Irish Council for Civil Liberties

ICCL Submission to the Public Consultation on review of the Mental Health Act, 2001

April 2021

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Overview

The Irish Council for Civil Liberties (ICCL) welcomes the opportunity to make a submission to the public consultation on draft legislation to update the Mental Health Act, 2001. This brief submission focuses on ICCL's area of expertise on detention and human rights as it relates to the review of the Mental Health Act, 2001.[1]

Note on terminology: While the Mental Health Act 2001 adopts and defines the term 'mental disorder', which has been widely criticised and is in need of reform[2], this submission adopts the term person with a mental health disability, in line with recommendations from the National Disability Authority.[3]

Part 1: Relevant human rights framework

Ireland ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2018, published its first initial state report for consultation in 2020 and is preparing for its first national review by the Committee on the Rights of Persons with Disabilities.[4] The Government's commitment to review the Mental Health Act, taking into account Ireland's human rights obligations under the CRPD and the recommendations of the Expert Group Review of the Act is welcome.[5] The Expert Group underlined the need to comply with human rights law, including the European Convention of Human Rights (ECHR) and the CRPD.[6]

The human rights of most relevance to this legislation include the right to life, right to equality and non-discrimination, right to liberty and security of the person, and prohibition of torture, inhuman and degrading treatment.

The right to liberty is a fundamental right, protected by the Irish Constitution (article 40(4)), ECHR (article 5), the International Covenant on Civil and Political Rights (article 9), and the CRPD (article 14). This right can be limited in certain circumstances, such as in the enforcement of criminal law or in the interest of public health.[7] Ireland made a declaration to the CRPD as to what article 12 (equal recognition before the law) and article 14 (right to liberty) means:

> "*Ireland recognises that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and mental integrity on an equal basis with others. Furthermore, Ireland declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.*"[8]

However, even in such situations, depriving someone of their liberty against their will is such a grave interference with personal rights that clear safeguards must be put in place to protect against unjust detention.

Part 2: Review of specific areas

This submission is not an exhaustive examination of all relevant human rights considerations but rather, given the short timeframe for the review process, draws on ICCL's previous work in this area to examine four specific areas: criteria for detention, changing timeframes, enhancing safeguards for individuals, and inspection, regulation and registration of mental health facilities.

1) Criteria for detention

There is a need to update the criteria for detention under the Mental Health Act, in line with human rights law. The current criteria provide that a person may be involuntarily admitted and detained on the grounds that they are suffering from a "mental disorder".[9] This criteria contravenes article 14 of the CRPD.[10] The UN Committee on the Right of Persons with Disabilities published guidelines on the right to liberty and security of persons with disabilities in 2016. They highlight that article 14 prohibits "*the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria area also used to justify the deprivation of liberty.*"[11] The Committee states that:

> "*Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent of the person concerned for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.*" [12]

This submission aligns with the Expert Group's recommendations on the need to revise the criteria to ensure that detention of a person cannot be permitted solely on the basis that the person has a mental health disability, in order to comply with international human rights law.

The Expert Group recommends expanding the exclusion categories of section 8(2), which states that certain groups cannot be involuntarily admitted on the sole basis that the person is suffering from the condition (personality disorder, socially deviant, addicted to drugs or intoxicants) to include people with intellectual disabilities. However, this exclusion should be broadened to all people with a mental health disability. Nobody should be detained solely on the basis of a mental health disability, this would constitute a violation of international human rights law. In line with Ireland's declaration to the CRPD, detention on mental health grounds should only take place where it is strictly necessary, used as a measure of last resort, and respects safeguards.

Recommendations:

I. Revise the criteria and broaden the exclusion groups for involuntary admission and detention in line with human rights law to ensure that detention of a person cannot be permitted solely on the basis that the person has a mental health disability.

II. Ensure that detention on mental health grounds only takes place when it is strictly necessary, used as a measure of last resort, and respects safeguards.

2) Changing timeframes

A key element of the right to liberty is the right to have confinement or detention reviewed by a court or tribunal. The European Court of Human Rights has made clear that a person involuntarily detained in a psychiatric facility for a lengthy period is entitled to challenge the lawfulness of their detention at reasonable intervals.[13]

The ICCL supports the Expert Group's recommendations relating to shortening timeframes at different points in the involuntarily detention process in order to ensure that the process complies with human rights requirements, such as in relation to the holding of tribunal hearings following an admission order.

Recommendation:

III. Shorten timeframes, such as in relation to the holding of tribunal hearings following an admission order, as recommended by the Expert Group, in line with human rights law to enhance safeguards for detained individuals.

