



## **IPRT Submission to the Sub-Committee on Mental Health on Pre-Legislative Scrutiny of the Mental Health (Amendment) Bill**

**22<sup>nd</sup> April 2022**

### **About IPRT**

Established in 1994, the Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system and the progressive reform of Irish penal policy, with prison as a sanction of last resort. IPRT publishes a wide range of evidence-informed policy positions and research documents; we campaign across a wide range of penal policy issues; and we have established IPRT as the leading independent voice in public debate on the Irish penal system.

### **Introduction**

1. IPRT welcomes the opportunity to make a further brief submission to the Sub-Committee on Mental Health in regards the Sub-Committee's role conducting Pre-Legislative Scrutiny (PLS) on the Mental Health (Amendment) Bill.<sup>1</sup> IPRT is gravely concerned by the ongoing detention and treatment of people with mental illness in Irish prisons, with people inappropriately held in isolation units and other areas of prisons while awaiting mental healthcare in appropriate settings. This is a situation which the Inspector of Mental Health Services has said "*fundamentally breaches their human rights*".<sup>2</sup>

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<sup>1</sup> As the Sub-Committee is aware, IPRT previously wrote to it on 28<sup>th</sup> January 2022 in order to highlight the mental health crisis arising in Ireland's prisons and asking the Sub-Committee to consider the various parallel processes that are currently ongoing such as the work of the High-Level Task Force and the work ongoing on the Assisted Decision-Making (Capacity) (Amendment) Bill 2021.

<sup>2</sup> Mental Health Commission, *Access to Mental Health Services for People in the Criminal Justice System* (MHC, 2021), at p.5, available at: <https://www.mhcirl.ie/publications/access-mental-health-services-people-criminal-justice-system>.

2. This is accordingly an area in which IPRT has consistently called for progressive reform.<sup>3</sup> We have particularly welcomed some of the renewed focus on this issue in recent years, evident in initiatives such as the establishment of a High-Level Task Force to examine the mental health and addiction challenges of persons interacting with the criminal justice system (a key recommendation advocated by IPRT in the run up to the 2020 election).<sup>4</sup>
3. That said, it is important to emphasise at the outset that IPRT's advocacy primarily focuses on the rights of people detained within *prison*, as opposed to those detained in forensic mental health settings and/or engaged in mental health treatment more widely. IPRT therefore has limited experience and expertise in the rights of patients receiving mental health services and the broader mental health legal framework.
4. IPRT has started building our knowledge-base in this area, primarily through the recent commissioning of an IHREC-funded scoping study on 'Access to rights for people detained in forensic mental health settings in Ireland'.<sup>5</sup> We specifically sought research on this topic on the basis that, despite the clear links between imprisonment, mental illness and psychiatric detention, there has been little examination in Ireland of how the human rights of prisoners/patients are met before, during and after a period in secure forensic mental health facilities. It is hoped that this small-scale scoping study can address this gap to some extent, by identifying the applicable rights frameworks and sectoral duties, and establishing where further research and advocacy might be useful.
5. This research is ongoing and is anticipated to conclude in early summer 2022.<sup>6</sup> IPRT hopes that the final report will provide further clarity around the specific rights and needs of people detained in forensic mental health settings in Ireland and, in this way, help inform the Mental Health (Amendment) Bill (as well as practice in this area more broadly). While we acknowledge that the report may unfortunately come too late for the PLS process, we believe it will still be useful to Oireachtas members in due course and as the Bill continues its way through the

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<sup>3</sup> More information on IPRT's work on the issue of mental health within our penal system can be found on our website here:

<https://www.iprt.ie/mental-health/>.

<sup>4</sup> See IPRT, *5 Key Recommendations for the Programme for Government 2020+* (IPRT, 2020), available at: <https://www.iprt.ie/elections-2020/5-key-recommendations-for-the-programme-for-government-2020/>.

<sup>5</sup> For more information on this, see IPRT, *Invitation to Tender: Access to rights for people detained in secure forensic mental health facilities in Ireland* (IPRT, 2021), available at: <https://www.iprt.ie/latest-news/invitation-to-tender-access-to-rights-for-people-detained-in-secure-forensic-mental-health-facilities-in-ireland/>.

<sup>6</sup> The NUIG Centre for Disability Law and Policy has been commissioned to carry out this research on behalf of IPRT, with meetings with the research team regularly taking place since the beginning of this year. The research will include a small number of interviews with relevant stakeholders.

legislative process. We will, of course, endeavour to provide the Sub-Committee on Mental Health with a copy of the report as soon as it is available.

6. As we await the findings of this ongoing research, this submission on the Mental Health (Amendment) Bill will be kept brief and focus only on key aspects of the Bill on which IPRT can currently comment. We hope, however, to continue engaging with the reform of this important legislation over the coming months and are happy to answer any questions and/or further assist the Sub-Committee on Mental Health in its work at any time.
7. A brief note on terminology. The following acronyms are used throughout this brief submission:
  - a. CMH = Central Mental Hospital
  - b. MHC = Mental Health Commission
  - c. UNCRPD = UN Convention on the Rights of Persons with Disabilities
  - d. The 2001 Act = Mental Health Act 2001
  - e. The 2006 Act = Criminal Law (Insanity) Act 2006
  - f. The 2015 Act = Assisted Decision-Making (Capacity) Act 2015

### **Key Provisions of Relevance within the Mental Health (Amendment) Bill**

#### **Head 17**

8. IPRT understands that the provisions under Head 17(6), in regards the admissions procedure, were likely introduced in part as a response to the situation which arose in the case of AM v Health Service Executive [2019] IESC 3.<sup>7</sup> While IPRT understands the desire to clarify/streamline the process for continuing to detain a person in the CMH under the 2001 Act (in circumstances where they have been detained pursuant to the 2006 Act but their sentence/lawful custody is coming to an end), we have concerns in regards what this will mean in practice for any individual subject to such measures.
9. In particular, IPRT observes that this would appear to place the person subject to such measures at a disadvantage in terms of access to procedural safeguards (such as the Mental Health Tribunal). The wording of the provision also appears to require only the opinions of the clinical director of the designated centre and the consultant psychiatrist responsible for the

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<sup>7</sup> *AM v Health Service Executive* [2019] IESC 3, available at: <https://www.bailii.org/ie/cases/IESC/2019/S3.html>.

person's care in order to make the admission order (i.e. there is no independent input into the decision as to whether the person fulfils the criteria for detention under section 8 and requires the special treatment provided by the CMH).

