Submission to the Mental Health Commission's Public Consultation on the Rules and Code of Practice governing the use of seclusion and restraint

Irish Human Rights and Equality Commission

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to examine any legislative proposal and report its views on any implications for human rights or, equality.[1]

The Commission is the designate Independent Monitoring Mechanism under the United Nations Convention on the Rights of Persons with Disabilities (the 'CRPD').[2] Further, the Commission understands that it is going to be designated as the Co-ordinating Body[3] of the National Preventative Mechanism (the 'NPM') framework under the legislation incorporating the Optional Protocol to the Convention Against Torture (the 'OPCAT').[4]

The Commission welcomes the opportunity to make this submission to the Mental Health Commission's Public Consultation on the Review of the Rules and Code of Practice ('the Review') governing the use of seclusion and restraint.[5] The Review was due to take place no later than 2015, having come into force in 2010, and is now six years overdue. Whilst recognising that the need for review is urgent, given the human rights engaged in the use of seclusion and restraint in all inpatient mental health

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[1] Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

[2] As provided for in the Disability (Miscellaneous Provisions) Bill 2016 which lapsed in the previous session of Dáil Éireann.

[3] See IHREC, Submission to the UN Committee Against Torture on the List of Issues for the Third Examination of Ireland (January 2020) at p 5.

[4] The Government has committed to ratify and implement the Optional Protocol to the Convention against Torture within 18 months of the formation of the Government. See Programme for Government, Our Shared Future (October 2020). The Mid-Year Progress Report of the Department of Justice's Action Plan for 2021 states that work on the General Scheme of a Bill (The Inspection of Places of Detention Bill) to ratify and implement the Optional Protocol to the OPCAT is progressing and likely to be concluded in Q3 2021, at p 29. Given the time constraint, this is unlikely to happen. It is anticipated that the Mental Health Commission will be a member of the National Preventative Mechanism.

[5] The Commission notes that the scope of the Review is both the Rules Governing the Use of Seclusion and Mechanical Means of Bodily Restraint pursuant to Section 69(2) of the Mental Health Act; and the Code of Practice on the Use of Physical Restraint in Approved Centres pursuant to Section 33(3)(e) of the Mental Health Act 2001; and that the public consultation survey includes questions on the development of future Rules on the use of chemical restraint due to its inclusion in the Mental Health (Amendment) Bill 2021.

services in the public, voluntary and independent sectors, including services for children and adolescents, adults, older persons, persons with an intellectual disability and a mental illness, and forensic mental health services; both the process and outcome of the review must be grounded in human rights.

The Review is taking place at a time of significant relevant legislative activity. Therefore, it should take account of and be congruent with: the draft heads of Bill to amend the *Mental Health Act 2001*,[6] the *Assisted Decision-Making (Capacity) (Amendment) Bill*, and the *Inspection of Places of Detention Bill*; as well as the *Mental Health (Amendment) Act 2018* and the *Assisted Decision-Making (Capacity) Act 2015*.

The Expert Group Review published in 2015 remains an important resource in the area of mental health reform in Ireland. However, it predates ratification of the CRPD and therefore its deliberations and recommendations should be reconsidered, in line with the requirement of compliance with the CRPD. The Expert Group's membership lacked the required participation of persons with disabilities, as per CRPD article 4(3); and it had limited engagement with international human rights standards, including in respect of seclusion and restraint. Therefore, it is important that the Rules and Code of Practice Review does not simply proceed to implement the findings and recommendations of the Expert Group Review, with regards to seclusion and restraint.

[6] The Commission will prepare legislative observations on the draft Heads of Bill to Amend the Mental Health Act of 2001 as of 13 July 2021, noting the provisions of Part 6 Restrictive Practices (including Head 85 Section 69 Seclusion, Head 86 Section 69A Mechanical Restraint, Head 87 Section 69C Physical Restraint, and Head 88 Section 69D Chemical Restraint) and Part 8 Admission of children to approved patient facilities (including Head 127 Section 107 Restraint and Seclusion).

