



## **Deprivation of Liberty: Safeguard Proposals**

### **Consultation Paper**

*(Please read in conjunction with  
the accompanying draft Heads of Bill)*

**The closing date for submitting your views is 9<sup>th</sup> March 2018.**

## Your Opinion Matters

The Department of Health has prepared draft Heads of Bill on deprivation of liberty safeguards which will form a new part of the Assisted Decision-Making (Capacity) Act 2015. The Department would like your views on these draft provisions which are available for download at <http://health.gov.ie/consultations/>.

This consultation paper provides some background information on the development of the draft Heads of Bill along with some questions on which we would like your views. It should be read in conjunction with the draft Heads of Bill.

Submissions should be made by e-mail to [deprivationofliberty@health.gov.ie](mailto:deprivationofliberty@health.gov.ie) or by post to:

Deprivation of Liberty Safeguard Consultation  
Room 204  
Department of Health  
Hawkins House  
Hawkins Street  
Dublin 2, D02 VW90

If you would like a paper copy of this consultation paper or the draft Heads sent to you, please contact the Department of Health at the address above or by:

Email: [deprivationofliberty@health.gov.ie](mailto:deprivationofliberty@health.gov.ie)

Phone: (01) 6354402 or (01) 6354732

Please also contact the Department if you have any questions in regard to this public consultation.

## Closing date

The closing date for submitting your views is **Friday, 9 March 2018**.

## Data Protection and Privacy Provisions

The information shared by you in this consultation will be used solely for the purposes of policy development and handled in accordance with data-protection legislation. An analysis of submissions received as part of the public consultation will be published online and will include a list of organisations and representative bodies which responded. Comments submitted by individuals may be used in the final consultation report but these will be anonymised. All personal data is securely stored and subject to data-protection laws and policies. For more information, see <http://health.gov.ie/data-protection/>.

Please note that submissions received by the Department are subject to the Freedom of Information (FOI) Act 2014 and may be released in response to an FOI request.

## Background

1. Legislative clarity on the issue of deprivation of liberty in residential facilities for older people, those with a disability or mental health issues is required in order to meet our obligations under the United Nations Convention on the Rights of Persons with Disabilities<sup>1</sup>.
2. The draft Heads of Bill, which accompany this consultation paper, have been prepared by the Department of Health with the assistance of the Department of Justice and Equality. It is intended that the draft deprivation of liberty safeguard proposals will form a new part of the Assisted Decision Making (Capacity) Act 2015<sup>2</sup>.
3. Please note that these draft Heads of Bill are for consultation purposes only and will be subject to change.

## What is the Purpose of the Heads?

4. The central issue to be addressed is that existing legislation in the form of the Assisted Decision-Making (Capacity) Act 2015 and the Mental Health Act 2001<sup>3</sup> do not provide a procedure for admitting persons without capacity to relevant facilities in which they will be under continuous supervision and control and will not be free to leave, nor do they provide procedural safeguards to ensure that such persons are not unlawfully deprived of their liberty. The draft Heads seek to address this gap.
5. Essentially, the draft deprivation of liberty provisions set out a process which aims to ensure that people are not unlawfully deprived of their liberty. The provisions are intended to provide safeguards for older people and persons with a disability in instances in which they are living in, or it is proposed that they will live in, a residential facility and there is reason to believe they lack the capacity to decide to live there. It is intended that these safeguards will also apply to mental health facilities in instances in which such persons have mental-health issues but are not suffering from a mental disorder and therefore cannot be involuntarily detained under the Mental Health Act 2001.

## Where and When Will the Deprivation of Liberty provisions apply?

6. The provisions will apply to residential centres for persons with disabilities, nursing homes and some mental health facilities.
7. The deprivation of liberty proposals will apply in circumstances in which it is proposed that a relevant person is to live in, or is already living in, a relevant facility and
  - (a) he or she is, or will be, under continuous supervision and control; and
  - (b) is not, or will not, be free to leave; and
  - (c) there is reason to believe that the person lacks capacity to make a decision to live in the relevant facility.