10. As far as IPRT is aware, a situation requiring such a procedure to be invoked is relatively rare. It is accordingly in question whether this provision is strictly necessary, particularly in circumstances where it appears to limit a person's right to the usual protections that would be provided as part of the admission process.

**Recommendation 1. The Sub-Committee should re-examine Head 17(6) and consider whether such a provision is necessary and, if so, if the protections offered to any person subject to such procedures can be strengthened.**

**Heads 85(3), 86(1) and 87(1)**

11. IPRT broadly welcomes the application of rules from the MHC to the use of seclusion, mechanical restraint and physical restraint measures. We also welcome clarity that the relevant provisions under these Heads will cover persons detained in the CMH or a designated centre (*per* ss.69(5), 69A(5) and 69B(5)).
12. That said, IPRT is aware that there may be issues in regards the compatibility of aspects of these provisions with the UNCRPD (e.g. the Article 17 right to physical and mental integrity) as well as ECHR case-law (which we understand has discussed the imposition of higher standards of scrutiny on forced medication and restraint<sup>8</sup>).
13. IPRT further notes that, while these provisions authorise such practices in order to "*prevent the person from injuring himself or herself or others*", there does not appear to be any provision for the use of alternative de-escalation techniques to be used first. This ties into IPRT's general view on the use of force within confined settings, namely, that the use of force and restraint should be a measure of last resort, with all relevant protocols instead emphasising de-escalation and conflict resolution in the first instance.<sup>9</sup> While such alternative approaches may be provided for within any MHC rules, this should be also established on a statutory footing.

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<sup>8</sup> See e.g. *X. v Finland*, no. 34806/04 (ECHR 2012), at paras.212-223; *Bureš v the Czech Republic*, no. 37679/08 (ECHR 2012), at paras.95-106; and *M.S. v Croatia (no. 2)*, no. 75450/12 (ECHR 2015), at paras.94-112.

<sup>9</sup> See e.g. Standard 31 (Use of Force) in IPRT's flagship *Progress in the Penal System* reports, IPRT, *Progress in the Penal System (2019)* (IPRT, 2019), at p.102, available at: <https://pips.iprt.ie/site/assets/files/Progress-in-the-Penal-System-2019.pdf>.

**Recommendation 2.** The Sub-Committee should consider whether the relevant provisions relating to seclusion, mechanical restraint and physical restraint align with the UNCRPD and consider including within the legislation an express obligation on healthcare professionals to use de-escalation techniques prior to engaging in any such practices.

### General Observations

14. There are two, more general, observations that IPRT would make in regards the Mental Health (Amendment) Bill.
15. First, it is important that there is clarity around how advance healthcare directives are to be applied in respect of people detained under the 2006 Act. In this regard, IPRT was pleased to see that the Joint Committee on Children, Equality, Disability, Integration and Youth, in its recent ‘Report on Pre-legislative Scrutiny of the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021’, recommended as follows: *“amending Sections 85(7) and 136 of the 2015 Act to extend provisions of the 2015 Act to people involuntarily detained under Part 4 of the Mental Health Act 2001 and the Criminal Law (Insanity) Act.”*<sup>10</sup>
16. Second, IPRT welcomes the provision of an advocate for those receiving treatment under the 2001 Act (*per* Head 5 of the Bill) and asks that the Sub-Committee consider extending such measures to those detained in forensic settings as well.

**Recommendation 3.** The Sub-Committee should consider how further protections may be provided to those detained in forensic settings, particularly in regards measures such as advance healthcare directives and the provision of advocates to such individuals.

### Conclusion and Summary of Recommendations

17. As a final remark, IPRT notes that – while not a matter for consideration as part of this specific process – the 2006 Act is likely also in need of review and update. This is a matter which should

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<sup>10</sup> Joint Committee on Children, Equality, Disability, Integration and Youth, *Report on Pre-legislative Scrutiny of the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill* (Houses of Oireachtas, 2022), at p.40, available at: [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_children\\_equality\\_disability\\_integration\\_and\\_youth/reports/2022/2022-04-08\\_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-decision-making-capacity-amendment-bill-2021\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_children_equality_disability_integration_and_youth/reports/2022/2022-04-08_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-assisted-decision-making-capacity-amendment-bill-2021_en.pdf).

be considered and progressed without further delay. IPRT would, of course, be happy to provide input and assistance on any such review of the 2006 Act.

18. IPRT again thanks the Sub-Committee for this opportunity to feed into the PLS process on this important Bill, and we are very happy to answer any questions that might arise.

**Recommendation 1. The Sub-Committee should re-examine Head 17(6) and consider whether such a provision is necessary and, if so, if the protections offered to any person subject to such procedures can be strengthened.**

**Recommendation 2. The Sub-Committee should consider whether the relevant provisions relating to seclusion, mechanical restraint and physical restraint align with the UNCRPD and consider including within the legislation an express obligation on healthcare professionals to use de-escalation techniques prior to engaging in any such practices.**

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