pointed out, "the error in this case was prompted by the wording of the form used by the Commission." The apparent inability of psychiatrists to specify a period less than the maximum period was clear on the face of the form as soon as it was issued in November 2006. This form was approved by the Mental Health Commission, and was widely circulated amongst other interested parties such as the Department of Health and Children and the Health Service Executive. Concerns about the wording of the form were raised publicly at conferences in Galway in November 2007 (repeated in Cork, June 2008 and Dublin, July 2008). As regards the wording of the Mental Health Act, a number of issues have arisen regarding the time limits, and these have led to the Commission issuing a 1,200-word guidance page on 'Duration of Involuntary Admission and Renewal Orders'. This guidance will need to be amended in light of the recent court case. It may now be better to re-word the Act so that the time limits operate in a more logical and streamlined manner.

While to some extent the various issues which have arisen regarding the legislation may be characterised as teething problems, a more concerted effort would appear to be required to ensure that such problems are minimised so that those involved in applying the Mental Health Act 2001 can concentrate on the substantive issues involved in each case.

It is noteworthy that a number of other significant issues remain unresolved and require urgent attention. For example, a patient who has their detention renewed for six months (for example), cannot apply to a Mental Health Tribunal for a review of their case during the six month period and must wait until the automatic review which will occur at the end of the six months, if the psychiatrist makes a renewal order. This is in spite of a clear ruling from the European Court of Human Rights in *Rakevich v Russia* in 2003, where it was stated that "the detainee's access to the judge [or tribunal] should not depend on the good will of the detaining authority."

The 2001 Act provides that the a person may be removed to an approved psychiatric centre *by members of staff of the approved centre* in certain circumstances (s.13). These "assisted admissions" are often carried out by an independent contractor rather than members of staff. In the *R.L.* case in 2008, it was held by the Supreme Court that the use of an independent contractor was a breach of the Act, although the patient's detention was upheld. It appears that such breaches of the Act have continued, in spite of the legal difficulties which they raise.

There are serious doubts about the burden of proof in Circuit Court appeals, where the patient is required to prove that he or she does not have a mental disorder (s.19), even though such a burden would appear to be contrary to the European Convention.

In addition, the powers of Mental Health Tribunals are unduly restricted by the 2001 Act. They may not consider questions of compliance with the sections on removal to the approved centre (s.13), referral of the admission order to the tribunal (s.17), transfer of a patient to hospital (s.22) or compliance with the Mental Treatment Act 1945.

The time has come for a fundamental review of the Mental Health Act 2001 in light of the Irish case-law to date, experience in the operation of the Act and recent decisions of the European Court of Human Rights. Reference may also be made to the Mental Health Commission's *Report on the Operation of Part 2 of the Mental Health Act 2001* (2008) and the Department of Health and Children's *Review of the Operation of the Mental Health Act 2001: Findings and Conclusions* (2007).

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