Human Rights Commission

Observations on the Criminal Law (Insanity) Bill 2002

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The Human Rights Commission

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1. Introduction

The Human Rights Commission (HRC) welcomes the opportunity to comment on the provisions of the Criminal Law (Insanity) Bill 2002 prior to the debate in the Oireachtas. The HRC warmly welcomes improvements in the legislation governing the criminal responsibility of mentally ill persons who have committed offences. Legislation has lagged from its 19th century origins and has been considerably in need of updating to take into account better contemporary understanding of mental illness and mental health. The human rights of persons in psychiatric detention, including persons detained in relation to the commission of criminal offences, is a continuing matter of concern for the HRC and the intention of the Bill to improve the law in relation to one aspect of psychiatric detention is to be welcomed.

The HRC recognises that the Bill raises many issues that are peculiar to the practice of psychiatric medicine and we are also aware that the Irish Psychiatric Association (IPA) and the National Disability Authority (NDA) have published detailed submissions on the Bill. The primary function of the HRC is to ensure that Irish legislative and administrative practice is in compliance with the human rights provisions of the Constitution and with Ireland's obligations under the international human rights treaties to which the State is party. In our observations on the present Bill, the HRC will confine itself to examining those aspects of the Bill that raise issues under those categories of established human rights protections.

We are also cognisant, however, of the widespread concern about the broader issue of the treatment of mentally ill persons and persons with mental, intellectual, physical and sensory disabilities within the criminal justice system. The HRC fully supports the recommendation of the NDA that there should be further development of legislation, policies and services to address outstanding issues relating to these categories of persons. The HRC will continue to monitor the development of policy and legislation in this area and we share the hope of the NDA that this Bill will be the first of a series of reforming Bills in the area.

As an initial point, we are concerned that the Bill should be guided by the general principles of mental health policy as set out, most recently, in the Mental Health Act, 2001, where s. 4 of the Act states:

> "In making a decision under this Act [to involuntarily detain a patient] concerning the care or treatment of a person…the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made".

We believe that the 2001 Act marks a significant advance in guaranteeing to mentally ill persons their constitutional rights to bodily integrity, liberty and equality of treatment and their human rights as guaranteed under international treaties and we are concerned that no provisions in the present Bill should diminish the general principles of protection contained in the 2001 Act.

2. Relevant International Standards of Human Rights Protection

European Convention on Human Rights (ECHR)

Under Article 5 of the ECHR, the European Court of Human Rights has developed a framework of procedural tests that must be satisfied in order to justify the detention of a person of 'unsound mind'. In the case of *Winterwerp v Netherlands*,[1] the Court established three principal tests:

(i) there must be objective medical assessment of mental illness;
(ii) the mental illness must result in a danger to the patient or others; and
(iii) the detention must be justified on a regular periodic basis.

In the case of *Aerts v Belgium,*[2] the European Court of Human Rights has ruled that, where a person is detained for mental illness, he/she must be held in a hospital or clinic and not in a prison where appropriate therapy and treatment are not available. In later cases, this principle has been stated in absolute terms and the Court has clearly indicated that states' responsibilities cannot be dispensed with for reasons of resources or the absence of appropriate alternative facilities.[3] Specific safeguards for the protection of detained persons are provided by Article 5 (4), which guarantees a right to challenge the legality of any detention, and Article 5 (5), which guarantees an enforceable right to compensation for persons detained in contravention of the provisions of Article 5.

Under Article 3 of the ECHR, the European Court has also examined the circumstances in which the denial of adequate care to persons with mental health needs can constitute inhuman or degrading treatment. In the case of *Keenan v United Kingdom*,[4] in relation to a mentally ill person who committed suicide while in prison, the Court held that the lack of effective monitoring of the detainee's medical condition, combined with poor keeping of medical notes and the use of solitary confinement and additional periods of detention as punishment, constituted inhuman and degrading treatment.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

The monitoring committee under this Convention, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Committee), has issued a number of General Comments in relation to involuntary psychiatric detention, including detention resulting from criminal proceedings. The CPT Committee has also placed a strong emphasis on the scrutiny of psychiatric detention in its recommendations and observations in relation to the CPT Committee's country visits. In its General Comment 8, in particular, the CPT Committee set out the following general principles:

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[1] (1979-1980) 2 EHRR 387
[2] (1999) 29 EHRR 50
[3] *Johnson v United Kingdom* (1997) 27 EHRR 296
[4] (2001) 33 EHRR 913

> "32. …The aim should be to offer material conditions which are conducive to the treatment and welfare of patients; in psychiatric terms, a positive therapeutic environment. This is of importance not only for patients but also for staff working in psychiatric establishments. Further, adequate treatment and care, both psychiatric and somatic, must be provided to patients; having regard to the principle of equivalence of care, the medical treatment and nursing care received by persons who are placed involuntarily in psychiatric institutions should be comparable to that enjoyed by voluntary psychiatric patients.
>
> 33. The quality of patients' living conditions and treatment inevitably depends to a considerable extent on available resources. … However, in the light of the facts found during some visits, the Committee wishes to stress that the provision of certain necessities of life must always be guaranteed in institutions where the State has persons under its care and/or custody. These include … - in health establishments - appropriate medication."

