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Mental Health Scotland Bill

Essential Changes
People are having their human rights violated by being detained under the 2003 Mental Health Act and then subjected to forced treatment. All are deprived of their right to liberty and their right to respect for private and family life. Most seem to be deprived of their right to a fair hearing. Many are deprived of their right not to be subjected to inhuman or degrading treatment and some are even deprived of their right to life. Those of us who have been campaigning on behalf of mental health patients are disappointed that the Health and Sport Committee has invited organisations that are not pressing for significant changes to be made to the 2003 Mental Health Act to give oral evidence about the Mental Health (Scotland) Bill but has not invited any of us. It may be that the Committee is of the opinion that none of us would have anything useful to contribute. If that is the case then it would appear that the Committee has no intention of recommending to Parliament that the 2003 Act be amended to take due account the UN Convention on the Rights of Persons with Disabilities (UN CRPD) even though this is a legally binding international treaty which the Scottish Ministers must observe and implement. In April of this year the UN CRPD Committee issued a General Comment (authoritative interpretation) which stressed the importance of not acting as though persons with mental health problems lacked legal capacity. Although organisations are acknowledging that account should be taken of this General Comment, none is proposing specific changes to the 2003 Act that will protect the rights of all mental health patients. These organisations seem to be content to leave it to the Scottish Government to decide what changes are necessary. Unfortunately the Scottish Government has made it clear that it is not prepared to make any significant changes to the 2003 Act. However, if no changes are made the consequence will be that the powers that psychiatrists currently have to detain and treat unwilling patients will remain undiminished and hence patients will continue to have their human rights violated.

This paper contains proposals for a few easily made changes to the 2003 Act, changes which would help to bring it into line with the General Comment of the UN CRPD Committee. These include proposals relating to short-term detention should it be decided that the Act should continue to provide for this rather than adopt the Recommendation of the Council of Europe (see submission MH045). As has been pointed out previously, the 2003 Act does not allow for the possibility that mistakes will sometimes be made when short-term detention certificates are granted and hence some people can be stigmatised by being wrongly sectioned: a successful appeal against detention does nothing to remove the stigma because of the nature of the remit of the Tribunal.

Forced ECT
The feelings of terror and distress caused by forced ECT are such that it clearly falls within the definition of inhuman or degrading treatment, something prohibited in all circumstances (see submission MHB045). The 2003 Act
should be amended, therefore, so that Scottish mental health legislation no longer permits ECT to be given to any patient who “resists or objects to the treatment”. This could be achieved by deleting s239 of the Act, a section which authorises a designated medical practitioner to declare that a patient lacks the legal capacity to make a decision regarding ECT. When considering whether to delete this section, account should account be taken of the fact that a 2009 ruling of the European Court of Human Rights seems to imply that only a court can deprive an individual of his or her legal capacity (see submission MHB045). Those rulings of the European Court are legally binding in the UK and hence in Scotland. There should be no assumption, therefore, that a designated medical practitioner can deprive an individual of his or her legal capacity to make a treatment decision.

**Forced treatment before an appeal**

Subsection 44(4)(c)(ii) of the 2003 Act should be deleted so that the Act no longer authorises the giving of forced treatment to a mental health patient unless, at a minimum, it has been properly established that the patient lacks legal capacity.

**On a related matter, subsection 242(4) of the 2003 Act refers to a patient who is capable of consenting to the treatment but does not consent. However, if the responsible medical officer is of the opinion that it is in the patient’s best interests that the treatment be given then, it appears that by virtue of this subsection, the treatment may be given against the patient’s will! This appears to be contrary both to common law and to the General Comment issued by the UN CRPD Committee. Section 242(4) of the 2003 Act should, therefore, also be deleted.**

**Lack of fair hearings**

Given what is known to have happened in practice, it can hardly be denied that many individuals did not receive a fair hearing when they appealed against their detention or forced treatment. In part this is because witnesses are not required to give evidence on oath so that mental health professionals can give false evidence with virtual impunity. When an individual’s liberty is at stake witnesses should be required to give evidence on oath. This should be specified in Schedule 2, subsection 12(2) of the Act. Consideration should also be given to the following points:

1. A mental health tribunal is required to determine whether the conditions which would justify detention “continue to be met”. That phrase should be deleted from subsection 50(4)(a) of the Act. The fact that the 2003 Act makes no allowance for the fact that inevitably mistakes will sometimes occur when psychiatrists assess patients is a major failing of the 2003 Act. The Tribunal, therefore, should be required to determine whether a mistake was made when an individual was sectioned. If it finds that a mistake was made then it should not only uphold the individual’s appeal against detention, but it should also acknowledge that the individual should not have been sectioned in the first place. This would go
some way towards avoiding the unfortunate situation of individuals being wrongly stigmatised.