3) Enhancing safeguards for individuals

The most important safeguard in relation to the deprivation of liberty is access to justice. Access to justice is "a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights."[14] It encompasses equal access to and equality before the courts, right to a fair trial, and accessible and effective remedies for rights violations.[15] According to the UN Special Rapporteur on the Rights of Persons with Disabilities, it is "essential in protecting the right to personal liberty."[16]

The CRPD specifically provides for equal recognition before the law (article 12) and access to justice (article 31) for people with disabilities. To comply with the CRPD, Ireland must "recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" (article 12(2))[17] and "ensure effective access to justice for persons with disabilities on an equal basis with others" (article 13(1)).[18]

The International Principles and Guidelines on Access to Justice for Persons with Disabilities highlight that:

> "*Persons with disabilities are entitled to all substantive and procedural safeguards recognised in international law on an equal basis with others, and States must provide the necessary accommodations to guarantee due process*" (Principle 5). [19]

One key barrier to this in the current Mental Health Act is section 73. Section 73 of the Mental Health Act requires an individual to receive the permission of the High Court before instituting civil proceedings under the Act.[20] In addition to being a human rights violation, concerns have been raised as to the constitutionality of this provision. A similar provision in the predecessor to the Mental Health Act, section 260 of the Mental Treatment Act 1945 was found to be unconstitutional.[21] More recently, in a decision granting permission to institute civil proceedings, Justice Clarke noted that: "The fact that a similar restriction is to be found

in section 73 must, at least, raise some questions about the constitutional validity of the identical restriction contained in section 73."[22]

ICCL recommends the repeal of this provision, in recognition of the right of persons with disabilities to have equal access to the law, in line with the Expert Group's recommendations.

Recommendation

IV. Repeal section 73 of the Mental Health Act in order to comply with human rights law.

4) Inspection, regulation and registration of mental health services

There is a need for independent inspections of psychiatric institutions and other health institutions where people are detained.

The CRPD requires the monitoring of all facilities and programmes that serve persons with disabilities to prevent exploitation, violence, and abuse (art. 16(3)) and the establishment of a national independent monitoring mechanism which facilitates civil society participation (art. 33).

Similarly, the Optional Protocol to the Convention against Torture (OPCAT) requires states to establish an independent, human rights-focused inspection and monitoring system. Ireland signed OPCAT in 2007 and since then ICCL has and continues to campaign for its ratification.[23] ICCL has shared recommendations regarding the design of the National Preventive Mechanism.[24] It is positive that one of the objectives of the Department of Justice's 2021-2023 Statement of Strategy is to publish the legislation to implement OPCAT and the Government must follow through swiftly on this commitment.[25]

Recommendation:

V. Immediately ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention and state care, including prisons, police stations, direct provision centres, and psychiatric hospitals.

Part 3: Situation of people with mental health disabilities in Irish prisons

There is a need to improve the treatment of people with mental health disabilities who interact with the criminal justice system, including by enhancing the availability of beds in approved mental health facilities for prisoners with mental health disabilities on a needs basis. The need for independent inspections is also important in the context of prisons. The Expert Group recommended that the Mental Health Commission should be granted "specific powers to make standards in respect of all mental health services and to inspect against those services."[26] This is an important recommendation, especially given the situation of people with mental health disabilities in Irish prisons.

The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) carried out a visit to Ireland in 2019 and its final report published in 2020 highlights "the rising number of homeless people with severe mental health problems who are ending up in prison."[27] The Irish Penal Reform Trust (IPRT) similarly highlighted this problem, that "People with mental health issues are ending up in the prison system due to a lack of access to appropriate services in the community."[28] Further, from July 2019-July 2020, every month there were between 20-33 prisoners with severe mental illness awaiting transfer to the Central Mental Hospital.[29] The CPT recommended that "urgent steps be taken… to ensure that mentally ill homeless persons in prison, who the courts are willing to bail, can be transferred rapidly to a psychiatric facility in the community to receive appropriate treatment."[30] It also recommended that the Irish authorities "enhance the availability of beds in psychiatric care facilities for acute mentally ill prisoners."[31]

The recent 'stand-off' by members of An Garda Síochána who were refused entry to the Central Mental Hospital while trying to transfer a patient there in accordance with a court order also highlights the need to take action on this issue.[32] This instance demonstrates the importance of increasing the capacity of mental health institutions and ensuring that a human rights-based approach is taken in treating people with mental health disabilities.

ICCL welcomes the recent establishment of a High-Level Taskforce to consider the mental health and addiction challenges of persons interacting with the criminal justice system.[33]

Recommendations:

VI. Grant the Mental Health Commission "specific powers to make standards in respect of all mental health services and to inspect against those services."[34]

VII. Ensure the High-Level Taskforce is granted sufficient resources, including staff, to carry out its mandate and conduct wide consultations.