The General Comment goes on to examine in detail the specific requirements in relation to living conditions in psychiatric institutions; the appropriate levels of and resources for staffing; the use of restraints and seclusion (the CPT Committee clearly states that seclusion should never be used as a form of punishment); and the need for adequate safeguards for the rights of persons detained. In relation to this last point:

> "55. The CPT also attaches particular importance to psychiatric establishments being visited on a regular basis by an independent outside body which is responsible for the inspection of patients' care. This body should be authorised in particular, to talk privately with patients, receive directly any complaints which they might have and make any necessary recommendations."

UN Human Rights Treaties and Other Instruments

The rights of persons detained involuntarily in relation to mental illness or disorder have been considered by a number of the UN treaty monitoring bodies, including the monitoring committees established under the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In this context, we wish to refer, in particular, to the earlier publication of the HRC, "*Observations on the Proposals Paper of the Disability Legislation Consultation Group (DLCG)*" ,[5] which sets out the general perspective of the HRC as to how the rights set out in the ICESCR have application in relation to disability more generally. The general principles relating to the protection of the rights of mentally ill persons, as they have been developed by the UN agencies, have been set out more recently in the 1991 UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

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[5] Publication of the HRC, June 2003.

3. Observations on the Criminal Law (Insanity) Bill 2002

In this section we will analyse the main provisions of the Bill and make recommendations in relation to the principal areas where we believe that the Bill can be amended to bring it into compliance with human rights' standards. We may wish to make a submission in relation to other aspects of the proposed Bill at a later stage in the legislative process.

1. General Observations: Language

The HRC is concerned by the use of the terms "insanity" and "mental handicap" in the proposed Bill. These terms are archaic and are considered unacceptable in contemporary practice because of their potential to stigmatise and demean individuals suffering from mental illnesses or disorders and persons with intellectual disabilities. We further note that these terms are no longer used by international organisations and have not been used in recent legislation in Ireland.

Indeed, it seems strange to us that the stated purpose behind the introduction of the new verdict of "guilty by reason of insanity", as described in the Explanatory Memorandum, is to counter the "pejorative connotations" of the term 'insane'. The HRC regards those negative connotations as applying to both terms.

> **The HRC supports the NDA recommendation that references in the Bill to 'insanity' be replaced by reference to 'mental disorder' and that references to 'mental handicap' be replaced by 'intellectual disability'. The HRC urges consistency in legislation in order to ensure harmonisation of practice and equivalence of treatment.**

2. Clauses 1-2: Definition and Allocation of 'Designated Centres'

We are concerned that the Bill envisages the use of prisons as 'Designated Centres' i.e. suitable places of detention under the Bill. The Explanatory Memorandum to the Bill explains the inclusion of prisons as designated centres on the basis that it may sometimes be more appropriate to detain a person in a prison than in a psychiatric centre. However, the judgment of the European Court in *Aerts* is unequivocal in requiring that, where a person is detained for mental illness, he/she must be held in a hospital or clinic and not in a prison where appropriate therapy and treatment are not available.

The UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care also clearly prohibit the use of prisons or sections of prisons. Therefore, any provision to allow the detention of mentally ill persons in prisons, where adequate therapeutic services are not available (as is generally the case in relation to Irish prisons) is inconsistent with international human rights standards. We further note that the detention of mentally ill persons in prisons where staff are not equipped or trained to treat those persons appropriately is likely to have detrimental effects on staff as well as on the detainees.

The HRC is aware that, at present, Irish psychiatric hospitals face difficulties regarding resources and capacity. However, in the *Johnson* case, the European Court also held that the lack of suitable alternative facilities could not be used to justify inappropriate detention. We further note the observation by the IPA that regional secure facilities will be required to adequately deal with violent offenders who may be directed to the care of the psychiatric services.

We are concerned that, in the context of the current levels of funding and resources within the psychiatric services, if ordinary District Mental Hospitals and Units were to be categorised as "Designated Centres", ordinary psychiatric patients would be disadvantaged. The consequence of such a classification would be to curtail their liberty due to the increased security and locked wards etc., which might be required in relation to persons detained in relation to criminal offences.

We note that the IPA is also critical of the omission of any provision in the Bill for outpatient treatment where that may be appropriate. We believe that this omission goes against the central philosophy of current psychiatric practice as expressed in the Mental Health Act 2001, where care in the community is the preferred option wherever it is possible.