National and international human rights standards

The Commission draws the Mental Health Commission's attention to the following human rights standards in the Constitution, the European Convention on Human Rights (the 'ECHR') and the CRPD.

Relevant law:

Article 40.4.1 of the Constitution:

> No citizen shall be deprived of his personal liberty save in accordance with law.

Art 1(e) ECHR:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (...)
>
> the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants (emphasis added).

Article 1 CRPD:

> The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.
>
> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory[7] impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

[7] Section 3 of The Irish Sign Language Act 2017 provides that (1) "the State recognises the right of Irish Sign Language users to use Irish Sign Language as their native language and the corresponding duty on all public bodies to provide Irish Sign Language users with free interpretation when availing of or seeking to access statutory entitlements and services. (2) The community of persons using Irish Sign Language shall have the right to use, develop and preserve Irish Sign Language."

Article 14 CRPD, which concerns liberty and security of the person, provides:

> States Parties shall ensure that persons with disabilities, on an equal basis with others:
>
> (a) Enjoy the right to liberty and security of person;
>
> (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

A number of other international human rights instruments are engaged, including the International Covenant on Civil and Political Rights[8] (the 'ICCPR'), the Convention Against Torture[9] and the Convention on the Rights of the Child.[10] Also relevant is the Optional Protocol to the Convention Against Torture, which Ireland is due to ratify in Q3 2021, although this deadline is likely to be missed,[11] and the Council of Europe's Committee for the Prevention of Torture (the 'CPT').[12] The Commission notes the *Council of Europe Parliamentary Assembly Resolution 2291 (2019)* on coercion in mental health.[13]

It is anticipated that the Mental Health Commission will be part of the OPCAT National Preventative Mechanism ('NPM'). As part of the mandate as a member of the OPCAT NPM, the Mental Health Commission would be required to carry out visits to places of detention, produce reports and make recommendations where appropriate. The Mental Health Commission would also have the opportunity to submit observations to

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[8] See IHREC, Submission to the UN Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland (August 2020) at p 35.

[9] See IHREC, Submission to the UN Committee Against Torture on the List of Issues for the Third Examination of Ireland (January 2020) at p 16-18.

[10] See IHREC, Submission to the UN Committee on the Rights of the Child on the List of Issues Prior to Reporting for the Fourth Periodic Examination of Ireland (July 2020) at p 26-27.

[11] See IHREC, Submission to the UN Committee Against Torture on the List of Issues for the Third Examination of Ireland (January 2020) at p 5. Published on 21 August 2021 - The Mid-Year Progress Report of the Department of Justice's Action Plan for 2021 states that work on the General Scheme of a Bill (The Inspection of Places of Detention Bill) to ratify and implement the Optional Protocol to the OPCAT is progressing and likely to be concluded in Q3 2021, at p 29. This is unlikely to be the case. As mentioned, it is expected that the Human Rights Committee will review Ireland's Fifth Periodic Report in 2022.

[12] The CPT country visit report has a specific focus on mental health. See the EU Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), Report to the Government of Ireland on the Visit to Ireland (24 November 2020).

[13] Ending coercion in mental health: the need for a human rights based approach Strasbourg: Council of Europe

the relevant authorities on existing and proposed legislation and policy. NPMs are also required to establish and maintain contact both with other NPMs, with a view to sharing experiences and reinforcing effectiveness, and with the Subcommittee on Prevention of Torture,[14] through regular meetings and the exchange of information.[15] Given the anticipated role of the Mental Health Commission as a member of the OPCAT NPM, this Review is an opportunity for it to promote and uphold human rights standards.

Voluntary and involuntary status

A person can only be detained in accordance with law. In the case of persons experiencing a mental disorder[16] in Ireland, that means detention in an approved centre in accordance with the *Mental Health Acts*.[17] Not only must a person experiencing a mental disorder be admitted to an approved centre, in accordance with law, but their detention must continue to be in accordance with law. The conditions of their detention must be lawful.

