

**NEW MENTAL HEALTH LEGISLATION – BOTSWANA  
RECOMMENDED CONTENT FOR NEW LEGISLATION 17<sup>TH</sup> JULY 2018**

**CONTENT OF LEGISLATION**

**Preamble**

People with mental illness are a vulnerable and disadvantaged population. There is a need to create an environment which corrects the historical wrongs that people with mental illness endured in the past and which enables them to enjoy and exercise their rights.

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**1. Purpose**

**2. Definitions**

- A. “Mental illness shall be defined as conditions included in the latest edition of the World Health Organisation’s International Classification of Diseases chapter on mental disorders excluding the following:
  - I. A diagnosis of personality disorder is excluded from the definition of mental illness for the purposes of this Act
  - II. Intellectual disability is excluded for the purposes of this Act, except when there is concomitant diagnosed mental illness.  
(For clarity, an intellectual disability describes a below-average IQ and a lack of skills needed for daily living. This condition used to be called “mental retardation.” A learning disability refers to weaknesses in certain academic skills).
  - III. Alcohol and substance use is excluded for the purposes of this Act, except where there is a mental illness arising out of alcohol and substance misuse.

- B. "Mental health facility" includes designated psychiatric facilities or general health facilities where mental health care and treatment is provided.

**3. Determination of mental illness**

- A. Mental illness shall not be determined on the basis of age or gender; political, economic, or social status; membership of a cultural, racial, or religious group; or non-conformity with sexual orientation, moral, social, cultural, work or political values or religious beliefs prevailing in a person's community.
- B. Past treatment or hospitalization shall not by itself be grounds for present or future determination of mental illness.

**4. Legal capacity**

- A. There is a presumption of capacity that persons with mental illness have capacity to make decisions unless proved otherwise. The onus on proving lack of capacity is on the person alleging the lack of capacity.
- B. The determination of capacity is task specific, so a loss of capacity in one area of life shall not lead to loss of capacity in other areas of life. The person shall be subject to tests to assess capacity. The assessment procedures should be different for different areas. The Mental Health Review Board shall prepare guidelines for these assessment procedures.
- C. Any loss of capacity is regarded as temporary and time limited and a fresh assessment should be done at regular intervals of time.
- D. In the event that a person is found to have incapacity in a particular area, their right to make decisions in that area of life should be regarded as temporarily suspended.
- E. There shall be different procedures for determining lack of capacity for different tasks, such as making mental health treatment decisions, decisions regarding property, and testamentary capacity.
- F. For the purpose of mental health treatment decisions, the initial determination of incapacity, valid for a limited period of time, can be made by a psychiatrist and/or a registered psychiatric nurse (as outlined in the procedures for facilitated admission below) so there is no delay in providing necessary medical and mental health treatment.
- G. After the initial determination of incapacity in (F) above, further determinations shall be made by the Local Mental Health Tribunal.
- H. For all areas other than mental health treatment decisions, the determination of incapacity shall be done by a court.
- I. A person shall be found to have incapacity to make decisions if the person is unable to:
  - I. understand the information that is relevant to making a decision on their treatment or admission or personal assistance; or

- II. appreciate any reasonably foreseeable consequence of a decision or lack of decision on their treatment or admission or personal assistance; or
  - III. communicate the decision under sub-clause (I) by means of speech, expression, gesture or any other means.
- J. The person shall at all times have a right to appeal the determination of incapacity to the Local Mental Health Tribunal in the first instance and subsequently to the National Mental Health Tribunal.

## **5. Advance Directive and Enduring Power of Attorney**

### **A. Advance Directive**

- I. An Advance Directive is a provision to enable persons with mental illness to exercise their will and preferences when they have loss of capacity to make decisions.
- II. This provision is only applicable to mental health care decisions.
- III. Any person can specify in an Advance Directive if they wish to nominate a representative to make decisions on their behalf when they have loss of capacity to make decisions for themselves.
- IV. Any person can write an Advance Directive specifying the kind of treatment they wish to receive or not receive if they have a mental illness in the future.
- V. An Advance Directive shall not apply to emergency treatment.
- VI. The procedure for making an Advance Directive shall be the same as for making a Power of Attorney in Botswana. That means the document shall be witnessed:
  - a. by the signature of two witnesses who are above the age of 14 years, and competent to give evidence in a court of justice, and who shall affix their signatures as near as conveniently may be to the signature or mark of the person making the Power of Attorney;
  - b. by the declaration of one such witness as aforesaid, who shall declare that he was present and saw the person making such power sign the same, or affix his mark thereto, or that such person acknowledged his signature or mark thereto in the presence or hearing of the witness; or
  - c. by the certificate of a Justice of the Peace or Notary Public.
- VII. The Advance Directive shall be registered with the Local Mental Health Tribunal.
- VIII. Advance Directives can be revoked, amended or cancelled by the person who made the Advance Directive in the same manner as a Power of Attorney is revoked in Botswana. Alternatively, the Advance Directive shall stand revoked if a new Advance Directive following the procedure above is made. If there are multiple Advance Directives, the latest (by date) Advance Directive shall be regarded as the valid Advance Directive.
- IX. If family members, the person nominated in an Advance Directive, or any mental health professional involved in the care of the person have reason to consider the Advance Directive does not represent the will and preferences of the individual or is not made in a valid manner, they can challenge the Advance Directive through the Local Mental Health Tribunal (with an appeal to National Mental Health