> **The HRC recommends that the term "Designated Centres" should not encompass any institutions that have not already be categorised as "Approved Centres" under the Mental Health Act 2001. This would help ensure consistency and equivalence of treatment with reference to this legislation. Only specialised psychiatric facilities should be categorised as Designated Centres.**
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> **Specifically, the HRC recommends that the reference to prisons in clauses 1 and 2 be removed, and that resources be made available to ensure that adequate levels of accommodation in specialised secure units in hospitals or clinics are put in place as a priority to accommodate any persons committed to detention under the Bill.**[6]
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> **The HRC is further concerned that, in general, ordinary District Mental Hospitals should not be used as Designated Centres, as the effect of such use would be likely to interfere with the rights to liberty and appropriate treatment of other patients in such hospitals.**
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> **The HRC also recommends that the option should be available to the courts to refer a person to whatever psychiatric treatment is medically deemed to be appropriate, including the possibility of outpatient treatment in the community.**

[6] Reference to the provision for resources is made under clauses 17-18 of the proposed Bill.

3. Clause 3: Fitness to be Tried

This clause deals with fitness to be tried. Where a judge sits alone to determine fitness for trial it is presumed that he/she will be informed by clear medical evidence, as is required under the ECHR. While the tests set out for a patient understanding the nature and course of the proceedings are legally appropriate, if a doctor is to use these criteria as a test in practice then they may be too vague. It is possible that a psychiatrist would produce more consistent evaluations if given definite criteria that could be scheduled to the Bill.

> **The HRC recommends that the clause be clarified to ensure that, in all cases, fitness to be tried, and not just subsequent decisions relating to committal, should be determined by reference to clear medical evidence. The HRC also recommends that more detailed guidelines for psychiatric assessment of fitness to be tried should be appended to the schedule to the Bill.**

4. Clause 4: Not Guilty by Reason of Insanity

This clause creates the special verdict of "not guilty by reason of insanity" and provides for the committal of persons that a court holds to fall within this category. The clause provides for an initial period of detention of up to 28 days.

> **While the HRC welcomes the provisions for review of detention under this section, we consider the prescribed periods may be excessively long to allow a person to be detained without a legal review. The HRC recommends, instead, that a period of 14 days might be more appropriate. See also our general comments above in relation to the use of the term "insanity".**

5. Clause 5: Diminished Responsibility

Under this clause, a person may be found by a jury or court to be guilty of manslaughter on the grounds of diminished responsibility if the mental disorder, "was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act".

The HRC notes that diminished responsibility by reason of insanity has been widely tested as a legal entity in other common law jurisdictions.[7] The provision of diminished responsibility implies *inter alia* the concept of "irresistible impulse". It is

[7] The Butler Report (HMSO 1975) in the UK, for example, advocated the abolition of the defence of diminished responsibility, disliking in particular the imprecision of the phrases "abnormality of mind" and "mental responsibility". The UK Law Commission's Codification of the Criminal Law (HMSO 1985) provides a more accurate definition of mental disorder. However, this codification included psychopathic disorder which elsewhere nowadays is considered to have too broad a definition to justify inclusion under diminished responsibility.

presumed that the courts will choose to interpret the law, as in the United States, on the principles of the "policeman-at-the-elbow" i.e. that a person's impulse was only irresistible if they would have carried it out had there been a policeman standing next to them.

> **This clause is a significant component of the proposed Bill. Although there does not seem to be any principle of constitutional or international human rights directly at stake, the HRC wishes to consider this point further and may wish to make a recommendation in relation to the proposed formulation at a later stage.**

6. Clauses 6-8: Appeals from Decision Relating to Mental Health

This part of the Bill makes provision for appeals from determinations of fitness to plead and the special verdict of not guilty by reason of insanity. These clauses appear to protect the rights of detained persons to fair proceedings, effective remedies and to challenge detention as set out in the Constitution and in Articles 5, 6 and 13 of the ECHR.

7. Clause 10 (2): Mental Health Review Board

This clause deals with the establishment of a Mental Health Review Board and makes reference to the Board exercising their functions with;

> "…regard to the welfare and safety of the person whose detention it reviews under this Act and to the public interest"

The HRC notes that this formulation is at variance with that adopted in the 2001 Act, which states:

> "the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made"

> **There may not be a great difference between the two standards in practice, but we believe that the assessment of any danger that a patient may pose should be based on the same standards regardless of the cause of the patient's detention. Therefore, in the interests of equivalence of treatment and based on the principle that the medical needs and constitutional rights of the patient should be central to the allocation of all medical treatment, the HRC prefers the formulation of the 2001 Act to be used here also.**

> **The HRC is also concerned, in a broader context, about the role, if any, that is envisaged for the Mental Health Commission established under the 2001 Act and the Mental Health Tribunals also provided for in that Act. We note that the NDA has recommended that the review powers under**

this clause be vested in such Tribunals to ensure that the persons subject to civil and criminal detention are afforded equivalent procedural rights. We believe that this proposal has some merit and recommend that relationship and possible overlap in functions between the proposed Mental Health Review Board and the institutions provided for in the 2001 Act should be reconsidered.[8]

8. Clause 11: Powers of the Mental Health Review Board

This clause sets out the powers of the Mental Health Review Board. It also states that the procedures of the Review Board are to be determined by the Review Board *with the consent of the Minister*. On this point, the HRC is concerned that the Review Board may not be seen to function independently.

