PE1494/M

Submission to PUBLIC PETITIONS COMMITTEE, Scottish Parliament

PE01494: Mental Health Legislation

Scottish Commission for Human Rights

24 January 2014

Introduction

1. The Commission welcomes the opportunity to submit evidence to the Public Petitions Committee on our views regarding this Petition.

> "*Calling on the Scottish Parliament to urge the Scottish Government to amend the Mental Health (Care and Treatment) (Scotland) Act 2003 to ensure that it is compatible with the European Convention on Human Rights.*"

The petitioner's concerns are discussed below - the relevant human rights standards are highlighted:

Short-term detention certificate

The petitioner argues that:

> *"The provisions for short-term detention are not ECHR compatible in that they permit individuals to be treated against their will before they have had an opportunity to appeal."*

There are a number of Articles of the European Convention on Human Rights (ECHR) which are engaged in this issue, including Article 5 (right opt liberty and security), 6 (right to a fair trial) and 8 (right to respect for private and family life) and potentially Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) of the ECHR.

To be in compliance with the ECHR, the confinement of a person of unsound mind must comply with the requirements laid down in the *Winterwerp v. the Netherlands* [1], namely:

- it must have been reliably established, through objective medical expertise, that the patient has a true mental disorder;
- the mental disorder must be of a kind or degree warranting compulsory confinement;
- the validity of continued confinement depends upon the persistence of such a disorder.

[1] (1979) 2 EHRR 387

In *X v. the United Kingdom*,[2] the European Court of Human Rights (ECtHR) declared that:

> *"an initial period of detention may be authorised by an administrative authority as an emergency measure provided that it is of short duration and the individual is able to bring judicial proceedings "speedily" to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure."*

In order to exercise their rights, it is important that individuals receive an explanation of the reason why the approved medical practitioner considers the grounds for short-term detention to be met. This could be best archived by providing a plain language statement in witting and support to ensure their understanding of the reasons for detention. The Mental Welfare Commission notes in their submission to this Petition that those subject to short term detention do not at present routinely receive a plain language statement in witting of the reasons for detention. Article 5 requires that any deprivation of liberty should satisfy the principle of legal certainty. This requires the conditions of deprivation of liberty to be clearly defined and the law itself be foreseeable in its application, so that it meets the standards of lawfulness set by the ECHR. The requirement here is to protect the individual from arbitrariness and allow the detainee to determine whether or not to commence proceedings to challenge detention under Article 5(4). It is important to note that under human rights law special procedural safeguards might be necessary to protect the interests of persons who were not capable of acting for themselves on account of their mental disabilities.

While the 2003 Act (s 50) allows for a revocation of the short term detention certificate in practice the review takes some time (between one and tree weeks) which may be an issue of concern. In *Witek v Poland*[3] the ECtHR considered that a delay of 30 day of a detention review was incompatible with Art 5 of the ECHR.

Absence of fair hearings

The petitioner argues that:

> *"When an individual does appeal against his or her short-term detention the nature of the 2003 Act is such that he or she is denied a fair hearing in breach of Article 6 ECHR."*

In determining the appeal, the Mental Health Tribunal must judge whether the criteria listed at section 50(4) continue to be met. In terms of human rights, the ECtHR has noted that such proceedings need not always include the same guarantees as required under Article 6(1) for civil/criminal litigation. Nonetheless, an essential element is that the person concerned should have

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[2] Application no. 7215/75
[3] Application no. 13453/07

access to a competent body and the opportunity to be heard either in person or, where necessary, through some form of representation (*Megyeri v. Germany*[4]).