VIII. Increase access to therapeutic psychiatric beds in community facilities and in the Central Mental Hospital so that prisoners with severe mental illness can be quickly diverted from the criminal justice system and receive the appropriate care needed.

Part 4: Need for increased safeguards during the Covid-19 pandemic

The Mental Health Act 2001 was amended in March 2020 to provide for emergency measures in response to Covid-19.[35] The amendments are outlined in Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 and allowed for changes to the process for reviewing detention by a Mental Health Tribunal.

It permits an independent examination by any consultant psychiatrist who is not treating the patient and not just those on its designated panel. The independent consultant psychiatrist may examine a patient "in person", "by other appropriate means", or if they are "unable, due to the exigencies of the public health emergency, to carry out an examination" they should set out the reasons for this in their report.[36] It also permits the appointment of a Mental Health Tribunal "consisting of one member who shall be a practising barrister or solicitor" with at least 7 years' experience if necessary, instead of the usual three person Tribunal.[37] IHREC has highlighted how:

> "*these measures have the potential to infringe the requirement for an independent hearing, highlighted by the High Court and Court of Appeal. The courts have stressed that the Oireachtas must be particularly careful in depriving those with mental illness of their liberty, and strong safeguards are necessary.*"[38]

The amendments also remove other key procedural safeguards. The revised Act allows a Tribunal to receive submissions in writing as opposed to having the patient present at a live hearing.[39] Ordinarily, the person detained has the right to be present at a Tribunal hearing and to make representations including through a legal representative.[40] A Tribunal must make a decision within 21 days of the admission or renewal order. This period can be extended for 14 days on the Tribunal or the patient's request and for a further 14 days beyond that on the patient's request.[41] However, the amendments enable the Tribunal to extend an involuntary order by a second 14 day period if the Tribunal "having due regard to the interest of the patient, is satisfied that it is necessary due to the exigences of the public health emergency".[42]

ICCL understands the need for adjustments in practice to minimise the spread of Covid-19 and to account for the availability of consultant psychiatrists, especially given the re-assignment of health workers to working on the Covid-19 response during the public health emergency. However, ICCL has previously raised concerns about these amendments as they have eroded key procedural safeguards relating to the detention of patients, as described above.[43]

Further, while there was an initial sunset clause of 9 November 2020 applicable to these amendments to the Mental Health Act, the Oireachtas approved an extension, following a controversial process, until 9 June 2021.[44]

IHREC has also raised concerns about these amendments and measures and highlighted they may be unconstitutional, in addition to violating human rights law.[45] ICCL recommends the immediate repeal of Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020, in line with IHREC's recommendations.[46].

Recommendations:

IX. Repeal Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020.
X. If Part 5 is not immediately repealed, ensure that patients are assisted in making written submissions, where that is the form of patient representations to the Tribunal, including by a legal representative.
XI. Ensure that more than one member of the Tribunal is sitting and hears these cases and do not resort to a one person Tribunal, except in the most exceptional cases and where there is a clear need for the Tribunal to operate in this manner.

Summary of Recommendations

I. Revise the criteria for involuntary admission and detention in line with human rights law to ensure that detention of a person with a mental health disability cannot be permitted on the basis that the person has an illness and/or impairment.
II. Ensure that detention on mental health grounds only takes place when it is strictly necessary, used as a measure of last resort, and respects safeguards.
III. Repeal section 73 of the Mental Health Act in order to comply with human rights law.
IV. Shorten timeframes, such as in relation to the holding of tribunal hearings following an admission order, as recommended by the Expert Group, in line with human rights law to enhance safeguards for detained individuals.
V. Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including prisons, police stations, direct provision centres, and psychiatric hospitals.
VI. Grant the Mental Health Commission "specific powers to make standards in respect of all mental health services and to inspect against those services."[47]
VII. Ensure the High-Level Taskforce to consider the mental health and addiction challenges of persons interacting with the criminal justice system is granted sufficient resources, including staff, to carry out its mandate and conduct wide consultations.
VIII. Increase access to therapeutic psychiatric beds in community facilities and in the Central Mental Hospital so that prisoners with severe mental illness can be quickly diverted from the criminal justice system and receive the appropriate care needed.
IX. Repeal Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020.
X. If Part 5 is not immediately repealed, ensure that patients are assisted in making written submissions, where that is the form of patient representations to the Tribunal, including by a legal representative.
XI. Ensure that more than one member of the Tribunal is sitting and hears these cases and do not resort to a one person Tribunal, except in the most exceptional cases and where there is a clear need for the Tribunal to operate in this manner.

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About ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights. ICCL has worked on data protection for decades.

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