This clause also raises issues of civil liability. The case-law of the European Court of Human Rights establishes a duty on the part of the State to take whatever positive measures are reasonably required in order to protect the general public from criminal actions of persons where those actions are reasonably foreseeable.[9] The HRC is concerned that nothing in this clause should deprive a member of the public of a right to a legal remedy where the State fails to fulfil that duty.

The issue of a legal remedy also arises in the context of any possible libel published by the Review Board with reference both to the constitutional right to a good name under Article 40.3.2, and the right to privacy guaranteed under Article 8 of the European Convention on Human Rights.

The central procedural requirement of Article 5 (1) (e) of the ECHR in relation to psychiatric detention is that all decisions relating to detention should be based on objective medical evidence of mental illness. The HRC recommends that the primary authority for all decisions relating to the release or transfer of detained persons should be the Mental Health Review Board. Therefore, the HRC recommends that the veto of the Minister be removed in this context.

In a case where the Government is concerned about the potential consequences of a particular decision of a Mental Health Review Board, it should remain open to the Government to challenge any such decision through judicial review proceedings on public interest grounds. Provision could be made in the proposed Bill for an expedited process to review decision in such situations.

In relation to civil liability, we presume that the general effect of this clause will not prevent a legal remedy where the Review Board, through

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[8] In line with this recommendation, where we refer to 'Mental Health Review Board' in these observations, the comments also apply to whichever body the relevant powers and functions are vested in, in the final version of the proposed Bill.

[9] See, in particular, the case of *Osman v United Kingdom* (2000) 29 EHRR 245

negligence, inappropriately releases a dangerous patient who subsequently causes severe harm.

The HRC is concerned that provision should be made to ensure that the legal aid available to patients is adequate, enabling patients to be adequately represented at the Review Board. We also feel that under clause 11 (6) (e) the Minister for Health and Children should be included in representations before sittings of the Review Board.

9. Clause 12: Periodic Review of Detention

This clause provides for review of detention at intervals of not more than 6 months.[10]

Article 5 (4) of the ECHR guarantees the right to a review of detention soon after the initial detention and at periodic intervals thereafter. Each case must be examined on its particular circumstances and the European Court has set no fixed limit requiring a particular period of time. The HRC recommends that the proposed period of 6 months be reduced to 3 months as a more appropriate and proportionate period.

10. Clause 13: Temporary Release and Transfer

This clause provides for temporary release and transfer of patients. The provision raises several issues, as it makes any such release subject to the consent of the Minister and also allows the Minister to issue directions as to the placing of patients outside of designated centres. It is presumed that the right to a remedy under the doctrine of *habeas corpus* will be unaffected by this provision, since it is built into the Constitution.

As with the proposals under clause 11, the HRC recommends that the authority for all decisions relating to the release or transfer of detained persons should be the Mental Health Review Board. Again, the Bill could provide for some process of review of any such decisions.

11. Clause 15: Application to Existing Detentions

The Bill proposes here to apply to existing detentions. This is a welcome provision to extend the protections in the Act to persons who are currently detained.

[10] This clause also extends the application of this provision to cover persons detained following a court martial under the Defence Act 1954. As a general point, the HRC is concerned that courts martial should also conform to the requirements of the ECHR (see comments on clause 16 below).

12. Clause 16: Courts Martial

This provision extends the application of the Bill to courts martial established under the Defence Act 1954. The HRC regards the protections afforded under this clause as being suitably equivalent to those in relation to civilian proceedings.

13. Schedule 1: Mental Health Review Boards

The HRC also wishes to refer to the provisions relating to the appointment and operation of the Mental Health Review Boards, as set out in the First Schedule to the Bill. The HRC attaches great importance to the independent appointment of persons to quasi-judicial positions in line with the constitutional principle that no person should be a judge in their own cause; *nemo iudex in causa sua*.

> **The HRC recommends that the Minister appoint members of the Review Board in a way that is not only independent, but that is also seen to be independent and transparent. The HRC also recommends that, in order to adequately protect the due process rights of persons coming before the Board, that it would be preferable to have two psychiatrists included as members. This would also enhance the protection of the rights of psychiatrists and would be in line with the principle of medical evaluation of all decisions pertaining to detention.**