

PE1494/G

PUBLIC PETITION NO. PE01494

Response from Mental Welfare Commission for Scotland

The Commission welcomes the opportunity to comment on this petition.

Short-term detention certificate.

The petitioner considers that short-term detention stigmatises an individual. We point out that an important principle of the 2003 Act is that no individual should experience discrimination through being treated under the Act. By asserting that detention is stigmatising, the petitioner is not acknowledging this principle and risks increasing the stigma associated with mental illness and learning disability by making this assertion.

We do not consider that treatment administered before an appeal or review by a judicial body constitutes a breach of ECHR and we particularly see nothing in article 6 that prohibits this. The petitioner fails to produce any relevant case law that supports his contention. We are aware of case law that states that detention without necessary treatment constitutes a breach of article 3 of ECHR. While the case of *MS v UK*¹ refers to detention in prison, it is arguable that detention in hospital without the provision of necessary treatment could also be a breach of article 3.

We are aware that in some jurisdictions, e.g. The Netherlands, there is a judicial review before treatment can start. This review takes place around a week after detention, does not have the rigour of the Tribunal process in Scotland and may not meet the test for fairness under article 6. Also, the reported use of physical restraint and seclusion pending this review is very high.

We also draw attention to our data on the use of mental health legislation in Scotland. Only a quarter of all episodes of compulsory treatment progress to a full compulsory treatment order². The majority of episodes do not continue beyond emergency or short-term detention. By delaying the start of treatment, it is likely that more individuals will be detained for longer.

One important point raised by the petitioner is the question of the individual having been “reliably shown to be of unsound mind” (*Winterwerp v Netherlands*)³. In Scotland, this is satisfied, for short-term detention, by a report from an approved

¹ <http://www.bailii.org/eu/cases/ECHR/2012/804.html>

² http://www.mwscot.org.uk/media/138265/mha_monitoring_report_final_25_sept_2013.pdf

³ [http://www.mentalhealthlaw.co.uk/Winterwerp_v_Netherlands_6301/73_\(1979\)_ECHR_4](http://www.mentalhealthlaw.co.uk/Winterwerp_v_Netherlands_6301/73_(1979)_ECHR_4)

medical practitioner with consent of a mental health officer, submitted to hospital managers. We know of no legal case that determines this does not comply with the Winterwerp definition. A view from a human rights legal expert might be interesting on this, but in the absence of case law, we do not consider that the present legislation in Scotland contravenes ECHR in this regard.

Absence of fair hearings

1. The petitioner appears to be applying a criminal test to civil law. He also fails to mention that the Tribunal must revoke the order if not satisfied that the grounds continue to be met. This places the burden on the practitioners to produce evidence that can be challenged by the patient. And the patient has the right to legal representation without charge, including the provision of an independent report. We have raised an important issue in this regard with officials within the Scottish Government. We consider that the patient must have an explanation of the reason why the approved medical practitioner considers the ground for short-term detention to be met. We think the 2003 Act should be amended to require the patient to have these in writing and to receive assistance in understanding the reasons. NB: the petitioner again asserts that compulsory treatment is stigmatising. We do not accept this to be the case.
2. The petitioner assumes that other tribunal panel members defer to the medical member's view. He produces no evidence to support this. In fact, the medical member can be outvoted. The balance to the tribunal was carefully considered by the Millan committee and we continue to support its composition. Note that the number of long-term orders determined by the Sheriff sitting alone (in terms of section 18 of the 1984 Act) was rising and this trend has been levelled off and slightly reversed under the 2003 Act. In terms of truthfulness, any evidence produced at the Tribunal can be challenged.
3. The Tribunal hearing meets the test for "competent court" under article 5 of ECHR. The reason for the lack of a process of evidence under oath as with the previous procedure in the Sheriff Court was that many, including service users, found it intimidating and too "legalistic".

Council of Europe Recommendations

These recommendations are not law. They merit a debate about their pros and cons but cannot support an argument that the 2003 Act does not comply with human rights legislation.

Further necessary changes

Again, World Health Organisation recommendations are not law. These issues are worthy of debate. The petitioner produces no evidence to support his assertion that

ECT is an inhuman or degrading treatment. We are aware that the Special Rapporteur to the UN Committee Against Torture recommends against ECT without consent, but this needs to be seen in the light of his highly contentious views that all individuals can make their own decisions with support and that detention and guardianship are inherently unlawful⁴. We cannot agree with this assertion. Also, individuals who receive ECT for severe and often life-threatening depression make a good response to treatment. On average, this is a better response than those who give consent because ECT works best for individuals who are most severely ill. The petitioner has not considered the serious risk to the individual's life and welfare, including serious suffering, from severe depression. Individuals who lack capacity to consent to ECT are, on average, older, reflecting the effect of severe depression on brain function in older adults⁵. Adopting the petitioner's recommendations would disadvantage individuals on the basis of age and may breach equality legislation. But the Commission would support well-conducted research to gain a better understanding of the experiences of individuals who have received ECT, especially when they were not able to consent.

It is also important to consider, more generally, the issue of availability of effective treatments for individuals who lack capacity to consent. The logical extension of the petitioner's views would be that nobody who lacks capacity to consent to treatment should be treated. We could never agree with this. It would discriminate against individuals with mental illness or learning disability in a wide variety of situations.

Summary

We do not consider that this petition provides justification for its assertions that the 2003 Act does not comply with human rights legislation. In previous publications and submissions to Scottish Government, we have raised situations where the Act, in our view, requires some amendments to be more fully compliant with human rights law. We understand that these matters are under active consideration in the process of review of the 2003 Act.

We are surprised that the petitioner has raised these issues but has not addressed the much greater problems with the Adults with Incapacity (Scotland) Act 2000. This legislation can allow an individual to be deprived of liberty under the terms of welfare guardianship. As the 2000 Act stands, this can be for an indefinite period with no mandatory periodic judicial review. While this matter is, along with other aspects of the 2000 Act, under review by the Scottish Law Commission, the contrast with compulsory treatment under the 2003 Act, where there is a mandatory review at

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http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

⁵ <http://www.sean.org.uk/AuditReport/SEAN-Report-2013-web.pdf>

least once every two years, by the Tribunal. The Mental Welfare Commission has expressed serious concerns about this discrepancy.

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