KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

DIRECTORATE OF RESEARCH, ADVOCACY AND OUTREACH

RESEARCH AND COMPLIANCE DIVISION

AN ANALYSIS OF THE MENTAL HEALTH (AMENDMENT) ACT, 2022

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A. INTRODUCTION

1. The Kenya National Commission on Human Rights is an Independent National Human Rights Institution established under article 59 of the Constitution and operationalized by the Kenya National Commission on Human Rights Act, 2011 (revised 2012). The Commission has a broad mandate to promote the respect and a culture of human rights in the Republic of Kenya.
2. The Commission is the designated monitoring body on the rights of persons with disabilities, and performs this function in close collaboration with civil society organisations (CSOs), particularly those of persons with disabilities, in line with article 33 of the United Nation Convention on the Rights of Persons with Disabilities (CRPD). In this regard, the Commission in March 2021, led thirty-two civil societies in reviewing the Mental Health (Amendment) Bill 2020 and developed a joint advisory with recommendations that was submitted to the Senate Standing Committee on Health.

B. BACKGROUND OF THE MENTAL HEALTH (AMENDMENT) ACT, 2022

3. The Act was first introduced in the Senate as the **Mental Health (Amendment) Bill (Senate Bills No. 28 of 2020)**, sponsored by Sen. (Arch.) Sylvia Kasanga. It was read the first time on 4th March 2020 thereafter committed to the Standing Committee on Health. The Committee report was submitted on 8th July 2020 and passed Second and Third Reading stages on 3rd June 2021 and 15th September 2021 respectively.
4. The Senate passed the Bill with amendments and referred to the National Assembly on 13th October 2021. The National Assembly passed the Bill amendments and referred back to the Senate for concurrence on 5th April 2022. The Senate on 8th June 2022 passed the National Assembly amendments to the Bill and referred it to the President for assent. It was thereafter **assented** to by the President on **21st June 2022**. The Act can be accessed on the link: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2022/TheMentalHealth_Amendment_Act_2022.pdf

C. GENERAL OBSERVATIONS ON THE MENTAL HEALTH (AMENDMENT) ACT 2022

5. It is important to highlight that Kenya ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2008. The Convention sets out the government's obligation to respect, protect and fulfill the rights of persons with disabilities in all aspects of their lives. Under the Convention,

persons with mental health conditions are considered as persons with (mental) disabilities and are accorded human rights protection. By virtue of article 2 (6) of the Constitution of Kenya, the CRPD forms part of the laws of Kenya and this greatly influenced the contents and processes of legislating the Bill.

6. The Commission welcomes the recently enacted Mental Health (Amendment) Act, 2022 and wishes to highlight the following milestones provided therein:

- The guiding principles with which the Act is anchored amplifies the place of human rights in mental health services provision to persons with mental health illness.
- The clear demarcation of the roles of national and county governments in mental health, especially with a focus on resources, national strategy and plan of action, care, treatment and rehabilitation, community based mental health services and county specific programmes to deal with stigma associated with mental illness.
- The rights based approach to mental health care, noting that the current Mental Health Act, 1989 did not contain a single provision on rights of persons who use mental health services.
- The inclusion of the right to legal capacity in the Bill, including recognition of supporters and supportive decision-making agreements. This is in line with recommendations of the UN Committee on the Rights of Persons with Disabilities in its Concluding Observations to Kenya. The Committee recommended that Kenya should 'Eliminate all forms of formal and informal substituted decision-making regimes and replace them with a system of supported decision-making, in line with the Committee's general comment No. 1 (2014) on equal recognition before the law'.
- The emphasis on community based mental health care. This is in line with articles 19 and 25 of the UN Convention on the Rights of Persons with Disabilities (CRPD). Article 25(c) of the CRPD requires States Parties to provide health services as close as possible to people's own communities, including in rural areas. Article 19 of the CRPD states that persons with disabilities have the right to live in the community, with choices equal to others.
- The recognition of aftercare services, without which persons with mental, psychosocial and other cognitive disabilities who have spent time in institutions cannot be effectively reintegrated and included in society.

- The recognition of the different cadres of mental health care workers who are instrumental in the provision of mental health services.