In the case of persons who is in an approved centre on a voluntary basis, that means that they must consent and continue to consent to be there, and that consent must be informed and given of their own free will. They must be free, in principle, to leave at any time.[18] In the case of persons detained on an involuntary basis, it means inter alia that the treatment regime to which they are subjected must be appropriate, proportionate and in their best interests. In the case of both, the conditions of being in an approved centre must respect their rights and dignity.

Seclusion and restraint: voluntary patients

If a person in an approved centre, on a voluntary basis, expresses a desire to leave, or attempts to leave, only to be secluded or restrained until such time as they change their mind and express the desire to stay, then the basis – and the lawfulness – of their detention may be called into question. It might be argued that they are no longer in an

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[14] The Subcommittee on Prevention of Torture is OPCAT's treaty body.
[15] For more practical guidance as to the requirements of OPCAT NPMs see Prof Rachel Murray and Dr Elina Steinerte, Ireland and the Optional Protocol to the UN Convention against Torture (2017) and OHCHR, Preventing Torture: The Role of National Preventative Mechanisms (2018).
[16] https://revisedacts.lawreform.ie/eli/2001/act/25/revised/en/html
[17] https://revisedacts.lawreform.ie/eli/2001/act/25/revised/en/html, see https://revisedacts.lawreform.ie/eli/2001/act/25/revised/en/html#SEC23 and https://revisedacts.lawreform.ie/eli/2001/act/25/revised/en/html#SEC24
[18] Hogan J, *AB v Clinical Director of St Lomans and Ors*.

approved centre on a voluntary basis. This was the issue in the case of *L v Clinical Director of St Patrick's Hospital and Ors*, in which the Commission appeared as amicus curiae.[19] The Court of Appeal[20] ruled that the patient's detention was unlawful, stating that while the hospital could attempt to persuade a patient stay under their care, there must be no restraint.

The Commission recommends that practical steps are taken to ensure that the decision in *P.L. v St. Patrick's Hospital* is adhered to in the revised Rules and Code of Practice.

Seclusion and restraint: involuntary patients

Persons detained on an involuntary basis, by definition, do not consent to their detention.

It follows that they do not consent to the treatment regime to which they are subjected, or to any of the conditions of their detention, including seclusion and restraint. Indeed, there will inevitably be a question about their ability to give informed consent. Their detention must still be in accordance with law. It must respect their fundamental rights.

The case of *AB v Clinical Director of St Lomans and Ors*, in which the Commission appeared as amicus curiae, concerned the question of the lawfulness of the detention of a person confined to an approved centre on an involuntary basis.[21] It is well established that a person's treatment regime must be appropriate, proportionate to their needs and in their best interest. If an involuntary patient is secluded or restrained out of proportion to the threat that they pose to themselves or to others; if those

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[19] After being continuously restrained and medicated the Appellant agreed to remain in the centre as a voluntary patient, according to the doctor - the change in the Appellant's desire was attributable to the effect of the drugs. Placing special weight on his repeated instructions to his solicitor that he wished to leave the hospital, the Commission concluded that, in all the circumstances, it was difficult to see how the Appellant's consent to remain in hospital could be said to have been both truly voluntary and fully informed.
See IHREC, Amicus Curiae Submission *L v Clinical Director of St Patrick's Hospital and Ors* (2012), at paras 45 and 46.

[20] *P.L. v. Clinical Director of St. Patrick's University Hospital* [2018] IECA 29.

[21] The Commission submitted that "*it is by now well-established that Article 5(4) ECHR requires that a person suffering from a mental disability detained for a lengthy period is entitled at reasonable intervals to challenge the lawfulness of his or her detention*". See IHREC, Amicus Curiae Submission, *AB v Clinical Director of St Lomans and Ors* (2018), at para 11.

techniques are used in inappropriate or unnecessary circumstances, and/or if it is not in their best interests to seclude or restrain them, then the use of those techniques may be unlawful. If the conditions of an involuntary patient's detention, including use of seclusion and restraint, are unlawful, then their detention may be unlawful, too.

