

Advance Healthcare Directives in Mental Health Services

Some Considerations

Brendan Kelly





Number 64 of 2015

Assisted Decision-Making (Capacity) Act 2015

Advance healthcare directives are a key element of the 2015 Act which will give greater clarity about the will and preferences of the person

For voluntary outpatients or voluntary inpatients:

- **A refusal of specified treatment in a valid advance healthcare directive “shall be complied with”**
- **A request for a specified treatment in a valid advance healthcare directive “shall be taken into consideration”**

For involuntary inpatients:

- **Advance healthcare directives pertaining to physical illness apply in the same way as for everyone else**
- **For *some* involuntary inpatients, advance healthcare directives pertaining to *mental illness* apply in a different way**

Assisted Decision-Making (Capacity) (Amendment) Act 2022

“(a) Subject to subsection (2) to (4) and paragraph (b), an advance healthcare directive shall, insofar as provided for by this Part, be complied with unless, at the time when it is proposed to treat the directive-maker—

(i) his or her treatment is regulated by Part 4 of the Act of 2001, other than where he or she is detained under that Act on the grounds that he or she is suffering from a mental disorder within the meaning of section 3 of that Act, or

(ii) he or she is the subject of a conditional discharge order under section 13A of the Criminal Law (Insanity) Act 2006,

<u>Psychiatry inpatient</u>	<u>Refusal of specified treatment for mental illness in a valid and applicable advance healthcare directive</u>	<u>Request for a specified treatment for mental illness in a valid and applicable advance healthcare directive</u>
Voluntary	“shall be complied with”	“shall be taken into consideration”
Involuntary under Section 3(1)(a) (“Risk” criterion)	<i>Not binding, but should be taken into consideration as an expression of will and preferences</i>	<i>Should be taken into consideration as an expression of will and preferences</i>
Involuntary under Section 3(1)(b) (“Treatment” criterion)	“shall be complied with”	“shall be taken into consideration”
Involuntary under Section 3(1)(a) and (b) (“Both” criteria)	<i>Not binding, but should be taken into consideration as an expression of will and preferences</i>	<i>Should be taken into consideration as an expression of will and preferences</i>

So, what will happen on commencement of the 2015 Act?

At first... Very little

Later... Still very little, if we do nothing about it





Mental Illness, Human Rights and the Law

Brendan D. Kelly

RCPsych Publications
Cambridge University Press
2016

Box 5.2 Reasons for low uptake of advance statements under the Mental Health (Care and Treatment) (Scotland) Act 2003

- Most persons have never heard of advance statements and, even if they have, they do not think they would ever be relevant to them.
- People do not know how to go about making an advance statement, who they can have as a witness, and what to do with the document once they have drawn it up.
- Service users recognise that when they are unwell they need medical treatment and trust those who may provide this treatment to provide only appropriate treatment.
- When in recovery, many service users find it hard to contemplate being unwell again and are not ready to prepare for that eventuality.
- People do not believe that any regard will be had to their statement when it may be needed [...].
- There is some confusion about the difference and similarity among advance statements, living wills and personal statements. This results in people entering irrelevant matters in their advance statements, which should only deal with treatments for mental disorder.'

(Scottish Government Review Group, 2009: pp. 8–9)

Key Points

Advance healthcare directives are key to the 2015 Act

They apply to the majority of patients in mental health services the same as they apply to everyone else

They also apply to involuntary inpatients, but with a caveat in relation to mental illness *only* for *some* involuntary inpatients

How they will be used in practice is largely up to services
