

**Observations on the Criminal
Law (Insanity) Bill 2010**

April 2010

I. INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution, set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001.¹ The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State. Its functions include keeping under review the adequacy and effectiveness of law and practice in the State with regard to constitutional and international human rights standards deriving from the Irish Constitution and the international treaties to which Ireland is a party.² The IHRC is mandated to make recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and promote human rights in the State.³

2. The Criminal Law (Insanity) Bill 2010 ("2010 Bill") was published on 26 January 2010. One of the aims of the 2010 Bill is the amendment of specific provisions the Criminal Law (Insanity) Act 2006 ("2006 Act") which provides for the detention of persons suffering from mental disorders who are deemed not fit to be tried or are found to be not guilty by reason of insanity.⁴ The 2010 Bill proposes to amend the 2006 Act in order to improve the compliance of Irish law with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in relation to the issue of fitness to be tried.⁵ In addition, the 2010 Bill is aimed at making better provision for the Mental Health (Criminal Law) Review Board ("Review Board") to make orders for the conditional or unconditional discharge of patients who are detained by order of a court in a designated centre, having been found unfit to be tried or not guilty by reason of insanity.⁶

3. The IHRC welcomes the 2010 Bill and considers it an important opportunity to improve the compliance of Irish law with international human rights standards and welcomes that this is one of the express purposes of the 2010 Bill. The IHRC considers that this Bill provides an opportunity to build on the legislative improvements made in this area of law to date. The IHRC wishes to highlight one particular issue concerning the measures that will be necessary to ensure implementation of the legislation in practice and to ensure Ireland's compliance with its international human rights commitments.

¹ For detailed information on the work of the IHRC, see www.ihrc.ie.

² Section 8(a) of the Human Rights Commission Act 2000.

³ Section 8(d) of the Human Rights Commission Act 2000.

⁴ Sections 4 and 5 of the 2006 Act.

⁵ Explanatory Memorandum of the 2010 Bill.

⁶ *Ibid.*

II. POWER OF RECALL FOLLOWING BREACH OF CONDITIONS OF DISCHARGE

a. Relevant Legislative Provisions

4. The 2010 Bill proposes to amend section 13 of the 2006 Act by inserting sections 13A, 13B and 13C to provide for the release of people detained under the 2006 Act subject to certain conditions. Section 13A of the 2010 Bill provides that when reviewing the detention of a patient under section 13, the Review Board may make an order for the discharge of a patient subject to “such conditions, including conditions relating to out-patient treatment or supervision or both, as it considers appropriate”. Further, the Review Board may only make a conditional discharge order where “the arrangements in relation to the discharge considered necessary by the Clinical Director of the designated centre have been made”.⁷ The Clinical Director concerned shall make such arrangements as may be necessary for “facilitating compliance by the patient who is the subject of the proposed order with the conditions of the order” and for the supervision of the patient.⁸ Section 13B of the 2010 Bill provides that conditional discharge of a person shall be deemed to be revoked where a person is in material breach of the conditions of conditional discharge.

b. IHRC Analysis

5. The IHRC welcomes the provisions of the 2010 Bill which provide for the enforceability of conditions specified by the Review Board where the Board orders the conditional discharge of a person detained under the 2006 Act. The IHRC acknowledges the need for enforceable conditions relating to discharge in these types of cases and this has also been recognised by the European Court of Human Rights (ECtHR) as an important safeguard given the complexity of the decision involved.⁹ In its Observations on the 2008 Scheme of the Bill, the IHRC noted that it is important to ensure that a person’s release from detention is not unreasonably delayed because of the conditions of discharge, particularly where a condition is outside the control of the person concerned to fulfil, as per the ECtHR case *Johnson v. United Kingdom*.¹⁰ In addition, in the case of *Kolanis v. United Kingdom* the ECtHR held that if a Mental Health Review Tribunal finds that detention is no longer necessary and that a patient is eligible for release on conditions, then “new issues of lawfulness may arise where detention nonetheless continues, due for example, to difficulties in fulfilling the conditions”.¹¹ Under the 2010 Bill, the Review Board may only make a conditional discharge order where it is satisfied that the arrangements considered necessary by the Clinical Director in relation to the discharge have been made. The Clinical Director is under an obligation to make arrangements to facilitate compliance by the patient with the relevant conditions and for the supervision of the patient.¹²

⁷ Section 13(A)(2).

⁸ Section 13A(2)(a) as inserted by section 7 of the 2010 Bill.

⁹ *Johnson v. The United Kingdom*, Judgment of 24 October 1997, Application no. 22520/93.

¹⁰ *Ibid.*

¹¹ *Kolanis v. The United Kingdom*, Judgment of 4 May 2004, Application no. 517/02 at para. 80.

¹² Section 13(A)(2).

6. The IHRC is concerned that a situation may arise where a person who is otherwise considered eligible for conditional discharge, cannot be granted conditional discharge by the Review Board because there is a lack of appropriate and available services to adequately supervise or treat a patient on an out-patient basis within the community. While the Clinical Director is under an obligation to make the arrangements that are necessary to facilitate compliance by the patient with the conditions of the discharge, he or she may not be in a position to guarantee the availability of such services in practice, as these are provided by the Health Service Executive. The Review Board cannot make a conditional discharge order unless it is satisfied the conditions considered necessary by the Clinical Director have been made in respect of the patient. In this regard, the IHRC notes the conclusions of the Mental Health Commission in their Annual Report 2008 that, “[c]ommunity-based mental health services with sufficient staffing and appropriate skill mix are woefully inadequate in many parts of the country”.¹³ The IHRC considers that the powers to allow for conditional discharge can only be effectively operated in practice if services are available within the community to effectively supervise people who are eligible for conditional discharge under the 2006 Act as amended.

7. The IHRC is concerned that a person’s detention should not be unreasonably prolonged or indefinitely postponed due to a lack of available out-patient services or community based supervision. The IHRC considers that to ensure the 2010 Bill is effective in practice and to meet the State’s international human rights obligations, adequate resources should be allocated to put in place the types of community outpatient treatment or supervision that will be necessary to allow for the conditional discharge of persons under the 2010 Bill. The IHRC considers the allocation of resources is necessary in order to prevent the indefinite deferral of a person’s detention due to a lack of available outpatient services and supervision, and to meet the State’s international human rights obligations under Articles 5(1)(e) and 5(4) of the ECHR. In addition, the IHRC reiterates its view that it would be beneficial to explicitly stipulate in the 2010 Bill that the conditions attached to discharge should be reasonable and proportionate.¹⁴

c. Recommendations

8. In order to ensure that the 2010 Bill will be effective in practice and to meet the State’s international human rights obligations, adequate resources should be allocated to put in place the types of community outpatient treatment or supervision that will be necessary to allow for conditional discharge as soon as reasonably possible where a person is deemed suitable for such discharge. In addition, section 13A should explicitly provide that the conditions of discharge imposed should be reasonable and proportionate having regard to all of the circumstances of the case.

¹³ Mental Health Commission, Annual Report 2008, p. 67, para. 7.9.

¹⁴ See IHRC Observations on the Scheme of the Criminal Law Insanity Act 2006 (Amendment) Bill 2008, November 2008, pp.9-10.