D. SPECIFIC PROVISIONS OF THE ACT

1. Obligations of the National and County Governments

Section 5 and Part IA of the Mental Health (Amendment) Act, 2022 demarcates the roles of each level of government, some of which are tabulated below:

National Government (Section 5 (2C))	**County Governments (Section 5(2D)(1))**
To provide the necessary ***resources for the provision of mental health care*** and treatment at National referral health facilities	To provide mental health ***care, treatment and rehabilitation services*** within the county health Facilities and ***ensure that level 2, 3, 4 and 5 county health*** facilities set aside dedicated clinics to offer outpatient services for persons with mental illness
To collaborate with the county governments with respect to ***development of the necessary physical and technological infrastructure*** for the care, rehabilitation and provision of health services; ***expanding and strengthening community and family-based care and support systems*** for persons with mental illness and other vulnerable persons.	To provide ***community based care and treatment*** for persons with mental illness including ***initiating and organizing community or family based programmes***
To adopt a ***comprehensive national strategy and plan of action and policies*** to promote the realisation of the rights of persons with mental illness under Article 43 of the Constitution	To ***allocate funds necessary for the provision of mental healthcare*** in the county budgets
To develop standards to be maintained by mental health facilities including ***number of qualified health professionals*** required to serve a mental health unit, ***type and quantity of diagnostic and therapeutic equipment***, medication and ***methods of care, rehabilitation and treatment*** to be administered to persons with mental illness	To formulate ***rehabilitation programmes*** and ***provide access to after-care service*** by persons with mental illness
To develop ***community-based programmes for the continued care and rehabilitation*** of persons with mental illness	To ensure mental health interventions at county level are ***comprehensive*** and include ***prevention, early intervention, treatment, continuing care and prevention from relapse,*** target ***persons at risk and those affected by catastrophic incidences***

To promote ***research, data collection, analysis and the sharing and dissemination of information*** on the welfare of persons with mental illness in the Republic	To provide ***adequate resources*** to ensure a person with mental illness lives a dignified life by ***financing community reintegration*** efforts

To ensure that the county governments meet their obligations under the Act, the County Executive Committee members for health are required under Section 5 (2D (2) to:

- Advise the Governor on all matters relating to the status of mental health and mental illness in the county
- Develop and implement county specific programmes that promote the rights of persons with mental illness in the county
- Monitor and evaluate the progress by the county in ensuring that Article 43 (1) (a) of the Constitution is realized
- Initiate and organise community or family based programmes for the care of persons with mental illness
- Advise the Board on the implementation of county specific programmes on mental health

NOTE: *Section 5 (2E)(1) of the Act establishes the county mental health councils in each county but does not specify its function*

2. Rights for Users of Mental Health Services under the Part II of the Act

i. Right to mental health services

The Act under Section 6 (3A) every person has a ***right to the highest attainable standard of mental health services***. The Section also provides that a person with mental illness has the right to *appropriate, affordable, accessible* ***physical and mental medical health care; counselling; rehabilitation; and after-care support***.

The Section further requires that community health and outpatient primary mental health care and treatment shall be **prioritized** as opposed to institutionalization.

ii. Free and informed consent

Sections 6 (3B) and 15 (9F) requires every health care provider to inform a person with mental illness, of the ***right of that person to choose an appropriate form of treatment*** and to obtain ***written consent before administering any treatment***. In the event that a person is incapable of giving own consent, the Act empowers a supporter or representative of that person to give consent. For the case of minors, consent from a guardian is desired. It also cites conditions that validate such consent.

The Sections however appear to limit persons with mental illness from participating in making decisions concerning their health and treatment and cede that role to supporters/representatives which amounts to substituted decision making thus upsetting the right to legal capacity. This could have been cured by providing for the use of ***advance directives***.

iii. Access to medical insurance

The Act under Section 6 (3D) makes it clear that persons with mental illness shall have the ***right of access to medical insurance*** for the treatment from public or private health insurance providers, including in medical schemes implemented by National and county governments.

The Act **bars** insurance company or persons providing health insurance services from ***discriminating against a person with mental illness*** or subject a person with mental illness to unfair treatment in obtaining the necessary insurance cover. Any culpable person under this part shall pay a fine not exceeding ***five million shillings***, or to imprisonment for a term not exceeding ***three years***, or to both.