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<sup>1</sup> <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

<sup>2</sup> <http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/html>

<sup>3</sup> <http://www.irishstatutebook.ie/eli/2001/act/25/enacted/en/html>

## **Approach Taken**

8. The approach taken in the Heads builds on the decision-making procedures, supports and safeguards already provided by the Assisted Decision Making (Capacity) Act 2015 and also includes some additional safeguards specific to deprivation of liberty.
9. In line with the Assisted Decision Making (Capacity) Act 2015, a person's capacity to decide to live in a relevant facility (in circumstances which amount to a deprivation of liberty) is to be construed functionally. If there is reason to believe that a person lacks capacity to make this decision and there is no third party with the legal authority to make the decision, an application must be made to the Circuit Court under Part 5 of the Assisted Decision Making (Capacity) Act 2015 seeking a declaration that the person lacks capacity to make the decision. The Court can either make the decision to admit the person itself, or appoint a Decision-Making Representative and give that person the authority to make the decision.

## **Challenges**

10. The development of legislative provisions relating to deprivation of liberty is a highly complex undertaking. In addition to satisfying the requirements of the UN Convention on the Rights of Persons with Disabilities, the provisions must also align with our obligations under the European Convention on Human Rights<sup>4</sup>.
11. Other countries, including the UK, have experienced significant difficulties in developing and implementing workable solutions while adhering to these requirements and appropriate case law. In Ireland we must also ensure that the new provisions appropriately align with the existing Assisted Decision Making (Capacity) Act 2015 and the Mental Health Act 2001.
12. It is acknowledged that the draft provisions represent a very significant cultural change and may be viewed as an imposition on families at what can be a difficult time. However, in order to satisfy the requirements of the Convention and to align with the approach adopted in the Assisted Decision Making (Capacity) Act 2015, a more formal process than that which currently prevails, with the involvement of the court in certain circumstances, is required.
13. The Department also acknowledges the impact that these draft proposals will have on the Circuit Court and on the health service. As we continue to refine the draft Heads we will seek to minimise the impact as much as possible.

## **Next Steps**

14. The submissions received through this public consultation will be analysed and will be considered by the Department in developing the final General Scheme and Heads of Bill which will be submitted to Government for approval.

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<sup>4</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

15. The findings will be published on the Department of Health’s website in due course. If you would like to receive a copy of these findings, please include your contact details in your submission.
16. A small number of outstanding legal issues relating to the Heads (such as a mechanism to be able to challenge a lawful deprivation of liberty), will also be considered as part of this process.

## **Main Provisions and Questions**

17. A summary of the main provisions is set out below and should be read in conjunction with the draft Heads of Bill. We welcome your views on any aspect of the Heads but have included some specific questions on which we would particularly like your views. Some general questions are included at the end of this document.

### ***Head 1 – Definitions***

This Head sets out definitions of key words and terms used in the draft Heads. One such key term is “admission decision” which is used to describe the decision that a relevant person will live in a relevant facility in which he or she will be under continuous supervision and control and will not be free to leave i.e. where a person will be deprived of their liberty. Please note that the definitions in section 2 of the Assisted Decision Making (Capacity) Act 2015 also apply to these Heads.

#### **Questions on Head 1:**

- 1.1 Do you have any views on the definitions currently included in this draft Head?
- 1.2 In particular, do you have any views as to the types of healthcare professionals that should be included within the definition of “other medical expert”?
- 1.3 Do you have any other views specific to Head 1?

### ***Head 2 – Application and Purpose of this Part***

This Head provides that these legislative proposals only apply to circumstances in which a person will be deprived of their liberty.

#### **Questions on Head 2:**

- 2.1 Do you have any views specific to Head 2?

