The Irish Nurses & Midwives Organisation
The Whitworth Building
North Brunswick St
Dublin 7

Submission to the Department of Health

Consultation on Deprivation of Liberty: Safeguard Proposals

09th March 2018

1. Introduction

1.1. The Irish Nurses & Midwives Organisation represents 40,000 Registered Nurses & Midwives in Ireland. We represent the vast majority of nurses and midwives who are engaged in both public and private practice, and we welcome the opportunity to make a submission to the Department on this important issue.

1.2. Our members are involved in service delivery and care in relation to persons who will be affected by these proposals throughout acute, care of older person, disability, community and other services.

1.3. The concepts associated with these proposals are welcome as there is an urgent necessity to address the position of persons whose liberty is interfered with in the context of service delivery. Bearing in mind that there is no effective regulation of this area, this is insufficiently protective of the human rights of such persons.

1.4. Moreover, the current position presupposes a fundamentally different level of respect, treatment and protection for certain categories of persons within our society which in turn fails to recognise the human worth and dignity of each individual. It is essential that we recognise as a society that notwithstanding one's personal characteristics all members of the human race have the same human rights.

1.5. In responding to this call for submissions we are mindful of the human rights of each person, including those recognised by our Constitution, where in accordance with Article 40.4.1: No citizen shall be deprived of his personal liberty save in accordance with law. In *King v. AG* [1981] IR 233 Henchy J observed that; *that no citizen shall be deprived of personal liberty save in accordance with law – which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution*. The provisions under consideration are of the utmost importance as the current system of deprivation, while surely benevolent in intent, does ignore the fundamental norms of the legal order postulated by the Constitution.

1.6. We are also conscious of the rights of persons pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and particularly

Article 5 thereof. These rights are of course specifically recognised in this jurisdiction through the prism of the European Convention on Human Rights Act 2003. In considering the deprivation of liberty of persons in similar circumstances to those contemplated by the current provisions the European Court of Human Rights (ECtHR) has established that any deprivation must be in accordance with law. In other words, there must be a clear procedure prescribed by law to authorise a deprivation of liberty so that a person can foresee when they will be deprived of their liberty. A person may be lawfully detained if they are sufficient medical reasons relating to, in the terminology of the Court, a mental disorder. While the meaning of such disorders may vary and have explicitly included persons without capacity who may face significant harm, there must be reliable medical evidence of a mental disorder which must be of a degree warranting detention and must be persisting at the time of the detention.[1] The requirement that the mental disorder must be of a degree warranting detention includes that detention is only justified where other, less severe measures, have been considered and found to be insufficient, and that the deprivation of liberty is necessary and proportionate.[2] There must additionally be a right to a speedy determination of the lawfulness of the detention by a court, to compensation in the event of unlawful detention, and finally there must be a procedure for regular review of the necessity for the detention.

1.7. Finally, we are conscious of persons rights under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), and particular Article 14 dealing with Liberty and Security of the Person. Article 14 provides;

> *States Parties shall ensure that persons with disabilities, on an equal basis with others:*
>
> *Enjoy the right to liberty and security of person;*

[1] *Winterwerp v Netherlands* (A/33) European Court of Human Rights, 24 October 1979 (1979-80) 2 E.H.R.R. 387; *Stanev v Bulgaria* (2012) 55 EHRR 22.
[2] *Stanev v Bulgaria* (2012) 55 EHRR 22.

Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

1.8. The United Nations Committee on the Rights of Persons with Disabilities ("the Committee") has published guidelines on Article 14 UNCRPD. The guidelines include in summary the following points:

1.8.1. Article 14 is in essence a non-discrimination provision prohibiting deprivation of liberty on the grounds of disability.

1.8.2. Schemes which provide for deprivation of liberty on the grounds of actual or perceived impairment where there are other reasons for detention, including that the person is deemed dangerous to themselves or others, are incompatible with Article 14.

1.8.3. Deprivation of liberty of persons with disabilities on health care grounds is not permissible.

1.9. The guidance follows the Committee's comments on the right of disabled persons to enjoy legal capacity on an equal basis with others under Article 12 UNCRPD. In particular the guidance states at paragraph 8:

1.9.1. "In its General Comment No. 1, the Committee has clarified that States parties should refrain from the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without their consent or with the consent of a substitute decision-maker, as this practice

constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention."

