

## **Review of Mental Disorders Act, 1971 and other related legislation**

Prepared by: Dr Soumitra Pathare, Consultant to the Project  
November 2015

The purpose of the review was to identify areas of legislation which need to be amended/repealed/replaced to comply with the Constitution of Botswana and Botswana's obligations under international law and human rights, to implement the strategies contained in Botswana's National Policy on Mental Health and to protect the rights of persons with mental illness in Botswana.

### **I. INTRODUCTION**

The following documents were reviewed for preparing this report:

- Mental Disorders Act 1971
- National Policy on Mental Health 2003
- National Policy on Care of People with Disabilities 1996
- Constitution of Botswana
- Penal Code as amended up to 2005
- Public Health Act 2013
- Marriage Act 2001
- Adoption of Children Act as amended up to 2000
- Prisons Act 1980 as amended up to 2006
- Wills Act 1957 as amended up to 1977
- Domestic Violence Act 2008

Botswana has ratified the following International Treaties and Conventions which have relevance to mental health legislation and policies:

- (a) International Convention on Civil & Political Rights (ICCPR)
- (b) Convention on Elimination of Discrimination against Women (CEDAW)
- (c) International Convention on Elimination of all Forms of Racial Discrimination (CERD)
- (d) Convention against Torture (CAT)
- (e) Convention on the Rights of the Child (CRC) and Optional Protocol
- (f) African Charter on Human and People's Rights

Botswana has neither signed nor ratified by the International Convention on Rights of Persons with Disabilities (CRPD) and is consequently not bound by it. Botswana is a dualist state, and international conventions need to be domesticated prior to its application in Botswana. The CRPD has not been domesticated into legislation in Botswana.

However Botswana Court of Appeal has emphasized that international obligations which have not been domesticated should nevertheless, serve as an interpretive source.

The National Policy on Mental Health in its 'Specific Objectives' lists mental health legislation. Specific Objective 5.3: *Provide a framework for a periodic review of legislation in line with local, regional and international trends in good mental health practices.*

The National Policy on Mental Health also mentions mental health legislation in its Strategies for implementation of the Policy (Strategy 6.8). It says that legislation should reflect modern trends and Botswana's obligations under international law and human rights. The specific objectives under the strategy include:

1. The Ministry of Health shall advocate for mental health legislation that is consistent with assuring rights and protection of people with mental disorders and adequate treatment and care of involuntary and voluntary patients
2. The Ministry of Health shall ensure that legislation in all statutes dealing with mental health is consistent with the principles set out in the National Policy on Mental Health.

## **2. ANALYSIS OF KEY LEGISLATION RELEVANT TO RIGHTS OF PERSONS WITH MENTAL ILLNESS**

### **2.1 Mental Disorders Act**

#### **Section 2: Interpretation**

The definition of "mentally disordered or defective person" has serious problems, apart from the use of outdated terminology ('defective'). The definition of mental illness includes mental incapacity and/or dangerousness and also includes intellectual disability.

The term 'patient' is a presumption that the person has an illness while the definition seems to imply that a determination of illness is necessary.

The term 'place of detention' as it is defined may include a police lock-up with the consent of the Commissioner of Police.

#### **Section 3: Classification**

This classification is not based on any medical logic and appears to be irrational and arbitrary.

#### **Section 5: Application for Reception Order read with Section 6, 7, 8, 9**

These sections relating to Reception order (and subsequent sections eg: Section 16) violate international human rights principles such as equality before the law, access to justice and due process and most importantly, are open to potential abuse by individuals as well as institutions. Any relative (and in some instances, any person) can make an allegation about mental illness of a person, and if the person refuses to voluntarily present himself/herself, the District Commissioner can authorise a police officer to apprehend the person and bring him before a medical practitioner for the purpose of obtaining a certificate (Section 7), then hold a hearing private (Section 8, District Commissioner's discretion) and if satisfied that the person has a mental illness, authorize his/her detention in an institution. During this entire process, there is no provision for person who is alleged to have a mental illness to be heard or represented in the proceedings against himself/herself. There is no provision of judicial review or appeal against the order of the District Commissioner.

#### **Section 11: Duty of the District Commissioner in respect of property**

Once a reception order is issued for detention of the person by the District Commissioner, the person also loses control over his property and in the name of protection, the District Commissioner can take into his possession any property belonging to the person. Thus the finding of mental illness results in

a complete loss of legal capacity. Once again, there is no provision for judicial review or appeal against this decision by the District Commissioner.

#### **Section 16: Other reception orders**

Under Section 14, the period of the detention under a Reception Order is restricted to 30 days, however provisions of Section 16 allow for detention up to 60 days and can be renewed indefinitely by the District Commissioner on the recommendation of a medical practitioner. Once again there is no provision either for a judicial review of this detention, nor is there a provision for appeal against the renewal of the order of detention by the District Commissioner.

