

Petitioner Letter of 2 February 2014

PE01494 Response to comments

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I have received much information from people who have had direct experience of being detained under the 2003 Mental Health Act or who have or had a close relative who had been so detained. The Scottish Parliament should not ignore their evidence: it reveals that psychiatrists do not always treat their patients with respect, sometimes make wrong diagnoses, can be too ready to accept that a diagnosis made by another psychiatrist is not in error, can make unwise treatment decisions, often fail to properly assess their patients' capacity, often ignore the provisions of the Act and occasionally provide inaccurate information to tribunals. It would be surprising if it were otherwise and yet the 2003 Mental Health Act seems to be based on the premise that psychiatrists can be trusted in virtually all respects. However, in a recent twelve month period there were 78 deaths among mental health patients subject to compulsory measures. Three of those who are supporting petition PE01494 blame the death of a loved one on those compulsory measures and in none of those cases did the detention seem to have been lawful. Further, psychiatrists seem to overprescribe antipsychotic drugs and fail to take sufficient account of the risks associated with their use: in an independent report commissioned and funded by the Department of Health it was stated that (in England) "*The use of these drugs in those with dementia has substantial clinical risk attached, including a conservative estimate of 1,800 extra deaths and 820 extra serious adverse events such as stroke per year*". In fact, these drugs pose serious risks to all patients as do the other drugs prescribed by psychiatrists and as does also ECT.

There are those who maintain that there is nothing wrong with the 2003 Act but only with the way in which it is being implemented. Such people have unrealistic expectations of those who implement this deeply flawed Act. If Parliament is serious about human rights then it must make fundamental changes to it. However, the Scottish Government's response to petition PE01494 demonstrates that it is not prepared to make the necessary changes. This is an untenable position since under the European Convention on Human Rights (ECHR) the Scottish Government has an obligation to ensure that the Convention rights of the people of Scotland are upheld, particularly the right to life, the right not to be subjected to inhuman or degrading treatment and the right to liberty. By refusing to suitably amend the 2003 Act the Government is failing to meet its ECHR obligations.

As was to be expected, the Scottish Human Rights Commission (SHRC) has made some noteworthy observations relevant to PE01494. In particular, the SHRC has drawn attention to the United Nations Convention on the rights of Persons with Disabilities (CRPD). This has been ratified by the UK and hence account must be taken of it by the Scottish Parliament. The House of Lords Committee on the Mental Capacity Act 2005 is due to report by 28 February 2014. In the evidence submitted to it there is reference to the potential implications of the CRPD for English

legislation. The report of that Committee should be of interest to legislators in Scotland as, of course, should the CRPD.

Juan Mendez is the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The SHRC observed that in a recent report he stated that treatment provided in violation of the terms of the CRPD cannot be justified under the medical necessity doctrine, a doctrine which those who defend the status quo have quoted as a justification for not making necessary changes to the Act. Following that report of 1 February 2013, Juan Mendez addressed the Human Rights Council of the UN on 4 March 2013. Included within his address was the following statement: "*The CRPD offers the most comprehensive set of standards on the rights of persons with disabilities and it is important that states review the anti-torture framework in relation to persons with disabilities in line with the CRPD. States should impose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock (ECT) and mind-altering drugs for both long- and short-term application.*" This statement is worthy of public debate. For hundreds of years it has been considered acceptable to detain persons believed to have a serious mental disorder and then to subject them to highly unpleasant "treatment". It is perhaps time to consider whether this practice should be ended. It is not, for example, considered acceptable to detain in hospital and then to provide chemotherapy to a cancer patient against the patient's will.

In order for there to be a fair hearing a tribunal must be both independent and impartial. Neither the SHRC nor the authors of the briefing paper seemed to appreciate that independence does not guarantee impartiality. Whatever the theory might be, the fact is that members of mental health tribunals are liable to defer to the supposed expertise of the psychiatrist on the panel. That psychiatrist will almost certainly have the same mindset as the one who is treating the patient. In particular, he or she is unlikely to think it necessary to carefully establish whether the patient has sufficient capacity to refuse treatment. In the five transcripts of tribunal hearings which I have studied I noticed that in each there was a complete failure to determine whether the patient lacked capacity even though this is a necessary criterion for the provision of involuntary treatment. In addition to this, three of those who sent me evidence complained about mental health tribunals. The general complaint was that the panel listened to what was said by the patient and his or her supporters but did not take account of that evidence when reaching its decision; tribunals seem to base their findings solely on the evidence provided by mental health professionals. Further, in a 2009 report about the early implementation of the 2003 Act it was stated that "*A significant group of participants (in the study) ...felt that the hearing was a waste of time.*" The 2003 Act should be amended to ensure that hearings are fair, perhaps by requiring a court rather than a tribunal to test the evidence.