Involuntary treatment, seclusion and restraint

In its 2014 Concluding Observations on the implementation of the ICCPR, the Human Rights Committee[22] recommended the State ensure that non-consensual use of psychiatric medication, electroshock, and other restrictive and coercive practices in mental health services is generally prohibited and only used in exceptional circumstances as a measure of last resort.[23] In 2020 there were 1,840 episodes of seclusion, this compares to 1,719 episodes in 2019.[24] There were also 4,055 episodes of physical restraint in 2020 compared to 5,019 episodes in 2019.[25] It is expected that the Human Rights Committee will review Ireland's Fifth Periodic Report in 2022; and the Commission will update it on the extent to which the Review of the Rules and Code of Practice adheres to human rights standards and implements its 2014 recommendations.

In inspections of facilities, the Mental Health Commission has noted the continued use of seclusion, physical restraint, Electro-Convulsive Therapy, involuntary administration of medication and recorded a pattern of failure on behalf of these establishments to comply with the rules governing the use of these practices.[26] The liberty of all people, including persons with disabilities, enjoys strong protection under the Constitution and under the ECHR. The conditions of detention in approved centres, including the use of techniques such as seclusion and restraint, must be in accordance with law, including national and international human rights standards. If the use of seclusion and restraint

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[22] The Human Rights Committee is the monitoring mechanism for the ICCPR.
[23] Human Rights Committee, *Concluding observations on the fourth periodic report* (2014) para 12.
[24] Mental Health Commission, Annual Report 2020, at p 28.
[25] Mental Health Commission, Annual Report 2020, at p 28. Overall there has been an increase in physical restraint episodes, going from 2,123 (2008) to 5,028 (2019). The report also reveals that while the total number of episodes of seclusion has decreased, going from 2,642 (2008) to 1,719 (2019) but the average duration of seclusion has increased. See MHC Report, The Use of Restrictive Practices in Approved Centres: Seclusion, Mechanical restraint and Physical Restraint (December 2020) at p 24-25.
[26] Mental Health Commission, *Annual Report 2018* (2019) pp. 66, 68; Mental Health Commission, *Mental Health Commission finds one critical and 20 high risk ratings in three mental health centres* (2019); Mental Health Commission, *The Administration of Electro-Convulsive Therapy in Approved Centres: Activity Report 2017 & 2018* (2020).

techniques do not respect a person's human rights, then they may be unlawful and, if they are, they may call into question the lawfulness of a patient's detention under those conditions. The Commission notes the WHO Guidelines on human rights based approaches to seclusion and restraint,[27] and international practice on cultural change in relation to the use of seclusion and restraint.[28] Best practice, human rights compliant guidance on the use of restraint in other settings and by other professions is a resource for the Review.[29]

The Commission recommends that the Mental Health Commission undertakes research to identify relevant human rights standards and how they can be embedded in the revised Rules and Code of Practice.

The Commission recommends that the Mental Health Commission takes measures to ensure that the reviewed Rules and Code of Practice significantly reduce the incidence of, and reliance on, involuntary treatment, seclusion and restraint.

The Commission recommends that the Mental Health Commission includes a commitment to an evaluation, monitoring and review of the operation and outcomes of the revised Rules and Code of Practice to ensure they are implemented in line with human rights standards.

Legislative framework

The Commission notes that there is significant legislative activity in this area, which is relevant in terms of the Review of the Rules and Code of Practice. The Review must

[27] https://www.who.int/activities/transforming-services-and-promoting-human-rights-in-mental-health-and-related-areas, https://www.who.int/publications/i/item/9789241516754
[28] http://patientsafety.pa.gov/ADVISORIES/Pages/200503_22.aspx
[29] For example An Garda Síochána *Overarching Use of Force* policy and the eight associated policy documents states compliance with domestic and international standards including the Constitution of Ireland 1937, the European Convention on Human Rights Act 2003, the UN Convention Against Torture and the UN Convention on the Rights of the Child; and that the fundamental principle underpinning An Garda Síochána's policy on the use of force is that any action taken must comply with the fundamental principles of legality, necessity (absolute necessity in terms of lethal force), proportionality and accountability and is applied in a non-discriminatory manner in accordance with the principles of the European Convention of Human Rights.