### ***Head 3 – Person’s Capacity to Make a Decision to Live in a Relevant Facility in Advance of an Application to Enter the Relevant Facility***

This Head provides that, where the healthcare professional who is determining a person’s requirement for residential care which is likely to result in a deprivation of liberty, has concerns about an individual’s capacity to make a decision to live in a relevant facility, he or she must notify people specified by the relevant person of this concern thereby affording them the opportunity to make an application to court under Part 5 of the ADMC Act for a declaration that the relevant person lacks capacity to decide to live in a relevant facility.

#### **Questions on Head 3:**

- 3.1 Do you have any views specific to Head 3?

#### ***Head 4 – Procedure for Routine Admission of a Relevant Person to a Relevant Facility***

This Head provides that the person in charge shall not admit a relevant person to a relevant facility in which they will be deprived of their liberty without: (i) evidence that the court has made an admission decision; or (ii) evidence that a third party has the legal authority (Decision-Making Representative or Enduring Power of Attorney) to make this decision and that third party made an admission decision.

##### **Questions on Head 4:**

- 4.1 Do you think the term “under continuous supervision and control” should be defined? If so, what should this definition include?
- 4.2 When the person in charge<sup>5</sup> has reason to believe that a relevant person may lack capacity to decide to live in a relevant facility, who should be notified with a view to affording them the opportunity to make an application to Court under Part 5 of the Act? This issue also arises in Heads 3(3), 7(4) and 8(1).
- 4.3 Do you have any other views specific to Head 4?

#### ***Head 5 – Procedure for Admission of a Relevant Person to a Relevant Facility in Urgent Circumstances***

This Head provides that the person in charge can, on the basis of medical evidence, authorise a temporary admission-decision in instances in which there is an imminent risk of significant harm to the person’s health or welfare or to prevent an imminent risk of significant harm to another person, and there is a concern that the relevant person lacks capacity to decide to live in a relevant facility. In such circumstances, the person in charge must notify people specified by the relevant person affording them the opportunity to make an application to court for an admission-decision. Where no such application is made within a specified time-period, the person in charge must contact the Director of the Decision Support Service and request that an appropriate person be assigned to the relevant person to make the application on their behalf.

##### **Questions on Head 5:**

- 5.1 In subhead (1), what are your views on the proposed circumstances in which an urgent admission can be made?
- 5.2 In subhead 2(b), should a health professional other than a registered medical practitioner be able to provide medical evidence? If so, what type of healthcare professional? This issue also arises in Head 6(2).
- 5.3 In subhead (7), who should make the application to Court if no one else does so? Do you have a view on the proposed role of the Director of the Decision Support Service? This issue also arises in Heads 7(6), 7(11) and 8(3).
- 5.4 Do you have any other views specific to Head 5?

#### ***Head 6 – Procedure for Making an Admission Decision***

This Head sets out the procedure for making an admission-decision. Under the European Convention on Human Rights, any decision to deprive a person of their liberty requires medical evidence.

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<sup>5</sup> In every place “person in charge” appears in this consultation paper, please read as “person in charge or healthcare professional on behalf of the person in charge”

**Questions on Head 6:**

- 6.1 Is the evidence of one medical expert sufficient?
- 6.2 Do you have any other views specific to Head 6?

**Head 7 – Persons Living in a Relevant Facility**

- (i) *Person who is living in a relevant facility either before or after the commencement of this legislation and wishes to leave it.*

If a person wishes to leave a relevant facility, they shall not be prevented from doing so. However, if there is a reason to believe that the relevant person lacks capacity to make this decision, the person in charge may temporarily prevent the relevant person from leaving the relevant facility. In such circumstances, the procedure under Head 5 must then be followed.