Tribunal if necessary). The burden of proof shall be on the person challenging the Advance Directive and not on the person who has made the Advance Directive.

- X. The following are grounds for challenging an Advance Directive:
  - a. the Advance Directive was not made by the person of his own free will and free from force, undue influence or coercion; or
  - b. the person did not intend the Advance Directive to apply to the present circumstances, which may be different from those anticipated; or
  - c. the person was not sufficiently well informed to make the decision; or
  - d. the person did not have capacity to make decisions relating to his mental health care or treatment when such Advance Directive was made;
- XI. The Local Mental Health Tribunal (and the National Mental Health Tribunal on appeal) has the right to uphold, revoke, alter, modify, or cancel the Advance Directive if the Tribunal is satisfied that one the conditions (a) to (d) are met.
- XII. Advance Directives cannot be contrary to the provisions of the Constitution of Botswana.
- XIII. An Advance Directive shall be invoked only when such person ceases to have capacity to make mental health care or treatment decisions and shall remain effective until such person regains capacity to make mental health care or treatment decisions.
- XIV. Any mental health care and/or treatment decision made by a person while they have the capacity to make mental health care and treatment decisions shall over-ride any previously written Advance Directive by such person.
- XV. A registered medical practitioner or a mental health professional shall not be held liable for any unforeseen consequences on following a valid Advance Directive.
- XVI. The registered medical practitioner or mental health professional shall not be held liable for not following a valid Advance Directive, if they have not been given a copy of the valid Advance Directive.

#### B. Enduring Power of Attorney

- I. This provision can be used by persons with mental illness for decisions affecting all areas of life, including property, finances, children, health care etc.
- II. The existing provisions for making a Power of Attorney in Botswana shall apply.
- III. The Enduring Power of Attorney shall be registered with the Local Mental Health Tribunal.
- IV. Persons with mental illness shall have the right to execute an Enduring Power of Attorney unless it is shown that they lack the capacity to make such decisions.
- V. An Enduring Power of Attorney shall be invoked only when such person ceases to have capacity to make decisions and shall remain effective until such person regains capacity to make decisions.
- VI. Any decision made by a person while he has the capacity to make decisions shall over-ride an Enduring Power of Attorney.
- VII. There should be provisions for challenging an Enduring Power of Attorney as is provided for Advance Directives [see 5 A (IX) above under Advance Directives].

## **6. Rights**

- A. Persons with mental illness enjoy all the rights guaranteed to citizens under the Constitution of Botswana.
- B. The law must uniformly use the term “persons with mental illness” so that the illness is separate from their identity as persons like everyone else.
- C. Persons with mental illness have the following rights:
  - I. Right to privacy.
  - II. Right to access quality mental health services.
  - III. Right to live in, be part of, and not be segregated from the community.
  - IV. Right to employment.
  - V. Right to parity and to be treated as equal to persons with physical illness in the provision of all health care and enjoy the same rights as persons receiving treatment in any other health facility.
  - VI. Right to information about their own mental illness and treatment.
  - VII. Right to access medical records of their own mental illness and treatment.

## **7. Admission and treatment of persons with mental illness**

- A. As far as possible, persons with mental illness shall be treated in their community near to their home. When treatment at home is not possible, admission to hospital may be considered in exceptional circumstances as outlined below, using the principle of least restrictive alternative.
- B. Independent admissions should be the norm as far as possible. Facilitated admission should be the exception and restricted to situations when the person lacks capacity to make decisions about their mental health care.
- C. Independent admission
  - I. All persons with mental illness desiring to take treatment as independent patients in a mental health facility or health facility where mental health treatment is provided shall apply to the Head of the mental health facility or health facility for admission. They will be examined by a psychiatrist or registered psychiatric nurse who will determine whether they have a mental illness and will benefit from admission to a mental health facility or health facility.
  - II. All persons with mental illness who are admitted as independent admissions shall be treated with their informed consent.
  - III. Persons who are admitted as independent admissions have the right to discharge themselves from the mental health facility or health facility when they wish to do so.
  - IV. If the psychiatrist or registered psychiatric nurse in charge of the person’s treatment is of the opinion they meet the criteria for a facilitated admission the

person may be prevented from leaving the facility for a period not exceeding 48 hours to allow procedures for a facilitated admission to be completed.