1.10. The conjoint effect of these rights should ensure that each person is treated as an individual, that they are presumed to have capacity, that where a decision is taken to limit liberty it should be the least interfering and a last resort, it should be taken in the context of a sufficiently protective legal framework, it must be factually sustainable, reviewed and reviewable.

1.11. Only when these, and related, rights are respected will all persons be treated in a manner which respects their legal rights, human rights, and inherent human worth.

1.12. In that context, our Organisation broadly welcomes the contents of the proposals, and again we welcome the opportunity to make further submissions to you on the contents.

2. Head 1 – Definitions

2.1. In respect of the definition of admission decision there is a reference conjunctively in respect of continuous supervision and control and an absence of freedom to leave. This seems in some senses contradictory, as it may arise that a person is not free to leave, but is not under continuous supervision and control, and the Act would not apply. Therefore, it is recommended that this definition be changed.[3]

2.2. Continuing in relation to this definition, it is recognised that the above definition is in preference to a definition of deprivation of liberty. In that context, we believe, alongside the disjunctive approach suggested above, that the definition should be explained such that in determining whether an admission decision is being made

[3] In making this point we are conscious of the 'acid test' referred to by Hale L in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19, at 48 – 49. Further, we are conscious of the case law of the ECtHR, such as *Guzzardi v Italy* (1980) 3 EHRR 333, *HL v United Kingdom* (2004) 40 EHRR 761, *Storck v Germany* (2005) 43 EHRR 96, *Kedzior v Poland* (Application No 45026/07) 16 October 2012, *Stanev v Bulgaria* (2012) 55 EHRR 22, and *Mihailovs v Latvia* [2013] ECHR 65. However, it remains the case that inability to leave, in the absence of continuous supervision and control is a pressing concern which should be addressed.

certain matters shall not be relevant.[4] For example, it might be said that; "In deciding whether an admission decision is being made it shall not be relevant that the person is compliant or has not objected, the location of the placement shall not be relevant, the reason or purpose behind a particular placement is not relevant, and variations in the nature or degree of the continuous supervision and control shall not be relevant".

2.3. Considering the definition of a Person in Charge and bearing in mind the designation of such a person in other legislative measures, we believe that significant attention must be paid to this term. Given the important legislative functions resting with such persons, and the potential for criminal sanction, it is essential that they are at a sufficient level of seniority. At present this function is often understood on a location by location basis, bearing in mind that a location may be a community house accommodating for example four persons, up to a large residential facility accommodating many persons. In smaller locations the Person in Charge is often at the level of unit manager, and this is an error of principle at present considering the legislative responsibilities lying with such persons under other legislation. However, this will be even more problematic in terms of the current proposed legislation. Overall, there must be a descriptor of the level of seniority envisaged by the legislation, bearing in mind the responsibilities imposed by the legislation on such persons. The explanatory notes associated with this Head display a grasp of the general situation in relation to Persons in Charge, however, there is a failure to engage with the level of seniority associated with the persons currently working in those roles, their level of autonomy within the organisations where they work, the amount of time available to them to engage in administrative duties, their level of authority, and the limitations placed upon them.

2.4. In defining a relevant facility, the breadth of the definition is welcome. However, entirely private providers of care are excluded (except for nursing homes) and this is insufficiently protective of the rights of persons. While it is recognised that entirely private facilities, for example in the provision of services for persons with

[4] A similar approach was advocated by Hale L in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19, at 50.

a disability, are relatively rare, it is an area which should be addressed in the legislation.

2.5. Continuing with the definition of relevant facility, notable is the exclusion of services providing care for acute illness or palliative care. However, if the regime is to have meaning there must be a recognition that a situations do emerge where a person is detained in such a facility for extended periods of time for treatment or care provision, and there is no principled reason or justification why one's liberty concerns should be any less in those circumstances. Notably, in the neighbouring jurisdiction provision has been made for such circumstances in the so called "Hospital Scheme", which while open to criticism does at least recognise and make provision for such circumstances, which is necessary. Indeed, the ECtHR has determined that the essential character of a deprivation of liberty involve; (*a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the state*.[5] All of these are potentially met by admission to an acute or palliative care service, and thus the exclusion of these services as a matter of principle is not justified.