#### **Section 17: Urgent application**

Provisions of Section 17 allow for Reception order to be bypassed in 'cases of urgency' where it is 'expedient either for the welfare of the patient or in public interest' that the person is immediately admitted to an institution for 'care, supervision, or treatment' based on an urgent application made by a relative and accompanied by a medical certificate from a medical practitioner. Under an urgent application, a person may be detained in an 'institution, hospital, prison or cell'. A person can be detained for a period of 14 days under an urgent order.

As before, there is no provision for appeal or a judicial review of this decision by an administrative officer.

#### **Section 19: Apprehension without warrant in certain cases**

This section allows a Police officer/headman/tribal messenger/member of a city, town, or district council "who has reason to believe that a person apparently mentally disordered or defective is dangerous to himself or to others and that it is necessary for the public safety or for the welfare of such person that before proceedings are taken under this Act he should be placed under care and control, may forthwith, **without warrant or order**, apprehend and convey such person to an institution or any suitable **hospital, prison or cell** and the person in immediate control thereof may, **notwithstanding the absence of warrant or order, receive and detain such person.** (Emphasis mine) The provisions of Section 19 are very wide and potential open to abuse by persons in position of authority.

#### **Section 27: Powers of Master on consideration of Reception Order and documents**

The provisions of this section give authority to the Master to

- (a) Allow indefinite detention of a person alleged to have mental illness
- (b) Appoint a guardian
- (c) Can order discharge if so recommended by a medical practitioner; it appears that this is the only way for a person under a Reception Order to be discharged from detention.
- (d) There is no mandatory review of the detention order at periodic intervals; there is also no provision for appeal against the order of the Master with regard to detention or the appointment of a guardian.

#### **Section 29: Where no remuneration is paid for maintenance and care**

The provisions of this section allow a relative of a person who is alleged to have a mental illness to detain and restrain the person in the home dwelling and only needs to inform the District Commissioner of the same along with a copy of a medical certificate as to the physical and mental condition of the 'patient' and the District Commissioner is supposed to forward the documents to the

Director, who is supposed to forward the documents to the Master, who will make an order that the person may be detained in the home or order the relative to take steps to have a Reception Order issued. The Master also has the authority to appoint a guardian (to manage property) for such a person. There is no requirement for the Master to hold a hearing or for the person to be present or represented when such an order is made. There is also no provision for appeal or periodic review of such orders.

### **Section 32: Reports on patients**

The Superintendent of the hospital where the person is detained has to make an annual report to the Director. However there is no provision for review of the detention or a provision for appeal by the patient against the detention.

### **Section 34: Termination of Detention**

Under the provisions of this section, a termination of the reception order for detention has to be ordered by the Master and requires **two** medical certificates. Furthermore, since the person has no legal representative, the termination is essential dependent on two medical practitioners getting together, writing the necessary certificates and requesting the Director for termination of detention of the person concerned. This entire process means that the process of detention is made much more difficult as compared to the process of admission. This is unlike legislation in most other countries – where the process of discharge is easier as compared to the process of admission. Surprisingly, there is provision to appeal to the High Court against a termination of the detention, whereas there was no provision of appeal to the High Court in the previous sections.

### **Section 36: Voluntary patients**

The Act is written in such a manner that Voluntary care and treatment seems to be the exception while Reception Order for detention seems to be the norm. This is quite contrary to the trends in mental health legislation internationally and also as recommended by international human rights conventions and practice. It is also unclear whether Voluntary patients have to give their consent to treatment or whether they will be treated forcibly. There is no provision in Section 36 that their consent should be obtained prior to any treatment. Furthermore, voluntary patients also have to give 1 weeks' notice to be discharged from the hospital. This is quite against the principle of voluntary admission and treatment – a person who is admitted voluntarily should have the right to discharge himself/herself at any time.

### **Section 50: Mechanical means of restraint**

This section permits application of mechanical means of restraints which are approved by the Minister and also permits the Superintendent of hospitals to authorize seclusion. This section also has an unusual definition of seclusion: a person is not regarded as being in seclusion if “he is isolated in a room in which the lower half of the door is so fastened or held but the upper half left open.” It is necessary to highlight that the Special Rapporteur on Prevention of Torture has said that seclusion and restraint of persons with mental illness may amount to torture, and Botswana has ratified the Convention against Torture (CAT). International best practice in mental health (eg: WHO) recommends removal of provisions for restraint and seclusion from mental health legislation.

### **Section 52: Minister may authorize removal of patients from Botswana**

This section gives the Minister the power to remove from the country any person who has been declared to be 'mentally disordered or defective', if, in the Minister's opinion, removal is likely to be for his benefit and proper care and treatment arrangements have been made.