D. Facilitated Admission

- I. If a person lacks capacity to make mental health care decisions, they may be admitted to a mental health facility or health facility where mental health treatment is provided as a facilitated admission.
- II. An application to the Head of the mental health facility or health facility for a facilitated admission shall be made by:
  - a. A person nominated under an Advance Directive if any, or
  - b. The Enduring Power of Attorney holder if any, or
  - c. A nearest adult relative if any, or
  - d. A social worker in public service.
- III. Once the application is made, the person shall be examined by two health professionals, one of whom shall be a psychiatrist or a registered psychiatric nurse, and the other shall be a registered medical practitioner.
- IV. The psychiatrist or registered psychiatric nurse shall not have a conflict of interest or be a relative of the person being examined for a facilitated admission.
- V. The psychiatrist or registered psychiatric nurse shall have examined the person alleged to have a mental illness within a period not exceeding 48 hours preceding the day on which they certify the following:
  - a. The person lacks capacity to make mental health decisions and;
  - b. The person has a mental illness as defined under the Act and;
  - c. The person has one of the following:
    - i. They have recently threatened or are threatening or attempted or are attempting to cause bodily harm to themselves or,
    - ii. They have recently behaved violently or are behaving violently toward another person or have caused or are causing another person to fear bodily harm from them,
    - iii. They have recently shown or are showing an inability to care for themselves to such a degree that places them at risk of harm to themselves.
- VI. The admission of a person with mental illness as a facilitated admission shall be limited to a period of 30 days.
- VII. The Head of the mental health facility or health facility has the right to discharge the person before the end of the 30 day period if they consider the person no longer meets the conditions for facilitated admission.
- VIII. Any person who is admitted as a facilitated admission shall receive treatment as prescribed by the psychiatrist, registered psychiatric nurse, or registered medical practitioner either with their consent to the said treatment, or with the consent of the person who made the application for the facilitated admission.
- IX. At the end of the 30 day period:
  - a. If the conditions for a facilitated admission continue to be met, the Head of the mental health facility or health facility shall apply to the Local Mental Health Tribunal for an order to continue the admission.



- III. If after assessment, the health care worker is satisfied the person appears to have a mental illness of such a degree that the person is a risk to their own safety or the safety of others or are neglecting themselves to an extent which puts their own life at risk, the health worker has the right to request assistance from the police, and the police have a duty to provide the necessary assistance to have the person moved to the nearest health facility for further assessment.
- H. Person with a mental illness in a public place
- I. If any police officer is informed by any member of the public that they have seen a person who they reasonably consider to have a mental illness in a public place, or if the police find a person in a public place who they reasonably consider to have a mental illness, the police shall have a duty to convey such a person immediately to the nearest health facility for assessment.
- I. Person with a mental illness at a health facility
- I. Any person at a health facility, who has come either through (G) or (H) above or has voluntarily attended the health facility and after examination, the health care staff at the facility are satisfied the person has a mental illness which requires assessment at a mental health facility, they shall arrange for the person to be transported to the mental health facility.
  - II. If necessary, the health care staff shall be entitled to ask police to provide assistance with such a transfer if the patient is violent or at risk of harming themselves or others and to also seek assistance of police to keep the person in a place of safety while transport is being arranged.
  - III. This transfer shall take place within a period of 48 hours and the police can hold the persons in a place of safety up to a period of 48 hours until transfer to the mental health facility.
- J. Leave of absence for persons in a mental health facility:
- I. The psychiatrist or registered medical practitioner in charge of a mental health facility or health facility may grant leave to a person who is a facilitated admission for a period not exceeding 14 days at a time. The psychiatrist or registered medical practitioner has the right to revoke the leave at any time if they are satisfied that it is necessary for improvement to, or to prevent deterioration of, the mental health of the person concerned.
  - II. If the person refuses to return to the mental health facility or health facility, the psychiatrist or registered medical practitioner in charge of the mental health facility or health facility shall inform the nearest health facility of the same and the subsequent process shall be similar to (G) above.
  - III. If the health worker feels the person is sufficiently well and does not need to return to the mental health facility or health facility, the health worker shall report the same to the mental health facility or health facility which requested the assessment. On receipt of this report from the health worker, the Head of the mental health facility or health facility shall discharge the person.