take full account of the draft heads of Bill to amend the *Mental Health Act 2001*,[30] the *Assisted Decision-Making (Capacity) (Amendment) Bill*,[31] the *Inspection of Places of Detention Bill*, as well as the *Mental Health (Amendment) Act 2018* and the *Assisted Decision-Making (Capacity) Act 2015*. The Commission awaits further progress in respect of the deprivation of liberty safeguards legislation and any legislative developments in this area will need to be considered during the Review and included in subsequent evaluation, monitoring and review of the revised Rules and Code of Practice.[32]

Enacted legislation

The Commission notes the delayed commencement of enacted legislation relevant to the Review.

The *Assisted Decision-Making (Capacity) Act 2015*, which will significantly alter procedures regarding involuntary confinement in residential care, as well as providing for assisted decision making for persons lacking capacity in relation to certain important decisions was enacted six years ago, but is yet to be commenced.[33]

The *Mental Health (Amendment) Act 2018*, which amends the definition of 'voluntary patient' in the *Mental Health Act 2001*, as recommended by the Human Rights Committee,[34] to reflect capacity and consent and provides for guiding principles in mental health treatment, has also been enacted but not commenced. [35]

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[30] The draft heads of Bill are primarily based on the 165 recommendations of the 2015 Expert Group Review of the Act, as well as the results of a 2021 public consultation, extensive consultation with key stakeholders such as the Mental Health Commission and HSE, and in light of domestic legislative changes in Ireland, including the Assisted Decision-Making (Capacity) Act 2015 and the Mental Health (Amendment) Act 2018, and Ireland's international obligations, including the UN Convention on the Rights of Persons with Disabilities, the UN Convention on the Rights of the Child and European Convention on Human Rights.

[31] It is expected that the Assisted Decision-Making (Capacity) Act 2015 is in operation by June 2022. Before the 2015 Act can be fully commenced, an Amendment Bill is required which is currently in preparation. The aim is that this Bill would be enacted by the end of 2021 and would resolve technical issues in the 2015 Act and provide further safeguards for wards. See Roderic O'Gorman, Minister for Children, Equality, Disability, Integration and Youth, Dáil Éireann Debate (24 March 2021).

[32] See IHREC, Submission to the Public Consultation on Deprivation of Liberty: Safeguard Proposals (March 2018).

[33] The Department of Health is actively working on the Assisted Decision-Making (Capacity) (Amendment) Bill that is expected to be enacted by the end of 2021 which will allow for the commencement of the 2015 Act.

[34] Human Rights Committee, Concluding observations on the fourth periodic report (19 August 2014) CCPR/C/IRL/CO/4, para 12.

[35] See IHREC, Submission to the UN Committee Against Torture on the List of Issues for the Third Examination of Ireland (January 2020) at p 5-6.

Move away from best interest principle

The revised *Mental Health Act*, the *Mental Health (Amendment) Act 2018* and the *Assisted Decision-Making (Capacity) Act 2015* must be read in conjunction with each other and must not be considered in isolation. The *Assisted Decision-Making (Capacity) Act* aligns with the principles of the CRPD and embraces the social model of disability.[36] In order to align with the *Assisted Decision-Making (Capacity) Act* and the CRPD, the draft heads of Bill to amend the *Mental Health Act* proposes that the 'best interest' principle in the *Mental Health Act* is replaced by the 'will and preferences' principle. The move away from the 'best interest' principle is significant in terms of strengthening the protection of the right of individuals who receive inpatient treatment.

The Commission recommends that the guiding principles set out in the Assisted Decision-Making (Capacity) 2015 Act and the draft heads of Bill to amend the Mental Health Act are reflected in the revised Rules and Code of Practice.