2. It is known that the standard of legal representation at mental health tribunals is generally poor. For example, a study of tribunal transcripts has revealed that the performance of one particular solicitor was such that she appeared to be acting on behalf of the responsible medical officer rather than on behalf of her client. That solicitor actually made statements designed to lead the Tribunal to believe that her client had suffered from a mental disorder prior to her detention in hospital even though that could not be deduced from her client’s medical records! That solicitor also failed to draw attention to contradictions in the evidence presented to the Tribunal by the mental health professionals.

It may be that the best way to ensure that the quality of legal representation is improved would be to require that the appeal be heard in public unless the mental health patient requests that it be held in private. At a public hearing solicitors might feel under greater pressure to properly represent their clients. It should be noted that Article 6 ECHR states that “everyone is entitled to a fair and public hearing”. Further, the Act does not require that tribunal hearings be held in private: Schedule 2, section 10 merely states that the Scottish Ministers may make rules “enabling hearings to be held in private”.

3. Yet another matter which might militate against a fair hearing is that the grounds for appeal against tribunal decisions are too narrow: section 324 (2) (d) of the Act should be amended because as it stands it can be interpreted to mean that no appeal is permitted against a tribunal decision which the Tribunal found to have been supported by facts that it had established. This section should be amended to allow for an appeal on the grounds that the tribunal had failed to take full account of all the facts presented to it. An appeal should also be allowed on the grounds that the Tribunal had not been in possession of all the facts when it made its decision. (A study of tribunal transcripts has made it clear to me that appeals on those grounds should be permitted. The standard of proof at the tribunals in question was abysmal.)

Concluding remarks
Some of those who have been involuntary patients are of the opinion that Scotland should adopt the General Comment of the UN CRPD Committee in its entirety and hence not permit any forced treatment. If the Health and Sport Committee is not prepared to accept that such a major amendment to the 2003 Act is desirable then it should at least do its utmost to have the 2003 Act amended in a way which ensures that the number of people subjected to forced treatment is drastically reduced. Current mental health legislation makes it too easy for psychiatrists to have individuals detained in hospital and/or treated against their will. Apart from anything else, this means that
there are unnecessary demands on the NHS budget. NHS expenditure could, in fact, be greatly reduced and fewer patients harmed if doctors adhered to the first piece of advice provided in the British National Formulary: “Medicines should be prescribed only when they are necessary, and in all cases the benefit of administering the medicine should be considered in relation to the risk involved”. Few doctors and psychiatrists seem to act in accordance with this advice: there is a vast over-prescription of both psychiatric and other drugs. This has a clear implication for legislation relating to forced treatment. In his submission MHB017, the internationally respected psychiatrist professor David Healy stated that “psychotropic drugs are the leading cause of death in the mental health system”. Also a major piece of research carried out by professor Pirmohamed and others between November 2001 and April 2002 estimated that adverse drug reactions causing hospital admission could be responsible for over 10,000 deaths of patients per year in England. While the drugs in question were not psychiatric drugs it should be noted that, according to Pirmohamed, “Most reactions were either definitely or possibly preventable”. The point is that the side-effects of drugs can harm patients and that doctors commonly do not take sufficient care when prescribing. The Health and Sport Committee should take account of such facts and endeavour to have the 2003 Act amended so that forced treatment occurs only in exceptional circumstances. If the Act is not so amended then the Scottish Ministers will not have observed and implemented the provisions of the UN Convention on the Rights of persons with Disabilities as they are required to do. The production of more guidelines or recommendations would be insufficient since past experience makes clear that these any such guidelines or recommendations are likely to be ignored. **It is essential that changes are made to the 2003 Act that greatly reduces the power of psychiatrists to detain individuals and then to subject them to forced treatment.**

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