In relation to the question as to whether the Mental Health Tribunal is such a competent body, ECtHR jurisprudence demonstrates that tribunals with similar composition can perform this function. The Court has not found that membership to particular profession automatically compromise impendence. What is of fundamental importance is that the principles of impartiality and independence are ensured (*DN v. Switzerland*[5]). There is both a subjective and objective element to determining impartiality. For a finding of violation there must be a “legitimate doubt” over impartiality, the standpoint of the parties being important but not decisive. Questions as to impartiality may arise for example if the approved medical practitioners in the tribunal is/was a colleague of the decision maker or is employed by the same institution, or had previous contact with the patient. Independence is the other essential attribute of the Tribunal. In this context this means independence from the executive and from the parties to the case. In the DN case, for example, the psychiatrist had already prepared a report on the individual which opposed discharge, and that was found to give rise to a legitimate doubt over impartiality.
As the Committee will be aware, the Mental Health Tribunal panel in Scotland consists of a legal member, a medical member and a community/specialist member. There are a number of legislative safeguards in place to ensure independence, including the requirement that none of the Panel should have had any previous connection with the patient/service user and the legal expert presiding the Panel.[6]

Use of electro-convulsive therapy (ECT)

The petitioner argues that:

> *“Several other changes must be made to the 2003 Act to ensure that it is ECHR compatible, in particular, changes relating to electro-convulsive therapy (ECT)”*

The ECtHR has clearly stated that measures which affect the physical integrity or mental health have to reach a certain degree of severity to qualify as an interference with the right to private life under Article 8 of the ECHR. However, even minor interferences with a person’s physical integrity may fall within the scope of Article 8 if they are against the person’s will (*Storck v Germany*[7]. The jurisprudence clarifies that the imposition of invasive psychiatric treatment requires regular judicial supervision. Article 8 protects the physical integrity of the person. In *X and Y v The Netherlands*[8] the ECtHR

[4] 13770/88 (1992) ECHR 49
[5] 27154/95 (2001) ECHR 235
[6] See The Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005 and ‘An introduction to the Mental Health Tribunal for Scotland: information for services users and their carers’. Published by the Scottish Executive, July, 2006
[7] 61603/00 [2005] ECHR 406
[8] (1985) 8 EHRR 235

held that private life covers the physical integrity of the person. The right to respect for private life is not an absolute right and can be limited under the specific circumstances prescribed by Article 8 (2).

In relation to physical integrity, the scope of Article 8 overlaps with the ambit of Article 3 of the ECHR. The difference between these two lies in the severity of the interference. The ECtHR held in the 1990's that a medical treatment which is imposed without consent will not amount to a violation to Article 3 if it is a "medical necessity" (*Herczegfalvy v Austria*[9]). This position has recently been challenged by the United Nations Special Rapporteur[10] on Torture, Mr. Juan Méndez. As the Special Rapporteur has said:

> *"The doctrine of medical necessity continues to be an obstacle to protection from arbitrary abuses in health-care settings. It is therefore important to clarify that treatment provided in violation of the terms of the Convention on the Rights of Persons with Disabilities – either through coercion or discrimination – cannot be legitimate or justified under the medical necessity doctrine."*[11]

In relation to ECT it is important to differentiate between two forms – modified and unmodified. The European Committee for the Prevention of Torture (CPT) has considered that unmodified ECT (i.e. without anaesthetic and muscle relaxant):

> *"can no longer be considered as acceptable in modern psychiatric practice. Apart from the risk of fractures and other untoward medical consequences, the process as such is degrading for both the patients and the staff concerned. Consequently, ECT should always be administered in a modified form."*[12]

Even where administered in a *modified* form (i.e. with appropriate anaesthetic and muscle relaxant) there are a number of safeguards which should be applied:

> *"ECT must be administered out of the view of other patients (preferably in a room which has been set aside and equipped for this purpose), by staff who have been specifically trained to provide this treatment. Further, recourse to ECT should be recorded in detail in a specific register. It is only in this way that any undesirable practices can be clearly identified by hospital management and discussed with staff."*[13]

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[9] Application no. 10533/83

[10] Special Rapporteurs are independent experts who examine, monitor, advise and publically report on human rights situations in specific countries and on particular human rights issues.

[11] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/22/53, para 35.

[12] European Committee for the Prevention of Torture, CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2011, para 39.

[13] Ibid.