Children's rights

The legal framework of treatment of children with mental health issues, and the continued admission of children to adult mental health services,[37] are ongoing sources of concern for the Commission. As was noted by the Committee on the Rights of the Child in the previous examination of Ireland on the Convention of the Rights of the Child,[38] 16 and 17-year-old children have no legal right to give or refuse consent for admission and mental health treatment.[39] It is welcome that the proposed draft heads of Bill to amend the *Mental Health Act* will give children aged 16 years and older the right to refuse or consent to their own mental health treatment.[40]

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[36] Catalina Devandas Aguilar, Report of the Special Rapporteur on the Rights of Persons with Disabilities (A/70/297 2015). See also Catalina Devandas Aguilar, Social Protection and Persons with Disabilities (Wiley Online Library, 2017).
[37] There were 27 admissions of children to adult psychiatric facilities in 2020 compared to 54 admissions in 2019. Mental Health Commission, Annual Report 2020 (2021) at p 4.
[38] Committee on the Rights of a Child (2016), Concluding Observations on the combined third and fourth period of Ireland, CRC/C/IRL/CO/3-4, paras 53-54.
[39] See IHREC (2019) Comments on Ireland's 16th National Report on the implementation of the European Social Charter, p 28. Department of Health, Report of the Expert Group on the Review of the Mental Health Act 2001 (2015) at p 67.
40 Head 124, Draft heads of Bill to amend the Mental Health Act 2001

The Commission recommends that the Mental Health Commission ensures that the Review considers the above legislation in a coherent and consistent manner in order to comply with Ireland's domestic and international human rights obligations, in particular the requirements under the CRPD.

Participation

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. This means that persons with all different types of disabilities should be included in consultation processes.[41] The participation of persons who are non-verbal should be ensured through independent advocacy and communication devices.

Further, the Review should take an intersectional approach to participation reflecting the diversity of Irish society. The Commission asks the Mental Health Commission to ensure participation of ethnic minority communities including the Traveller Community in the Review. It is important that the Review takes account of ethnic minority communities' experience of mental health and mental health services[42] including how mental health is impacted by:

- structural vulnerability, racism, discrimination, lack of access to social economic resources;
- migration particularly for those who have experienced pre- and post- migration trauma; and
- language barriers.

The Commission notes the experience of seclusion and restraint of members of ethnic minority communities in other jurisdictions.[43] [44] The Commission refers the Mental Health Commission to its recent submission to the Anti-Racism Committee on Developing a National Action Plan on Racism, which includes a section on mental health.[45] The Commission welcomes the current review of Ethnic Minorities and Mental Health: Guidelines for mental health services and staff on working with people from

[41] Article 1 CRPD provides that "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."
[42] For example https://akidwa.ie/wp-content/uploads/2020/01/LetsTalk2.pdf
[43] https://researchbriefings.files.parliament.uk/documents/CBP-8088/CBP-8088.pdf; https://www.mind.org.uk/media-a/4429/restraintguidanceweb1.pdf
[44] https://www.mind.org.uk/media-a/4429/restraintguidanceweb1.pdf
[45] https://www.ihrec.ie/documents/developing-a-national-action-plan-against-racism-ihrec-submission-to-the-anti-racism-committee/

ethnic minority communities and views this as an opportunity to inform the Review on the Rules and Code of Practice governing the use of seclusion and restraint.[46]

The Mental Health Commission should consider CRPD article 4(3) and CRPD General Comment No 7 in designing and implementing its Review process.[47] Article 4(3) places an obligation on states to closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations, in the development and implementation of legislation and policies. The Commission also notes that General Comment No 7 also particularly refers to the importance of the inclusion and participation of women in consultation processes.[48]

The participation of persons with disabilities and their representative organisations is enshrined in article 4(3) of the CRPD. The CRPD Committee has defined Disabled Persons Organisations ('DPOs') as:

> "those comprising a majority of persons with disabilities – at least half their membership – and governed, led and directed by persons with disabilities."[49]

General Comment No 7 states:

> "that public authorities should give due consideration and priority to the opinions and views of organizations of persons with disabilities when addressing issues directly related to persons with disabilities. Public authorities leading decision-making processes have a duty to inform organisations of persons with disabilities of the outcomes of such processes, including an explicit explanation in an understandable format of the findings, considerations and reasoning of decisions on how their views were considered and why."[50]

In an effort to progress the implementation plan of the CRPD, the Commission is of the view that the State should develop a framework for the recognition and support of

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[46] https://www.mentalhealthreform.ie/wp-content/uploads/2017/01/EthnicMinorityGuidelines.pdf

[47] CRPD Committee, General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention (November 2018).

