



ICCL Explanatory Note on the Emergency Measures In The Public Interest (Covid-19) Bill 2020¹

The right to liberty is a fundamental right. It is protected by article 40(4) of the Irish Constitution, under article 5 of the European Convention on Human Rights and article 9 of the International Covenant on Civil and Political Rights.

This right can be limited in certain circumstances including where a person has a mental disorder and may be a danger to themselves or others or where their condition will significantly deteriorate without treatment. Even in such situations, depriving someone of their liberty against their will is such a grave interference with their personal rights that clear safeguards must be put in place to protect against unjust detentions. The current law, enshrined in the Mental Health Act 2001, reflects this and has in place a number of safeguards against unjust involuntary detention.

Safeguards under the Mental Health Act

A key element of the right to liberty is the right to have confinement or detention reviewed by a court or tribunal. Under the Mental Health Act 2001, an order to detain someone, known as an admission order, can be made by a consultant psychiatrist. This order has to be sent to the Mental Health Commission, who must refer the matter to a Tribunal. This Tribunal can affirm or revoke the admission order² and must receive a report from a separate, independent consultant psychiatrist.³ This Tribunal normally consists of a solicitor/barrister, a consultant psychiatrist and a third member who may be a medical practitioner.⁴ The person detained has the right

¹ This note is intended as an explanatory guide on the rights impact of the Emergency Powers in the Public Interest (Covid-19) Bill and is not intended as a guide to existing rights or procedures under the Mental Health Act 2001.

² Or an order to renew the detention, known as a renewal order.

³ Mental Health Act 2001, s.17.

⁴ Mental Health Act 2001, s.48

to be present at a Tribunal hearing, and to make representations including through a legal representative.⁵ A Tribunal must make a decision within 21 days of the admission or renewal order. Ordinarily, 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.⁶

Amendments provided for by the Emergency Measures in the Public Interest (Covid-19) Bill 2020

The proposed amendments to the Mental Health Act outlined in the Emergency Measures in the Public Interest (Covid-19) Bill 2020 allow for changes to this process. The independent examiner due to report to the Tribunal will not have a statutory right to access the centre where the person is detained and may need to examine them by other means, such as by video link.⁷ The three person Tribunal can default to a remote hearing, and may consist of only a solicitor/barrister where the other members are unavailable.⁸ The Tribunal can receive submissions in writing as opposed to having the patient present at a live hearing.⁹ The 2nd 14 day period of extension to the Tribunal's decision can now be made if the Tribunal thinks it's necessary because of the public health emergency and not just on the patient's application.¹⁰

These amendments are made in light of the predicted lack of availability of medical personnel to perform their usual functions because of their deployment to combat Covid-19.¹¹ The amendments allowing for submissions in writing rather than a live hearing, as well as the removal of the statutory right of an independent examiner to access the relevant medical centre are made with the aim of combating the spread of the disease.¹²

⁵ Mental Health Act 2001, s.49

⁶ Mental Health Act 2001, s.18(4)

⁷ Emergency Powers in the Public Interest (Covid-19) Bill s.17, amending s.17 of the Mental Health Act 2001.

⁸ Emergency Powers in the Public Interest (Covid-19) Bill s.20, amending s.48 of the Mental Health Act 2001.

⁹ Emergency Powers in the Public Interest (Covid-19) Bill s.21, amending s.49 of the Mental Health Act 2001.

¹⁰ Emergency Powers in the Public Interest (Covid-19) Bill s.18(c), amending s.18 of the Mental Health Act 2001.

¹¹ S. 16 of the Emergency Measures in the Public Interest (Covid-19) Bill 2020 inserting s.2A into the Mental Health Act 2001

¹² S. 16 of the Emergency Measures in the Public Interest (Covid-19) Bill 2020 inserting s.2A into the Mental Health Act 2001

ICCL recommendations

ICCL understands the need for these amendments during this public health emergency. However, we would urge the government and the Mental Health Commission to ensure that the patient's voice is not lost in the application of these measures in order to ensure compliance with s.4 of the Mental Health Act.¹³ It is vital that patients are assisted in making written submissions, where that is the form of patient representations to the Tribunal and where assistance may be necessary. Patient support during video conferences should also be ensured. We urge the Tribunal, in whatever form it is sitting, to ensure that the patient's voice is heard in any decision to extend the period for its review by a second 14 day extension. We also underline the importance of having more than one member of the Tribunal and urge those concerned not to resort to a single person Tribunal except in the most exceptional cases and where there is a clear need for the Tribunal to operate in this manner.

Finally, we urge the government to ensure that anybody who is detained under the Mental Health Act has access to self-isolation facilities and is treated equally in this regard.

Sunset Clause

A sunset clause of 9 November applies to the amendments to the Mental Health Act¹⁴ so all of the changes will cease to operate after that date, unless the Oireachtas approves a further extension. ICCL, with its colleagues working in the mental health field, will be monitoring the exercise of these measures until then and campaigning for a return to full safeguards for patients detained under the Mental Health Act following the period of emergency.

¹³ S.4(2) provides that "Where it is proposed to make a recommendation or an admission order in respect of a person, or to administer treatment to a person, under this Act, the person shall, so far as is reasonably practicable, be notified of the proposal and be entitled to make representations in relation to it and before deciding the matter due consideration shall be given to any representations duly made under this subsection."

¹⁴ See S.1(3)(a) of the Emergency Measures in the Public Interest (Covid-19) Bill 2020. This is the same date that applies to the amendments to the Public Health Act 1947, provided for by the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020.