2.6. The definition of restraint practices refers to practices for non-therapeutic purposes. While Head 10 provides for the making of regulations for exceptional circumstances in relation to restraint for non-therapeutic purposes, there is no where a definition or explanation of restraint which serves a therapeutic purpose. To understand correctly the rights of a person, and to allow staff effectively understand and implement the legislation in furtherance of those rights, the concept of therapeutic restraint practices should be defined.

2.7. Considering the issue of medical experts, and other medical experts, in the first instance no definition is provided for a medical expert. In respect of other medical experts, it is suggested that a functional description be adopted, such that other registered professionals who are in a position to provide relevant evidence to assist a court in making a decision would be included. This is addressed further in later comments.

[5] *Stanev v Bulgaria* (2012) 55 EHRR 22, at paras 117 – 120.

2.8. No provision is made within the definitions for the concept of an independent advocate, and in this context bearing in mind the situations contemplated for relevant persons a new office should be created to assist such persons. Or in turn it may be opportune to change the meaning of the Court Friend facility available to the Director under other provisions in the Act such that their range of activity would extend beyond assistance in the context of applications pursuant to part 5 of the Act.

2.9. No provision is made to define a healthcare professional; however, such persons have functions under the proposed legislation, e.g. Head 3. Additionally, the definition should be in relation to a health and social care professional.

3. Head 2 – Application and Purpose

3.1. Head 2(1) again refers conjunctively to continuous supervision and control and inability to leave. The points made above at para 2.1 apply equally here.

3.2. It is noted that the legislation will not apply to wards, and this does not seem to follow the UNCRPD.

4. 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

4.1. While ample provision is made in respect of reference to other legal mechanisms which may be in place pursuant to the Act, or other enactments, concerning decision making and assisted decision making, there is insufficient provision for persons who may not have such facilities available, and where a determination has been made by the professional concerned.

4.2. While reference to section 8, and interventions, ameliorates that concern to some extent, it is necessary that a person whose liberty is proposed to be limited has access to an independent advocacy service, or an independent advocate. It is necessary to include this facility to ensure that the best interests and rights of the relevant person are fully considered, and their perspective adequately advanced both at this preliminary stage, and at later stages. While it is apt to state that this early notification mechanism may afford the relevant person an opportunity to make an application to the court under Part 5 of the Act, the facility to make such an

application, the faculties necessary to do so, the means to do so, and the capacity to represent one's interests in an effective manner require at least the assistance of independent advocate. While the position of a Court Friend is contemplated by the Act, this is only engaged where a hearing is taking place under Part 5, and therefore this is insufficiently protective of the rights of the person.

5. Head 4 – Procedure for Routine Admission of a Relevant Person to a Relevant Facility

5.1. The deprivation of liberty should not be a routine action, and therefore we suggest that this Head be retitled to refer to the "Procedure for Non-Emergency…". This puts this head in contrast to Head 5 which deals with 'emergency' circumstances.[6]

5.2. Sub head 1 provides a welcome, clear and definite statement of principle.

5.3. In terms of continuous supervision and control, and the specific question in the consultation, we have already made comments on how that issue should be approached in the context of the definition of an admission decision.

5.4. In respect of the notification associated with this Head, and in keeping with our comments in relation to Head 3, we recommend that an independent advocate facility be established to ensure an effective form of assistance which ensures that the rights and interests of a relevant person are defended.

6. Head 5 – Procedure for Admission of a Relevant Person to a Relevant Facility in Urgent Circumstances

6.1. The use of the term Urgent should be changed to Emergency. In this regard the provisions of the Head in question relate, broadly, to imminent risk of serious harm. Additionally, if one considers the other provisions of the Act, where imminent risk of serious harm is invoked, e.g. sections 44(5) and 62(1), the term "emergency circumstances" is utilised. Therefore, for the purposes of internal consistency within the proposed amended Act, the term Emergency Circumstances should be used.

[6] Note we refer here to 'emergency' in the context of our suggestions in relation to Head 5.