[48] This point was stressed to the Commission by Stig Langvlad who led the drafting of General Comment No 7.

[49] CRPD Committee, Guidelines on the Participation of Disabled Persons Organizations (DPOs) and Civil Society Organizations in the work of the Committee, CRPD/C/11/2 (April 2014) at para 3.

[50] CRPD Committee, General Comment No 7, at para 23.

DPO's and pay due regard to the statutory Public Sector Equality and Human Rights Duty.[51]

The CRPD Committee has called on states parties to consider consultations with and the involvement of persons with disabilities as a mandatory step prior to the approval of laws, regulations and policies.[52] The active and meaningful participation of persons with disabilities in the consultation process in relation to decisions that affect their rights and lives is at the heart of the CRPD. This is consistent with the human rights based approach in public decision-making processes, and ensures good governance and social accountability.[53] The Committee also recommends that consultations should begin in the early stages and provide an input to the final product in all decision-making processes.[54] Of note is that the Committee states that full and effective participation should be understood as a process, not as an individual one-time event.[55]

To fulfil their obligations under article 4(3), states parties should adopt legal and regulatory frameworks and procedures to ensure the full and equal involvement of persons with disabilities, through their representative organisations, in decision-making processes and the drafting of legislation and policies concerning issues related to persons with disabilities, including disability-related legislation, policies, strategies and action plans.[56]

The Commission is concerned that the Mental Health Commission's organisational structure for the Review of an Expert Advisory Group and a Reference Group creates an apparent two tier approach to professional and lived experience expertise, and has an insufficient level of representation of persons with disabilities including DPOs. According to the CRPD Committee, states parties should give particular importance to

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[51] Joint Committee on Disability Matters, UN CRPD and Ratification of the Optional Protocol: Discussion (17 June 2021).
[52] CRPD Committee, General Comment No 7, at para 15.
[53] CRPD Committee, General Comment No 7, at para 2.
[54] CRPD Committee, General Comment No 7, at para 15. The Committee also calls for the views of persons with disabilities, through their representative organisations to be given due weight and for States to ensure that they are not only heard as a tokenistic approach to consultations and participants should be informed of the outcome of the process, at para 48.
[55] CRPD Committee, General Comment No 7, at para 28. Further, it states that when engaging in public decision-making processes, persons with disabilities and their representative organisations should be protected against intimidation, harassment and reprisals, particularly when expressing a dissenting opinion, at para 29.
[56] CRPD Committee, General Comment No 7, at para 53.

the views of persons with disabilities, through their representative organisations, support the capacity and empowerment of such organisations and ensure that priority is given to ascertaining their views in decision-making processes.[57] States parties should give priority to the views of organisations of persons with disabilities when addressing issues related to persons with disabilities.[58]

The Commission stresses the importance of the involvement of all impairment groups, without any type of exclusion based on the type of impairment, so that individuals can effectively and fully participate without discrimination on an equal basis with others.[59]

Seclusion and restraint are coercive practices associated with physical and psychological harm.[60] Throughout the consultation process it is essential that the Mental Health Commission provides access to support for those who will be sharing direct and indirect experience of seclusion and restraint. Further, mechanisms must be put in place to protect persons sharing experiences of seclusion and restraint from negative consequences in their current and future use of services; and they must be supported and feel safe and respected when expressing their experience or opinion in public.[61] Participation mechanisms must be human rights based and avoid paternalistic assumptions regarding the involvement of persons with disabilities.