- (ii) *Person who after commencement of this legislation had capacity to live in a relevant facility and may now lack capacity*

If a person in charge has reason to believe that a relevant person who is living in a relevant facility may now lack capacity to make a decision to continue to live there, he or she must notify people specified by the relevant person of this belief, thereby affording them the opportunity to make an application to court for an admission-decision. Where the person in charge does not receive notification of this application within a specified time-period, he or she shall contact the Director of the Decision Support Service and request that an appropriate person be assigned to the relevant person to make the application on their behalf. The requirement to apply to court does not apply where the person in charge/healthcare professional considers the individual has fluctuating capacity or where there is a high probability of the person's demise within a short period.

- (iii) *Person who previously lacked capacity and may have regained it*

If a person in charge has reason to believe that a relevant person may have regained capacity to make a decision to live in the relevant facility, he or she must notify the appropriate Decision-Making Representative or Attorney. This will allow an application to be made to court for a review of the court declaration that the person lacked capacity. Where the person in charge does not receive notification of this application within a specified time-period, he or she shall contact the Director of the Decision Support Service and request that an appropriate person be assigned to the relevant person to make the application on their behalf.

**Questions on Head 7:**

- 7.1 In subhead (2), do you have views on how the issue of fluctuating capacity should be addressed?
- 7.2 In subhead (2), do you have a view on the length of time that would be considered a "short period"? This issue also arises in Heads 7(8), 7(12) and 8(5)
- 7.3 Do you have any other views specific to Head 7?

### ***Head 8 – Transitional Arrangements for Existing Residents on Commencement of this Part***

This Head provides that in instances in which a relevant person is living in a relevant facility on commencement of this Part and there is reason to believe that they lack capacity to make a decision to continue to live in the relevant facility, the person in charge shall notify people specified by the relevant person of their belief. This is done to afford them the opportunity to make an application to court under Part 5 of the ADMC Act. Where the person in charge does not receive notification of such an application within a specified time-period, they shall contact the Director of the Decision Support Service and request that an appropriate person be assigned to the relevant person to make the application on their behalf.

#### **Questions on Head 8:**

8.1 Do you have any views specific to Head 8?

### ***Head 9 – Review of Admission Decisions***

This Head provides for the review of an admission decision.

#### **Questions on Head 9:**

9.1 Do you have any views specific to Head 9?

### ***Head 10 – Chemical Restraint and Restraint Practices***

This Head prohibits the use of chemical restraint for non-therapeutic reasons in the context of deprivation of liberty and also provides that a person should not be subjected to restrictive practices unless there are exceptional circumstances and such practice is in accordance with Regulations prescribed by the Minister.

#### **Questions on Head 10:**

10.1 Do you have any views specific to Head 10?

### ***Head 11 – Records to be Kept***

This Head sets out the records that must be kept by relevant facilities for inspection.

#### **Questions on Head 11:**

11.1 Do you have a view on the types of records that must be kept under this Head?

11.2 Do you have any other views specific to Head 11?

### ***Head 12 – Regulations***

This Head provides power to the Minister to make regulations in regard to certain matters.

#### **Questions on Head 12:**

12.1 In subhead (1), do you think that the Minister should be empowered to make regulations on any other aspect of the Heads?

12.2 In subhead (2), do you have a view on any other policy and procedure that should be included in this subhead?

12.3 Do you have any other views specific to Head 12?

### **Head 13 – Offences**

This Head sets out the offences in relation to deprivation of liberty.

#### **Questions on Head 13:**

- 13.1 Do you have a view on the proposed offences set out in this Head?
- 13.2 Do you have any other views specific to Head 13?

### **14 - General Questions**

- 14.1 A number of the Heads - 5(2)(b), 5(3), 5(4), 5(7), 5(8), 7(6), 7(9), 7(11), (8(1) and 8(3) - set down timeframes within which certain actions must be taken. Do you have a view on any of these proposed timeframes?
- 14.2 The draft Heads apply to older people, persons with disabilities and people with a mental health illness. In terms of timeframes and in light of the existing provisions of the Mental Health Act 2001, should those with mental health illness be treated differently to others?
- 14.3 Do you have any other views on the draft provisions?