- K. Absence without leave from a mental health facility.
  - I. Any person who has been admitted as a facilitated admission and goes missing from the mental health facility or health facility, the psychiatrist, registered psychiatric nurse or registered medical practitioner in charge of their treatment shall inform the police, and the Power of Attorney holder if any, or a person nominated under an Advance Directive if any, or a nearest adult relative if any, of the same.
- L. Discharge of the person after treatment for mental illness from a mental health facility or health facility
  - I. When the person is to be discharged from the mental health facility or health facility, a social worker should be involved to support the person's re-integration back into the community.
  - II. The social worker should identify the family to facilitate a return by the person to live with the family, or if this is not possible, provision should be made by the State for the person to be provided with supported community accommodation.

## **8. Emergency treatment**

- A. Any psychiatrist, registered psychiatric nurse, or registered medical practitioner shall provide urgent medical treatment to a person with mental illness either in the community, at their home, or in a mental health facility or health facility without the consent of the person with mental illness if it is immediately necessary to prevent:
  - I. death or irreversible harm to the health of the person, or
  - II. the person inflicting serious harm to self or others.
- B. Emergency treatment includes transportation of the person to the nearest mental health facility or health facility for assessment.
- C. Emergency treatment shall be limited to a period of 72 hours.
- D. No Special Treatments can be done under this emergency treatment provision.
- E. The following people will be informed as soon as practicable and at least within 24 hours when the patient is subject to seclusion,
  - I. The Power of Attorney holder, if any, or;
  - II. The person nominated under an Advance Directive, if any, or
  - III. The nearest adult relative.

## **9. Regulation of the use of seclusion in mental health facilities**

- A. Seclusion shall only be:
  - I. done as a matter of last resort, in exceptional cases, to prevent immediate or imminent harm to self or others,
  - II. shall be regulated by having standards decided by the Mental Health Board,

- III. can only be done in an mental health facility or health facility authorised by the Mental Health Board,
  - IV. shall be authorised by a psychiatrist, registered psychiatric nurse, or registered medical practitioner,
  - V. the reasons and duration of each incident of seclusion be recorded in a database and made available to the Mental Health Board,
  - VI. should never be used and a means of punishment or for the convenience of staff,
  - VII. restricted in use to a specified maximum time period.
- B. The following people will be informed as soon as practicable and at least within 24 hours when the patient is subject to seclusion,
- IV. The Power of Attorney holder, if any, or;
  - V. The person nominated under an Advance Directive, if any, or
  - VI. The nearest adult relative.
- C. The development of appropriate structural and human resource requirements that minimize the need to use seclusion in mental health facilities shall be encouraged.

**10. Regulation of the use of restraint in mental health facilities**

- A. Restraint shall only be:
- I. done as a matter of last resort, in exceptional cases, to prevent immediate or imminent harm to self or others,
  - II. shall be regulated by having standards decided by the Mental Health Board,
  - III. can only be done in an mental health facility authorised by the Mental Health Board,
  - IV. shall be authorised by a psychiatrist, registered psychiatric nurse, or registered medical practitioner,
  - V. the reasons and duration of each incident of seclusion be recorded in a database and made available to the Mental Health Board,
  - VI. should never be used and a means of punishment or for the convenience of staff,
  - VII. restricted in use to a specified maximum time period.
- B. The following people will be informed as soon as practicable and at least within 24 hours when the patient is subject to restraint,
- I. The Power of Attorney holder, if any, or;
  - II. The person nominated under an Advance Directive, if any, or
  - III. The nearest adult relative.
- C. The development of appropriate structural and human resource requirements that minimize the need to use restraint in mental health facilities shall be encouraged.

**11. Regulation of Special Treatments**

- A. Electro-convulsive therapy (ECT)

- I. ECT may only be given to a person with mental illness subject to the following conditions:
  - a. The informed consent from the person,
  - b. Recommendation from two psychiatrists,
  - c. When the person lacks capacity to give informed consent, then with the consent of the Power of Attorney holder if any, the person named in an Advance Directive if any, the nearest adult relative if any, or a social worker in public service,
  - d. Information has been provided to the person with mental illness or persons named in (C) above of the treatment plan and the risk and consequences of such a treatment,
  - e. Not to be done on a child below the age of 18 years.
- B. Psycho-surgery for mental illness can only be performed with the approval of the National Mental Health Tribunal AND the informed consent of the person concerned.