It is worth noting that medical insurance for treatment of mental illness will enhance access to services and bridge the disparity associated with physical and mental health.

iv. Protection from physical, economic, social, sexual and other forms of exploitation

Section 6 (3E) of the Act ***prohibits forced labour*** against persons with mental illness within and outside ***health facilities***. It guarantees them the ***right to receive remuneration*** for any work done on an equal basis with others (not having mental illness). Exploitation of persons with mental illness attracts *imprisonment for a term not exceeding three years* or a fine not exceeding one million shillings, or both.

This provision is significant to deter the abuse of persons with mental illness within various setups.

v. Economic, civil and political rights

The Act in Section 6 (3F) just like the Constitution, guarantee persons with mental illness the right to exercise all civil, political, economic, social and cultural rights without any limitations permitted in law.

vi. Right to access information and confidentiality

In line with Article 35 of the Constitution, the Act under Section 6 (3G) guarantees persons with mental illness access to information regarding their *mental and other health status*, *clinical records* and other related information maintained by a health facilities; and health service providers.

Where a person with mental health cannot exercise this right, access to information on behalf of that person is permitted through a *supporter, representative or guardian* (if a minor).

All information regarding the care and treatment of a person with mental illness is *confidential* under Section 6 (3H) of the Act, unless disclosure is required by *law, court, in the public interest, for treatment* among others.

vii. Right to a supporter and supported decision making

The Act under section 6 (3I) allows persons with mental illness to appoint their supporters and inter into a ***supportive decision making agreement*** in writing. Such agreement shall be valid only if at initiation, the person with mental illness was aware of their actions, signed, and attested by two witnesses who also sign the agreement.

A supporter appointed under the Act ***owes a duty of care*** to the person with mental illness and shall ensure that any decision made by the supporter is in accordance to the will and preference of the person with mental illness.

This provision of the Act is a departure from the norm of substitutive decision making to a supported decision making arrangement where persons with mental illness have a say in whatever happens around them.

viii. Right to legal capacity

Section 6 (3K) affirms that persons with mental illness have the right to recognition before the law and shall enjoy legal rights on an equal basis with other persons in all aspects of life. This provision is well in line with ***Article 12 of the UN Convention on the Rights of Persons with Disabilities***.

However, this right is limited by other sections of the Act as indicated below:

- A representative to be appointed without the participation of a person with mental illness to make decisions concerning the affairs of the persons concerned ***(section 6 (3I) (5***) and ***Section 26 (c) (3) (a) (ii).***
- Involuntary detention of a person with mental illness upon the opinion of qualified mental health practitioner and on grounds listed in ***Section 22***.

ix. Seclusion and restraint

The Act under Section 15 (9E) provides that ***a person with mental illness shall not be physically restrained or secluded except in accordance with the provisions of this Act, the prescribed procedures and upon authorization by a mental health practitioner***. The upshot is that the Act allows for the use of physical restraint which in most cases turn out to be forceful restraint and seclusion.

During the Bill review phase, the Commission submitted that the Committee on the Rights of Persons with Disabilities[1] as well as the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[2] have called for an ***end to all coercive and non-consensual psychiatric interventions*** including the use of restraint and seclusion as it amounts to torture and ill-treatment. It is thus unfortunate that Parliament retained this section of the Act.

x. Involuntary admission and treatment

Section 22 of the Act amends section 14 of the Mental Health Act, Cap 248 which provides for instances where a mental health facility may admit a person to a mental health facility involuntarily, if in the opinion of a qualified medical practitioner the person, because of mental illness, poses imminent harm to

[1] Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment submitted during the 22nd session of the Human Rights Council

[2] Available at https://www.ohchr.org/en/professionalinterest/pages/cat.aspx

him/herself or others; if failure to admit the person will lead to serious deterioration in the condition of the person; or if failure to admit will hinder the provision of appropriate treatment which can only be given through the admission of the person to a mental health facility.

