

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE
PROPOSED REGULATIONS FOR LICENSING COMMUNITY MENTAL HEALTH DAY
CARE AND RESIDENTIAL CARE FOR PEOPLE WITH MENTAL ILLNESS AND OR
SEVERE OR PROFOUND INTELLECTUAL DISABILITY, 2022

The Law Society of South Africa (LSSA) has considered the proposed Regulations to be made under section 66 of the Mental Health Care Act, 2022 (the Act) with reference to licensing community mental health day care and residential care for people with mental illness and or severe or profound intellectual disability.

Definition of 'applicant':

The proposed Regulations provide that "applicant" means a person that applies for a license to provide a mental health service or operate a mental health day care or residential care facility to five or more people with mental illness and or severe or profound intellectual disability. [emphasis added]

The underlined phrase also finds application to a 'day care facility' and a 'residential care facility', as defined in the proposed Regulations.

Paragraph 5 of the proposed Regulations prohibits the establishment and operation of a day care or residential care facility which provides care to five or more people with mental illness and or severe or profound intellectual disability without license from the relevant provincial department of health.

The above prohibition is potentially ambiguous as it may be interpreted to mean that:

- i. day care or residential care facilities that provide care to less than five persons with mental illness and or severe or profound intellectual disability are exempted from complying with the proposed Regulations; *alternatively*
- ii. only day care or residential care facilities that provide care to more than five persons are eligible for licensing pursuant to the proposed Regulations.

A purposive interpretation is likely to lead to the latter interpretation, in which instance the LSSA is of the view that the inclusion of the phrase 'five or more people' throughout the proposed Regulations, is arbitrary and beyond the scope of the enabling provision, which provides:

Section 66(1)(o) Regulations

“The Minister may, after consultation with all relevant members of the Executive Council, make regulations on authorisation and licensing of health establishments administered under the auspices of State, a non-governmental organisation or private body providing mental health care, treatment and rehabilitation services and conditions to be attached to such authorisation or licence.”

Furthermore, the definition of 'health establishment', as contained under section 1(xiii) provides no minimum requirement for the number of users of such institutions. Likewise, Chapter III of the Act is focused on the qualitative, as opposed to quantitative considerations in relation to the care of mental health care users.