Additionally, this amendment is justified considering the description of the type of circumstances which allow an admission to be made in the absence of judicial or other adequate authority.

6.2. The circumstances provided for at sub head 1 appear appropriate in terms of authorising a temporary decision to be made. However, a concern arises in relation to the interpretation of imminent risk of significant harm to the person's health or welfare. It is important that the criteria are narrow enough to ensure sufficient protection of the rights of the person, yet broad enough to encompass the range of necessary circumstances which would necessitate such a temporary decision. Much of this point will be determined as a matter of interpretation in individual circumstances, however, it would be useful if the Minister were empowered to issue regulations which would specify the matters to be considered in determining the threshold in such cases.

6.3. In terms of sub head 2(b), given the wide range of registered professionals who provide services to persons who will be affected by this enactment, it is recommended that the views of a medical practitioner and other relevant registered health and social care professionals would be considered in this context. As to which experts, we recommend that Registered Nurses, Social Workers, and Psychologists be included if any list is to be determined, however, it may be better to leave the matter at registered health and social care professionals who have relevant knowledge of the circumstances and relevant information to provide, which touches on the potential existence of the circumstances provided for in sub head 1(a). Similar considerations arise in relation to Head 6(2).[7]

6.4. In terms of who should make the application, pursuant to sub head 7, if no one else does so, we believe this is a function which should be assigned to the HSE as the primary provider of health and social care services in the State. In addition, the professionals involved in such decisions will be closely aligned to the services and structures of the HSE.

[7] In *Stanev v Bulgaria* (2012) 55 EHRR 22, at para 153, the ECtHR has recognised that while medical evidence will be required, in addition the welfare of persons may also be a relevant consideration. In that context other health and social care professionals will likely be in a better position to advance relevant evidence in respect of welfare concerns.

6.5. Again, we repeat our call for the office of an independent advocate to be established to assist a relevant person, or in the alternative an amendment to the Act which increases the range of functions associated with the Court Friend office.

7. Head 6 – Procedure for Making an Admission Decision

7.1. The provisions of sub head 1, referring to the threshold of significant harm on its own is insufficiently protective. While the threshold of significant should remain, harm should be extended to refer to harm to health or welfare, and indeed welfare has been identified as a relevant consideration by the ECtHR and is recognised within the proposals in Head 5 in the context of 'urgent' decisions.

7.2. It is appropriate and necessary that the interference be, in our terms, a 'last resort' in so far as less limiting means of addressing any concerns should be considered prior to any steps being taken.

7.3. Similar considerations as those referred to at 7.1 above, apply in relation to the role of a court in respect of sub head 3.

7.4. Referring to sub heads 1, 2 and 3, we refer to the points made at 6.3 above, in that while we recognise the necessity for medical evidence in accordance with the decisions of the ECtHR, that court has also recognised the relevance of evidence as to welfare, which may well be better articulated by other health and social care professionals involved in providing services to a person.

7.5. We refer again to the role of an independent advocate, and in this context the Court Friend mechanism may apply, however, our previous comments on the importance of an independent advocate apply equally here.

8. Head 7 – Persons Living in a Relevant Facility

8.1. In respect of sub head 1, our comments in relation to Head 5 apply equally.

8.2. Concerning sub head 2, it is not clear as to what exactly is meant by the provision. Is it meant that a person may be temporarily detained without reference to sub head 1, and the related Head 5, where it is believed their absence of capacity will be for

a short time? If so the approach may be practical, however, a definition of a short period is required, and a failure to define short period is insufficiently protective. In terms of such a definition, recourse may be had to the Head dealing with 'urgent' circumstances, and the lesser period of 3 days, after which the matter should be dealt with in similar terms to sub head 1.

8.3. In respect of sub heads 4 to 6, we refer again to the position of an independent advocate.

8.4. Concerning, sub head 6 and the related sub head 8, similar considerations apply in relation to the definition of a short period.

8.5. It is important in this context to reemphasise that such considerations apply in circumstances of contemplated lack of capacity, and that all appropriate supports should be offered, in accordance with the Act more generally, in the context of offering support to make decisions.