## **12. Prisoners with mental illness**

- A. If it appears to a police officer or prison officer that a prisoner, either under-trial or convicted may have a mental illness, the officer in charge shall make an application to the Head of the mental health facility to transfer the prisoner to the mental health facility for assessment and admission to the mental health facility if necessary for treatment.
- B. On assessment, the mental health professional may recommend either:
  - I. Outpatient treatment and returning the prisoner to the gaol or prison to complete their trial or sentence, or
  - II. Recommend admission to the mental health facility either as an independent or facilitated admission depending on the criteria being met.
  - III. If under sentence, on discharge from the mental health facility the prisoner shall be returned to the prison to complete their sentence.
  - IV. If under sentence, time spent at the mental health facility will count toward the prisoner's duration of sentence.

## **13. Rights of caregivers and families**

- A. In the case of independent patients, information will be shared with the caregiver and families only with the consent of the person concerned.
- B. Caregivers and families of minors and those persons admitted as facilitated admissions have the right to:
  - I. information about the treatment and care being provided to the person, and
  - II. the grounds for a facilitated admission, and
  - III. treatment and care being proposed to be given, and
  - IV. be involved in treatment planning and discharge planning,

- V. visit the person in the mental health facility,
  - VI. if any seclusion or restraint was used, and
  - VII. complain about deficiency in services,
- C. Caregivers and families have the right to be provided with support by health services to be able to perform their care-giving role.

**14. National Mental Health Tribunal**

- A. The National Mental Health Tribunal shall be appointed by the President. It will be chaired by a Judge of the High Court and shall consist of a consultant psychiatrist with at least 10 years' experience, a representative from the Attorney General's office, a representative from the Law Society and a representative from the Ministry of Health.
- B. The Functions of the National Mental Health Tribunal include:
- I. Hearing all appeals against the orders of the Local Mental Health Tribunals,
  - II. Any issues related to violation of rights of persons with mental illness in mental health facilities, and
  - III. Decisions on discharge or otherwise of all persons who have been detained as Special Presidential detainees after conviction as 'Guilty but Insane' or 'Unfit to Plead by Reason of Insanity' verdicts of the Courts.
- C. The National Mental Health Tribunal shall meet as required with a minimum of two meetings in each calendar year.

**15. Local Mental Health Tribunals**

- A. The Local Mental Health Tribunals consist of 6-7 members and shall be appointed by the Minister for Health and Wellness.
- B. Local Mental Health Tribunals shall be established in different parts of country and the number of such Local Tribunals shall be decided based on quantum of work and need for such Tribunals.
- C. The Local Mental Health Tribunal will be chaired by a Principal Magistrate and shall consist of a two members who are either a psychiatrist, registered psychologist, or registered psychiatric nurse, one person who is a care-giver or a family member of a person with mental illness, and two civil society representatives with an interest or expertise in mental health and/or human rights.
- D. The Tribunal will have a quorum of 3.
- E. The Tribunals shall make decisions by consensus, or failing that, by majority voting. In the event of an equal number of votes, the Chairperson shall have an additional casting vote.

- F. Functions of the Local Mental Health Tribunals shall include:
  - I. Hearing appeals by persons with mental illness against facilitated admission, and
  - II. Deciding on renewal or extension of facilitated admission after 30 days.

## **16. Mental Health Board**

- A. The Mental Health Board shall be an independent body with its own secretariat.
- B. The Board shall consist of 7-9 members and include mental health professionals (psychiatrists, registered psychologists, registered psychiatric nurses, and psychiatric social workers), a public health administrator, a representative of users of mental health services (i.e. person with current or past mental illness) and representatives of care-givers or a family member of a person with mental illness.
- C. Functions of the Board include:
  - I. Setting standards for accreditation of mental health facilities,
  - II. Regulating mental health facilities,
  - III. Setting criteria and standards for specific mental health services, interventions, and treatments as necessary,
  - IV. Authorising mental health facilities for the use of seclusion or restraint,
  - V. Setting standards for the use of seclusion and restraint in mental health facilities,
  - VI. Reviewing use of seclusion and restraint in mental health facilities,
  - VII. Visiting and inspecting mental health facilities,
  - VIII. Developing standards for supported community accommodation.
- D. Non-official members of the Board will be paid a sitting fee and expenses for attending a meeting of the Board.

## **17. Offences and Penalties**

- A. The following offences need to be included:
  - I. Making false declarations for any actions under the Act,
  - II. Neglect and/or abuse of persons with mental illness,
  - III. Obstructing professionals/others from performing their duties under the Act,
  - IV. Breach of confidentiality,
  - V. Failure to declare conflict of interest,
  - VI. Performing procedures and/or treatments not in conformity with the procedures laid down in the Act.