The Adults with Incapacity (Scotland) Act 2000 establishes that adults (people aged 16 or over) are to be assumed to have legal capacity to make decisions (including to accept or refuse healthcare). It also establishes that people are to be provided with the support they need to make decisions, and outlines a functional approach to capacity – i.e. one that asks whether this person is able to make this decision at this time (with appropriate support). Part 16 of the 2003 Act outlines the conditions required if a patient is incapable of consenting. A designated medical practitioner must certify that the patient is incapable of making a decision and that the treatment is in the patient's best interests having regard to the likelihood of the treatment alleviating or preventing deterioration in the patient's condition (s 239(1)). If a patient is incapable of consenting, but resists or objects to treatment, treatment is only permitted (s 239(2)) under certain of the urgent medical treatment provisions in the Act e.g. where the purpose of the treatment is to: save the patient's life; prevent serious deterioration in the patient's condition; or alleviate serious suffering.

There are legislative safeguards for some intrusive treatments and some require an independent opinion from a Designated Medical Practitioner appointed by the Mental Welfare Commission. In addition, the 2003 Act does not authorise the use of force in administering treatment where the person is not in hospital. It is also important that these procedural guarantees of review include the right to participate in those reviews. There is obviously a need to consider whether seriously invasive treatment may be being overused in practice.

The Commission notes in particular that SAMH recommends an independent research review to determine the longitudinal effects and outcomes of ECT on individuals in Scotland, whether the treatment was consensual or not as well as a review of rules related to consent and the "best interests" test. The Commission considers that such steps would be timely in considering the approach to non-consensual treatment and the use of ECT continues to reflect international human rights law, standards and best practice. [14]

Any interference with the right to respect for private and family life must be based on law, pursue a legitimate aim and be the least restrictive alternative means capable of achieving the legitimate aim. It is also important that in situations where an individual lacks capacity, every effort is made to ascertain the individual's previously stated wishes.[15] Including for example the use of advance statements. The McManus review noted that advance statements were not used as much as they could be and should be further promoted.

In relation to all of the above questions the new United Nations Convention on the Rights of Persons with Disabilities (the CRPD, which the UK ratified in 2009) will also have an impact, in particular in relation to questions of legal capacity and substitute decision making. The UN Committee on the CRPD is currently consulting on a draft General Comment (authoritative interpretation)

[14] The Commission has benefited from sight of the submission prepared by SAMH for this Petition, which has carefully reviewed the evidence and follows discussion with a range of relevant bodies.
[15] See for example *Glass v UK*, Application No 61827/00. Decision of 9 March 2004.

of the Article on legal capacity, in which it appears to propose a far stronger line than current ECHR standards.

Conclusion

The determination of compatibility of the 2003 Act is a matter for the Courts. However it is important to consider that compatibility is not a static question. The ECHR is a living instrument and there have been important developments in ECHR jurisprudence, in the standards established by the European Committee for the Prevention of Torture, in the adoption of the UN CRPD and in reports of UN Special Rapporteurs, which have happened since the 2003 Act (and the AWIA 2000) was adopted. SHRC has engaged with a number of individuals throughout Scotland, who have raised concerns about the inconsistent practice and implementation of the 2003 Act, particularly in relation to ECT. It is therefore important to consider the need for an independent review of the practice. The forthcoming legislation to amend the 2003 Act and reviews of the AWIA 2000 provide timely opportunities to consider whether the relevant domestic legislation is keeping pace with international developments in law and best practice. The Commission looks forward to engaging with those opportunities.

In addition, Scotland's National Action Plan for Human Rights includes a commitment that:

> *"The Scottish Government will work with the Mental Welfare Commission, the Scottish Human Rights Commission and others to take forward implementation of the commitment in the Mental Health Strategy for Scotland to increase awareness, understanding and respect for human rights in the context of mental health services, ensuring rights are a key component of mental healthcare in Scotland."*[16]

This work is ongoing and regular progress reports will be available.

[16] Scotland's National Action Plan for Human Rights 2013-2017, p 34.