Regarding ECT, the Scottish Government, it would appear, is not prepared to consider the possibility that involuntary ECT might constitute inhuman or degrading treatment in spite of the evidence that this is so. I had pointed out that, according to NICE, some of those who had been given ECT reported "*feelings of terror, shame and distress*" and that this implied that involuntary ECT fell within the definition of inhuman or degrading treatment provided by the European Court of Human Rights at para 52 of the judgment in the case of *Pretty v UK*. Parliament should take account of that information and also the following facts:

- In 2010 Richard Bentall and John Read co-authored a literature review on the effectiveness of ECT. Their conclusion was that “*the cost-benefit analysis of ECT is so poor that its use cannot be scientifically justified*”.
- In North America Dr Peter Breggin has acted as an expert witness in successful ECT malpractice suits. In one of those there was a settlement of more than \$1 million.

Given those facts, together with the ratification of the CRPD and the views of Juan Mendez it is clear that the 2003 Act should be amended in line with the recommendation of the World Health Organisation, namely that “*If ECT is used, it should only be administered after obtaining informed consent*”. The safeguards in the 2003 Act regarding involuntary ECT are irrelevant, in part because there is evidence that they are ineffective but, more importantly, because inhuman or degrading treatment is prohibited in all circumstances and involuntary ECT seems to fall into this prohibited category.

The Mental Welfare Commission’s defence of the provision within the Act that authorises involuntary treatment prior to an appeal against detention is that there is not yet any case law which establishes that this constitutes a breach of the ECHR. That is a weak defence. The SHRC has noted that the European Court of Human Rights has held that a medical treatment which is imposed without consent will not amount to a violation of Article 3 ECHR if it is a “medical necessity”. However, not all involuntary treatment given prior to an appeal could convincingly be shown to be a medical necessity. For example, a woman who was judged to be not obviously depressed was given an antidepressant against her will, a drug to which she reacted badly. If that did not constitute a breach of Article 3 ECHR then it certainly constituted a breach of Article 8 ECHR. That follows from the submission provided by the Law Society. Later, when the same woman was given further medication against her will, prescribing guidelines were not followed and her life might have been endangered as a result. It should be noted that deaths do occur among those detained on the basis of a short-term detention certificate. It would be surprising if none of those deaths was attributable to the drugs that they were given. Some people have grounds to raise an action under section 7(1) of the Human Rights Act and a successful action would result in the case law that is at present lacking. However, Parliament should not wait until there is such case law. It is a breach of Article 6 ECHR to deprive people of their right to refuse treatment without affording them a fair hearing. Parliament should, therefore, amend the 2003 Act taking due account of the CRPD: the grounds for the provision of involuntary treatment should be strictly limited and, except in an emergency, no involuntary treatment should be permitted without the approval of a tribunal or court.

Under the 2003 Act over 3000 people are detained each year on the basis of a short-term detention certificate which authorises detention for up to 28 days. It should be of concern, therefore, that these can be so easily granted: the 2003 Act does not contain sufficient safeguards to ensure that no one is wrongly deprived of his or her liberty. There is even credible evidence that some people have been detained, not because they had a serious mental disorder, but because they have been making serious allegations against others. That aside, as the Mental Welfare Commission observed in its report for 2007-08, it appears that some people have been unlawfully detained because proper procedures had not been followed. Evidence supplied to me confirms that this has happened. A weakness of the Act is that it contains no provision for an appeal on the grounds of unlawful short-term detention (s291 does not apply) and that the Tribunal is not

required to determine whether the short-term detention is lawful. In addition, as has been made clear by the SHRC, detention on the grounds of unsoundness of mind is not lawful unless, at a minimum, it has been reliably shown that the individual in question is of unsound mind. Under the 2003 Act there is no requirement to apply that standard of proof. Parliament should ensure that this situation is changed. Further, although the Scottish Government has implied that prior to the passage of the 2003 Act legal advice was provided stating that the 2003 Act is ECHR compatible it is inconceivable that each section of the Act had been carefully scrutinised by legal advisers: the Act is based on the ridiculous premise that an approved medical practitioner is never mistaken when he or she considers it likely that the necessary conditions are met and, on that basis, grants a short-term detention certificate. The Act is clearly based on this premise because, when a patient's appeal against short-term detention is being considered, the Tribunal is only required to consider whether the necessary conditions "continue to be met". There should be no assumption that they were met in the first place. The amended Act should require that no one can be detained in a psychiatric institution for an extended period until the evidence that this is necessary has been properly tested by a tribunal or court. It should also specify that emergency detention must be for the shortest possible period.