The Section further allows for the involuntary admission of a person for a period not exceeding ***six months***, which can be extended for a further ***indeterminate*** period upon getting the consent of that person's supporter, representative or guardian (in case of a minor). This section offends ***Article 14 of the CRPD*** which provides for an absolute ban on deprivation of liberty on the basis of impairment including non-consensual commitment and treatment.

xi. Emergency admission

Section 26 amends section 16 of the Mental Health Act on emergency admission. Under section 16(1)(b) and (c), the Mental Health Act permits emergency admission on a variety of grounds including that the person is ***'likely to act in a manner offensive to public decency'*** and that the person ***'is being cruelly treated or neglected by any relative or other person having charge of him'***.

The Act did not identify these sub-sections as among those proposed for deletion. The Commission proposed that these sub-sections should also be repealed, as they do not reflect justifiable reasons for emergency treatment (with its attendant deprivation of liberty). The fact that a relative is cruel to a person with a mental illness should attract criminal charges rather than emergency treatment on the part of a person with mental illness.

xii. Revamped Mental Health Board

Section 7 of the Act amends section 4 of the Mental Health Act, cap 248 to provide for the membership of the Mental Health Board which now include a representative of the Commission. The functions of the Board are as follows:

- advise the National government and county governments on the levels of access to mental health care services in Kenya and the most appropriate strategies and programmes for the care of persons with mental illness and the effective delivery of mental health care services at the national and county levels of government;
- set standards for the establishment of mental health units;
- approve the establishment of mental health units within a national referral hospital
- inspect mental health units and mental health facilities to ensure that they meet the prescribed standards
- to develop guidelines on emergency treatment of persons with mental illness the procedures to be adhered to during emergency treatment;

- to collaborate with the Cabinet Secretary responsible for education in developing and integrating in the education syllabus instructions relating to mental health, including instructions on prevention, treatment, rehabilitation and general information on mental health related illness
- to prepare reports on prevalence of mental illness in the country and in particular to articulate in the reports an analysis of the specific types of mental illness recorded in every county.
- to perform such other functions as may be conferred upon it by or under this or other written law.

It is worth noting that the representation of the Board can be termed as heavily "***medicalized***" and does not include a ***user of mental health services nor persons with lived experiences*** thus falling short of the requirements under Article 4(3) of the Convention on the Rights of Persons with Disabilities (CRPD), which provides for the close consultation and active involvement of persons with disabilities in decision-making processes that concern issues related to them.

E. AREAS OF CONCERN AND FOR IMPROVEMENT

1. **Right to legal capacity** to be augmented through relooking at sections of the Act that limit persons with mental illness from exercising this right. Such provision are as below:
    - A representative to be appointed without the participation of a person with mental illness to make decisions concerning the affairs of the persons concerned ***(section 6 (3I) (5***) and ***Section 26 (c) (3) (a) (ii).***
    - Involuntary detention of a person with mental illness upon the opinion of qualified mental health practitioner and on grounds listed in ***Section 22***.
2. **Use of physical restraint and seclusion** under Section 15 (9E) goes against recommendations of the Committee on the Rights of Persons with Disabilities and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment calling for an ***end to all coercive and non-consensual psychiatric interventions.***
   The Board can be empowered to review reports of restraint and seclusion by mental health facilities.
3. **Involuntary treatment** under Section 22 of the Act allows for the involuntary admission of a person for a period not exceeding *six months*, which can be extended for a further *indeterminate* period. This section offends *Article 14 of the CRPD* which provides for an absolute ban on

deprivation of liberty on the basis of impairment including non-consensual commitment and treatment.

4. The Act would have provided for **Advance directives** being statements made by capable adults for purposes of issuing binding instructions or declaring what should happen in situations that may arise in the event of their incapacity, to inform part of informed consent for admission and treatment among others.
5. **For emergency admission,** the Act should have repealed Section16(1)(b) and (c) providing for grounds for emergency admission such as ***'likely to act in a manner offensive to public decency'*** and that the person ***'is being cruelly treated or neglected by any relative or other person having charge of him'***. This are not sufficient grounds for admission.
6. **Representation of the Board** should have considered a user of mental service or a person with lived experience, to conform to Article 4 (3) of the CRPD.
7. **County mental health councils** established under section 5 (2E)(1) of the Act ought to have been assigned specific functions especially in the context of provision and access to mental health services in the counties.

…….THE END…….