8.6. We refer again to the importance of an independent advocate in terms of the circumstances contemplated by sub heads 9 to 12.

9. Head 8 – Transitional Arrangements

9.1. We repeat here our comments in relation to the necessity for the assistance of an independent advocate.

9.2. The comments made previously in relation to fluctuating capacity apply equally here.

10. Head 9 – Review of Admission Decisions

10.1. Explicit reference should be made to the role of the Court Friend in the absence of other legal representation.

10.2. An explicit cross reference should be made to Head 7(1) and related provisions in respect of the facility for a person to make an application, or to be assisted in doing so.

11. Head 10 – Chemical Restraint and Restraint Practices

11.1. This Head is welcomed by our Organisation.

11.2. In keeping with the provisions facilitating regulations in relation to restraint practices, we believe it would be useful for ministerial regulations in relation to medication matters. We support the prohibition on chemical restraint, and note the therapeutic context in which medication is permitted, therefore regulations would assist in ensuring that the margins of therapeutic usage are appropriately implemented in as protective a manner as possible for persons who may be in receipt of medication for a legitimate purpose.

12. Head 11 – Records to be Kept

12.1. We consider the range of records to be appropriate.

12.2. While there are additional matters which should be recorded, e.g. reasons for medication administration, or matters related to the exceptional use of restrictive practices, the duty to record these matters, as well as others, already falls on registered professionals arising from their respective codes of professional conduct, related guidelines/standards, and both statutory and employment standards applicable to the locations where services are provided.

13. Head 12 – Regulations

13.1. We have suggested that the Minister should additionally be empowered to make regulations in relation to certain matters pursuant to Head 5, and additional regulations pursuant to Head 10.

13.2. Furthermore, in keeping with other suggested amendments we believe that that the office of an independent advocate should be established, and in turn such an office seems apt to be administered by the Director, and in turn the Minister should be empowered to make relevant regulations akin to the provision made at sub head 2.

14. Head 13 – Offences

14.1. The use of the term deliberate seems inappropriate and should be replaced with the term intentional.

14.2. Related to this point, it is essential that the Person in Charge is a person of sufficient experience, seniority and authority to be able to make decisions which have the potential to give rise to significant criminal liability. This is not currently the case in all circumstances.

14.3. Furthermore, it is essential that significant training is offered to staff working in services who will be responsible for many roles in the context of the proposed legislation.

15. Additional General Comments

15.1. In respect of a person in charge, or healthcare professional on their behalf, and decisions in relation to a lack of capacity and potential necessity for deprivation of liberty, we believe that insufficient attention is paid to the role of the multi-disciplinary team. While the ultimate responsibility for a decision may rest with an individual, we believe that where such decisions are to be made, the proposed language should be enhanced by referring to a decision being made; "…where appropriate following consultation with the multidisciplinary team."

15.2. It is important that appropriate registered professionals are available to all persons who may be affected by this legislation. For example, older persons should have access to appropriately qualified and experienced registered nurses in assessing their needs and planning care to meet those needs. So too persons with an intellectual disability should have access to registered nurses for persons with an intellectual disability. It is important to recognise that a failure to provide appropriate persons to assist a relevant person may lead to a misjudging of their position, and thus a more limiting approach than necessary being adopted.

16. Conclusion

16.1. Our Organisation recognises and supports the development of this legislation.

16.2. Human rights know no barrier, and the condition of a person should have no bearing on whether their right to liberty should be protected.

16.3. Nurses and Midwives have a responsibility to respect the human dignity and worth of each individual and we welcome legislation which is appropriately protective of the rights and interests of those we care for.

16.4. Members of our profession will be at the forefront in implementing many aspects of this proposed legislation, and it will be essential that a comprehensive suite of structured training be delivered to our members. Additionally, it is essential that those among our professions who are charged with decision making under the proposed legislation have the appropriate training, experience, time, seniority and authority to allow them make decisions which are in the best interests of persons affected by the legislation.

16.5. Additionally, in the finalisation and enactment of these provisions sufficient time must be provided to services and staff to fully understand and prepare for implementation.

16.6. We welcome the opportunity to make this submission, and we are available to make further comment as may be necessary.

Dr Edward Mathews
Director of Regulation and Social Policy