There is no provision for appeal against the Minister's decision in this regard. This provision violates international human rights conventions protecting citizenship rights and freedom of movement of all citizens, including those with mental illness.

## **2.2 Marriage Act 2001**

### **Section 14: Insane persons and persons below age**

This section prohibits marriage of an 'insane person' who is 'incapable of giving consent'. However the term 'insane person' is not defined in the Act, and is quite likely to be interpreted as a person with mental illness. A plain reading of the text also means that marriage is prohibited only if the 'insane person' is incapable of giving consent; so presumably, an 'insane person' who is capable of giving consent can still marry. However this provision, is highly discriminatory to persons with mental illness for two reasons: the lack of definition of insane person will result in it being interpreted as a person with mental illness and second, mental illness is no barrier to marriage.

## **2.3 Adoption of Children Act 1952 as amended up to 2000**

### **Section 5: Appointment of guardian for the purposes of adoption**

While the Adoption Act requires that a guardian should consent for adoption, under this section, the Minister may appoint a guardian for a child whose parent is incapable by reason of a 'mental disorder or defect' of consenting to the adoption. This section effectively means that a person with mental illness cannot either consent or object to adoption of their own child. This provision adversely affects the parental rights of a person with mental illness and violates international human rights conventions which protect the rights of all persons to found a family.

### **Section 8: Rescission of an order of adoption**

This section [1(c)(iv)] permits the adoptee parents to request and obtain an order rescinding the adoption if they prove that the child they adopted had a 'mental disorder' at the time of adoption and the adoptive parents were unaware of the same at the time of adoption. This section is discriminatory to children with mental health problems and also promotes stigma against persons with mental disorders. It also violates international human rights conventions and is contrary to international best practice in the field.

## **2.4 Domestic Violence Act 2008**

### **Section 7: Application for an order**

This section provides for a person who is subject to domestic violence to apply to the Court for an interim order, restraining order, tenancy order and occupation order. However a person who is 'mentally challenged' is not permitted to make such application.

However the term 'mentally challenged' is NOT defined in the Act, and is therefore open to arbitrary interpretation. It could either be interpreted as a person with mental illness and/or a person with intellectual disability or who is regarded to have a mental illness and/or intellectual disability.

This section violates the rights of persons with mental illness/intellectual disability to access justice on an equal basis with others.

## **2.5 Public Health Act 2013**

Section 22 (2) (c) directs the health officer to "take all lawful, necessary and reasonably practicable measures to ensure equal access and equity to health care services for all including those with mental illness." This provision is in line with international best practice and is a very useful provision for advocating for increased quantity and better quality mental health services and for funding of such better quality services.

## **3. RECOMMENDATIONS**

1. The Mental Health Act, 1971 is based on an outdated understanding of mental illness and does not take into account medical advances in the treatment, care and rehabilitation of persons with mental illness. The Mental Health Act also violates international conventions ratified by Botswana, such as the ICCPR and the Convention against Torture. Although Botswana has not ratified the Convention on Rights of Persons with Disabilities (CRPD), it is important to note that the Mental Health Act will not meet the standards and human rights protections for persons with mental disability (mental illness) under the CRPD. The provisions of the Mental Health Act are also contrary to recommendations and standards made by international organizations on mental illness such as the United Nations MI Principles, the WHO Handbook on Mental Health, Human Rights and Legislation. It will be extremely difficult to amend the Mental Health Act to bring it in line with above international conventions and standards as the Act is premised on a custodial solution and exclusion of persons with mental illness rather than a rights based approach to care and treatment. It will be easier to draft new legislation which complies with these requirements.
2. It is important that all stakeholders are consulted and part of the drafting process for the new law. In particular, it is important that persons with mental illness and their representative organizations care-givers and their representative organizations and human rights organizations are part of the consultation and law drafting process.
3. It is important that those drafting the new law take General Comment 1 and the Guidelines on Article 14 by the Committee on Rights of Persons with Disabilities into account when drafting new legislation.
4. Provisions pertaining to persons with mental illness in other laws such as the Children's Act, the Marriage Act etc. outlined above will also need to be amended to protect rights of persons with mental illness. Although Botswana has not ratified the CRPD, it is important to highlight here that these provisions violate rights protected in the CRPD.

5. The Constitution of Botswana protects fundamental rights of all citizens such as the right to life, right to personal liberty, protection from inhuman treatment, protection from deprivation of property, protection of law and protection from discrimination. The laws highlighted above including the Mental Health Act, violate these basic fundamental rights of persons with mental illness, which are protected by the Constitution of Botswana.
6. New legislation will need to incorporate models of supported decision making in the law. For example these could include, advance statements or directives, nominated representatives or enduring power of attorney etc. These are compliant with the CRPD.
7. New legislation also needs to specifically address the mental health needs of children and the elderly.