The Commission notes that the public consultation on the review of the Rules and Code of Practice is still at an early stage and recommends that the Mental Health Commission consider how the requirements under article 4(3) of the CRPD are embedded into its approach.

The Commission recommends that there should be close consultation and active involvement of all impairment groups throughout the review including the organisational structures.

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[57] CRPD Committee, General Comment No 7, at para 13.
[58] CRPD Committee, General Comment No 7, at para 14.
[59] CRPD Committee, General Comment No 7, at para 16.
[60] Tahani Hawsawi et al, 'Nurses' and Consumers; Shared Experiences of Seclusion and Restraint: A Qualitative Literature Review', International Journal of Mental Health Nursing (2020) 29(5) 831-845.
[61] CRPD Committee, General Comment No 7, at para 27.

The Commission recommends that there should be a public opportunity to review an initial and a final draft of the revised Rules and Code of Practice.

Data

The Commission draws the Mental Health Commission's attention to CRPD article 31 and the need for the development of a robust, comprehensive data system on seclusion and restraint.[62] The Commission notes that an adequate data system is vital to monitor implementation of the commitment to reduce the use of seclusion and restraint and provided a baseline from which to monitor the use over time. This data system can include both administrative data and survey data.

Such a data system must be designed to collect, process and publish data that is disaggregated by groups covered in the *Equality Acts*.[63] The Commission also calls for data disaggregated by impairment group within disability, according to CRPD article 1. The Commission recommends that particular attention should be given to the experiences of disabled women (CRPD article 6) and disabled children (CRPD article 7) in data collection.

The Commission reiterates its calls for all public bodies that equality data collection is required under the Public Sector Equality and Human Rights Duty of the *Irish Human Rights and Equality Commission Act 2014 (section 42),* which states the need for public services to assess and report on progress on their equality goals.[64] This also applies to the processing of personal and special category data as it applies the General Data Protection Regulation (the 'GDPR') which, in the views of the Commission, is permissible under Section 42 of the 2014 Act as they constitute equality data.[65] In ratifying the CRPD, Ireland is committed to the development of statistical information to enable identification of issues for persons with disabilities.[66] The National Statistics Board (the 'NSB') recommends that the 2022 census definition of disability should be incorporated into all survey data collection, and disabled/non-disabled analyses of

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[62] Article 31 CRPD, Statistics and Data Collection.
[63] See EU Equality Data Guidelines, 2018, at p 6.
[64] See IHREC's Guidance on 'Implementing the Public Sector Equality and Human Rights Duty'. The EU Equality Data Subgroup published a 'Guidance Note on the Collection of Data Based on Ethnic or Racial Origin' (September 2021), which includes guidance on collecting special category equality data in compliance with GDPR https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/equality-data-collection_en. See also: IHREC's 2021 Submission to the Anti-Racism Committee, pp 13-17.
[65] See IHREC FAQs on the Duty.
[66] National Statistics Board, 2021, Strategic Priorities for Official Statistics 2021-2026, at p 27.

relevant statistics be made readily available.[67] Furthermore, the NSB highlights the need for due regard of accessibility of statistical information for those with disabilities.

The Commission recommends the establishment of a robust, comprehensive and publicly assessable data system to provide for the collection, processing and publication of disaggregated data in order to effectively monitor the reduction of seclusion and restraint over time.

The Commission recommends that data on seclusion and restraint should be disaggregated by equality grounds and impairment groups and that such statistical information should be routinely published and made publically and research accessible.

[67] National Statistics Board, 2021, Strategic Priorities for Official Statistics 2021-2026, at p 27.

Review

Given the significant level of anticipated legislative changes over the coming years and the egregious character of human rights violations that are risked in the use of seclusion and restraint, it is important that the publication of the revised Rules and Code of Practice is accompanied by an implementation plan and evaluation, and a monitoring and review plan. Further, it is important that the review period is sufficiently long for implementation, but not so long as to address limitations in services in a timely manner.

The Commission recommends that there is a commitment to a three year review period of the Rules and Code of Practice to ensure that there is compliance with human rights standards.



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